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S. HRG. 112–920

# NOMINATIONS TO THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

APRIL 18, 2012

**Serial No. J–112–71**

Printed for the use of the Committee on the Judiciary

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SUBMISSIONS FOR THE RECORD

Undersigned Organizations: American Association of Law Libraries; American Civil Liberties Union; American Library Association; Association of Research Libraries; Bill of Rights Defense Committee; Center for Financial Privacy and Human Rights; The Constitution Project; Consumer Action; Consumer Watchdog; Defending Dissent Foundation; Liberty Coalition; Muslim Public Affairs Council; National Association of Criminal Defense Lawyers; OpenTheGovernment.org; Patient Privacy Rights; Privacy Times; Remar Sutton; Founder, Privacy Rights Now Coalition, April 17, 2012, joint letter ..... 507

# NOMINATIONS TO THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD

**WEDNESDAY, APRIL 18, 2012**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The Committee met, pursuant to notice, at 10:08 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Whitehouse, Franken, and Grassley.

Chairman LEAHY. Thank you all for being here. Normally, I would go first. Senator Grassley has to go on to something else, so I will yield to Senator Grassley to begin.

## OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I thought we had everything lined up so I could speak at 10:10 over on the floor and then get over here, and that is what I emailed him this morning. So I have got to back up and be over here now. Welcome to all of you.

Following the terrorist attacks on 9/11, we made a number of reforms in order to protect the Nation from further attacks. These reforms included tearing down the artificial wall between law enforcement and national security cases that the Justice Department had created, passage of the *PATRIOT Act*, reforming the intelligence community, and updating the Foreign Intelligence Surveillance Act.

Many of these efforts were based upon Commission by the bipartisan 9/11 Commission. Altogether, the various reforms recommended by the 9/11 Commission and then implemented have strengthened our National security and helped to prevent another major terrorist attack on U.S. soil. However, we must remain vigilant against terrorist attacks and not let down our guard.

I am sorry. I ran over here, and I should not have run. I am too old for that.

[Laughter.]

Chairman LEAHY. I know all the running you do. None of us could keep up with you.

Senator GRASSLEY. Lest we forget that we were spared an attack on Christmas Day 2009 because the would-be bomber could not ignite the explosives, similar to the failure of the would-be shoe bomber, Richard Reid, further evolving threats such as radicalized homegrown terrorists, such as Nidal Hasan, who is charged with

murdering 13 and wounding 29 at Fort Hood, represent the evolving threat we face.

That said, some have argued that all these reforms to our intelligence, law enforcement, and national security agencies have been at the cost of civil liberties and individual rights. Recognizing this concern, the 9/11 Commission recommended that Congress create the Privacy and Civil Liberties Oversight Board to oversee the new authorities granted to these agencies.

In 2004, President Bush issued an Executive order creating an executive branch board focusing on safeguarding civil liberties. Congress also acted by passing and signing into law the Intelligence Reform and Terrorism Prevention Act, which included provisions creating the Privacy and Civil Liberties Oversight Board in statute. However, the original board was slow to develop, facing nomination and budget issues.

In 2007, legislation updated the board's statute, re-establishing it as an independent agency. President Bush promptly nominated three individuals to serve on the board in February 2008, but those nominations were not addressed by this Committee during the 110th Congress.

Despite the board's new Congressional mandate in 2007, President Obama waited until December 2010 to nominate two of the five board members. The other three were not nominated by the President until December 2011. Given the significant mission of this board, it is hard to understand why it took the President nearly three and a half years of a four-year term to send up the nominees.

We are here today to address all five of these nominations. There are a lot of important questions that I have of the nominees. Because we probably will not be able to ask all the questions, I will just say a summary of what I am going to proceed with when we get to questions.

There are significant concerns over the broad mandate of the board, how it will be staffed, and how much it will cost. Further, there are concerns about what the mission of the board will really be. We already have privacy and civil liberties officers at many of the federal agencies that the board will oversee. How do the members plan to interact with these existing entities to ensure that the board does not prevent them from doing their job? I look forward to hearing the nominees' views on how the board will actually operate and how they plan to coordinate but not duplicate existing civil liberties oversight.

Most importantly, I want to hear from the nominees how they will ensure that the work of the board will not hinder ongoing intelligence and law enforcement operations. Additionally, I will ask about their views on a number of critical national security tools that have been proven to keep the Nation safe. Both the *PATRIOT Act* and FISA have been reformed to ensure that information critical to preventing terrorist attacks is accessible and is shared among necessary law enforcement and national security partners.

This board has a broad mandate to oversee how these laws are implemented, and it is important for Members to understand if these nominees have any preconceived bias or opposition to these important tools authorized by Congress.

So for a second time, I welcome the nominees as well as their family members and guests with them. Each of the nominees has a distinguished background. Many of them are no strangers to this Committee, having previously been confirmed by the Senate to very important positions, and obviously, Rachel Brand, one of the nominees, is from my State of Iowa, and she has very impressive credentials as well as an impressive professional career.

Welcome to all of you. Thank you.

Chairman LEAHY. Thank you.

Senator GRASSLEY. And I will be back in a little while.

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

Chairman LEAHY. Thank you very much.

As I said earlier, the Committee is holding this important hearing. We do want to consider these nominations to the Privacy and Civil Liberties Oversight Board. The PCLOB—and if anybody wants to try to pronounce that, feel free, because I know I could not. But as our Nation faces growing threats to national security at home and abroad and in cyberspace, I think it is important that we have a fully functioning board, and I welcome the President's nominees to this critical board.

We have developed a lot of new tools to combat terrorism—some have worked, some have not—since September 11th. Some have been very effective; some have been, I think, as much an annoyance as they have been effective. But throughout it all, I applaud the people in our country who do try to keep us safe, and we know that we will continue to have new procedures. But we also have to have meaningful checks and balances. We are going to safeguard our fundamental values as we try to secure the Nation.

I have worked with Senators Durbin, Lieberman, Collins, and others to create the Privacy and Civil Liberties Oversight Board at the recommendation of the 9/11 Commission, something I felt should be there. We wanted to ensure that Americans' privacy and civil liberties are effectively protected even while we had these heightened national security measures.

As the 9/11 Commission observed in its report, which is something we should not forget, is that "[I]f our liberties are curtailed, we lose the values that we are struggling to defend." That goes back to Ben Franklin's comments that were not dissimilar.

The board was initially established within the Executive Office of the President. Five years ago, we revised the legislation to improve the board's effectiveness. We wanted it to be an independent executive branch entity. We did this to strengthen the board. By "we," I mean all of us who worked together on this legislation. We wanted to have a greater impact on the policies that affect Americans' privacy and civil liberties.

Now, here in Congress, we are considering various proposals to enhance the Nation's cybersecurity. We all want to do that. We are not absolutely sure the best way to do it because the proposals would have a significant impact on the privacy rights and liberties of all Americans. So we are grappling with these important questions. How does our National Counterterrorism Strategy impact the rights and liberties of U.S. citizens not only here at home but when

we are abroad? We have smartphones, GPS devices, and other mobile technologies that make it a lot easier for our Government to identify and track potential threats. But they also mean that we could have increased government surveillance which could imperil our privacy rights and our civil liberties.

Over the last several weeks, we have seen reports in the *New York Times* and elsewhere about the increased location tracking conducted by local police and the fact that such surveillance is neither limited to terrorist threats or, most importantly, subject to a warrant requirement or judicial review. It is getting a little bit too close to Big Brother for me, and that is why I have been working so hard to update and strengthen the Electronic Communications Privacy Act.

This should not be a partisan idea. Safeguarding our liberties is not a Democratic or a Republican idea. It is an American idea. These are American values, and we should all embrace them. And they set us apart from some of the other countries around the world, the fact that we do appreciate our privacy and liberty. And if anybody questions whether you really appreciate privacy, go to my own State of Vermont. We consider privacy to be one of the most important values we have.

So I hope we will join together and consider these nominations to this important board in a bipartisan manner. I welcome the nominees.

Before we start and before I introduce each one of the nominees, as is our custom, I wish to swear you all in, so if you could stand, please. Do you swear that the testimony you will give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MEDINE. I do.

Mr. DEMPSEY. I do.

Ms. COOK. I do.

Ms. BRAND. I do.

Judge WALD. I do.

Chairman LEAHY. Thank you.

Our first witness will be David Medine. He is an attorney at the U.S. Securities and Exchange Commission. He previously served as a senior adviser to the White House National Economic Council from 2000 to 2001 before spending 10 years as a partner at the law firm of Wilmer-Hale. We have alumni of Wilmer-Hale here. From 1992 to 2000, Mr. Medine was the Associate Director for Financial Practices at the Federal Trade Commission, where, in addition to enforcing financial privacy laws, he took the lead on Internet privacy, chaired a federal advisory committee on privacy issues, and was part of the team that negotiated the Privacy Safe Harbor Agreement with the European Union. That must have been fun.

Before joining the FTC—I say that tongue in cheek—he taught at Indiana University's Bloomington School of Law and the George Washington University School of Law. He has been nominated to serve as Chair of the Privacy and Civil Liberties Board.

Before you begin, Mr. Medine, do you have any family members here?

Mr. MEDINE. Yes, I do.

Chairman LEAHY. Well, would you go ahead and introduce them? That way it will be part of the record, and it will be someday in the Medine family archive.

Mr. MEDINE. Thank you very much, Mr. Chairman. First, I will introduce my wife, Carol Weil; my daughter, Marissa, who is a public policy major in college; my other daughter, Julia, who is a high school student locally; and my sister, Emily.

Chairman LEAHY. You are fortunate to have your family with you, and please go ahead. Do you have a statement you wish to make?

Mr. MEDINE. No, just that we are—I was humbled and grateful to have been nominated for this position. I look forward to working with such a distinguished bipartisan group of colleagues, and I look forward to answering your questions.

Chairman LEAHY. I am going to introduce each one of the members of the panel, and then we will go to questions.

James Dempsey—James Xavier Dempsey, as I recall—is Vice President for Public Policy at the Center for Democracy and Technology—no stranger to this Committee, he has testified here many times—a nonprofit organization focused on privacy, national security, government surveillance, and other policy issues. Prior to joining it in 1997, he served as deputy director of the nonprofit Center for National Security Studies and special counsel to the National Security Archive. He served as Assistant Counsel to the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights. He clerked for Judge Robert Braucher of the Massachusetts Supreme Judicial Court, and as I said, no stranger to this Committee.

Mr. Dempsey, do you have family members here?

Mr. DEMPSEY. No, Mr. Chairman, I do not.

Chairman LEAHY. The next witness will be Elisebeth Collins Cook, counsel with the law firm Wilmer-Hale. Did we leave anybody back at Wilmer-Hale?

[Laughter.]

Chairman LEAHY. She focuses on complex civil litigation, administrative action, and legal policy. In 2008, she was confirmed as Assistant Attorney General for Legal Policy at the U.S. Department of Justice. In 2009, Ms. Cook served as Republican Chief Counsel, Supreme Court Nominations, for the U.S. Senate Committee on the Judiciary, and, of course, is no stranger to all of us here.

Earlier in her career, she clerked with Judge Lee Rosenthal of the U.S. District Court for the Southern District of Texas and for Judge Laurence Silberman of the U.S. Court of Appeals for the District of Columbia.

Ms. Cook, do you have any family members here?

Ms. COOK. Yes, I am delighted to be joined today by my parents, Tom and Martha Collins; and my husband, James Cook.

Chairman LEAHY. Thank you. Good to have you.

Ms. COOK. And friends and colleagues have taken the time today to be here, and I thank them for that.

Chairman LEAHY. Thank you. We will add all of them, if you give all of their names to the reporter. They might as well be in the Cook archive.

Rachel Brand, currently Chief Counsel for Regulatory Litigation at the U.S. Chamber of Commerce, National Chamber Litigation Center, and she is referred to, of course, by Senator Grassley earlier. Previously she practiced law with the firm of Wilmer-Hale. She also served as Assistant Attorney General for Legal Policy at the U.S. Department of Justice. She handled policy issues including counterterrorism. She was Associate Counsel to President George W. Bush. She was a law clerk to Justice Anthony Kennedy of the Supreme Court of the United States and to Justice Charles Fried of the Supreme Judicial Court of Massachusetts.

Ms. Brand, do you have family members here?

Ms. BRAND. Thank you, Mr. Chairman. I do. My husband, Jonathan Cohn, is in the audience, and my four-year-old son, Willem Cohn, is here, too.

Chairman LEAHY. Who is just fascinated by all the——

[Laughter.]

Chairman LEAHY. Last, but not least, is a very good friend of this Committee, and I would note a personal friend, Judge Patricia Wald. She served on the U.S. Court of Appeals for the District of Columbia from 1979 to 1999, including five years as Chief Judge. Since that time, she has served in various capacities, including as a judge on the International Criminal Tribunal for the Former Yugoslavia; a member of the President's Commission on Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction. She had been an Assistant Attorney General for Legislative Affairs at the Department of Justice before joining the court of appeals. She also clerked for Judge Jerome Frank on the U.S. Court of Appeals for the Second Circuit, which is a circuit I argued before years ago.

Judge Wald, do you have family members here?

Judge WALD. No, I do not, Senator. My husband died within the last year, so I am sure he is here in spirit supporting me on. My five children and 10 grandchildren are so widely dispersed throughout the country that I gave them a pass on this hearing since they have been to previous confirmation hearings.

I do have some good friends and former colleagues in the audience.

Chairman LEAHY. I offer my condolences on the passing of your husband. I know you were together for a long, long time. Enjoy those grandchildren. As you know, they are the reward for having put up with your children all those years.

[Laughter.]

Chairman LEAHY. And there is a hidden part of the Constitution which I will reveal today to all these legal scholars, the hidden part of the Constitution which requires grandparents to spoil their grandchildren. My wife and I believe strongly in it.

Mr. Medine, a fully operational Privacy and Civil Liberties Oversight Board is, of course, essential, as we know, to protecting our privacy. And I have said on this so many times since September 11th of 2001, we have got to protect ourselves, but we have got to balance it with what makes us great as a Nation, our privacy and our civil liberties. What are going to be some of your first priorities if you are confirmed as Chairman of the Board, and how will you address these priorities?

**STATEMENT OF DAVID MEDINE, TO BE CHAIRMAN AND MEMBER OF THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD**

Mr. MEDINE. Thank you, Mr. Chairman——

Chairman LEAHY. Is your microphone on?

Mr. MEDINE. Thank you, Mr. Chairman. If confirmed, the board would have to meet and discuss what our priorities are, but there are obviously a lot of pressing concerns about national security and counterterrorism efforts and our charge to make sure that there is the proper balance struck between privacy and civil liberties and counterterrorism. But as you alluded to, the 9/11 Commission said the choice between security and liberty is a false choice. But there are a number of programs that we would look at. One is the statute calls for us to look at the information-sharing guidelines, and so that would certainly be a first priority. And I know those guidelines have been recently revised, and so they are essentially a living process, and the board, if confirmed, would be happy to look into those and provide the required advice. But there are a number of other issues that, once we meet, we would establish some priorities.

One thing that we cannot do until we have been established is to gain access to highly classified information which would give us the full range of knowledge in setting our priorities.

Chairman LEAHY. Mr. Dempsey, we talked about how you share information within the government, and obviously, if we are under any kind of an attack, the ability to share that is very important, whether it is a physical attack against us or a cyber attack. But I am also concerned that today we do not have all our private information in a filing cabinet at home. It is online somewhere. And I have had a lot of Vermonters who expressed worry about the National Security Agency or the Department of Defense accessing information about their online activities. I worry because sometimes with good intentions you have people who do not seem to use much sense.

For example, whoever the idiots were in the Department of State and the Department of Defense who put all this information, private and confidential memos from Ambassadors onto a computer where a corporal, whatever his motivations, could just access all that stuff and give it out—I mean, people have died and other things have happened because of that. And I realize the corporal has been arrested, but I would like to see some public exposure of whoever the num-nums were—that is a professional Vermont term—who allowed all that stuff to be put on a computer where somebody could get it anyway. It is obvious they had no idea how computers work or how easily they can be accessed.

I say that because you can understand why people are worried that if we give more and more power to the government to go into our private things, some idiot is going to put it somewhere where the next thing we know it is going to be all over Leak-a-pedia, or whatever you might want to call it.

So how do you assess the privacy and civil liberty implications? How do you address something like that?

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**
**QUESTIONNAIRE FOR NOMINEES**
**TO PRIVACY AND CIVIL LIBERTIES BOARD**

**PUBLIC**

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

David Medine (former name: David Samuel Medine)

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

Chairman and Member, Privacy and Civil Liberties Oversight Board

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

WilmerHale
1875 Pennsylvania Ave., N.W.
Washington, DC 20006

Reside in Bethesda, Maryland

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

July 15, 1953 New York, NY

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

The University of Chicago Law School, 1976-1978, JD 1978
Hofstra University Law School, 1975-1976
Hampshire College, 1971-1975, BA 1975

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

**WilmerHale (2002 – present) (known as Wilmer, Cutler & Pickering from 2002-2004)**
Partner
1875 Pennsylvania Ave., N.W.
Washington, DC 20006

**Hogan & Hartson (2001-2002)**
Partner
555 Thirteenth St., N.W.

Washington, DC 20004

**White House National Economic Council (2000-2001)**
Senior Advisor
Washington, DC 20500

**Federal Trade Commission (1989-2000)**
Associate Director for Financial Practices (1992-2000)
Assistant Director for Credit Practices (1989-1991)
Washington, DC 20580

**University of Maryland School of Law (1988-1989)**
Visiting Associate Professor
500 W. Baltimore St.
Baltimore, MD 21201

**Indiana University (Bloomington) School of Law (1986-1988)**
Associate Professor
211 South Indiana Ave.
Bloomington, IN 47405

**The George Washington University Law School (1983-1986)**
Clinical Instructor
2000 H St., N.W.
Washington, DC 20052

**Covington & Burling (1979-1983)**
Associate
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

**Kurzban, Kurzban & Weinger (1978)**
Assistant
2650 SW 27th Ave.
Miami, FL 33133

**Environmental Defense Fund (1977)**
Student Intern
1875 Connecticut Ave., N.W.
Washington, DC 20009

**U.S. Environmental Protection Agency (1975 and 1976)**
Student Intern
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

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

No military service. I have registered for selective service.

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

**Chambers USA: America's Leading Lawyers for Business:** leader in privacy and data security –Band 1: 2007 (DC); 2008, 2009, 2010 and 2011 (National).

**Chambers Global: The World's Leading Lawyers:** nationwide leader in the privacy and data security field in 2010 and 2011.

**Legal 500**, data protection and privacy, considered "'excellent', particularly with respect to data-security regulation in the financial services sector" (2008); listed as a "leading lawyer" in the area of Media, technology and telecoms (2009 and 2011).

**Lawdragon 3000** Leading Lawyers in America (2011).

**Martindale Hubble:** "AV Preeminent 5.0 out of 5" Peer Review Rated (highest rating).

**The Best Lawyers in America:** selected by peers for inclusion in the area of banking law (2006-2012).

**DC Super Lawyers** selected for inclusion in the area of banking law (2008-2009).

**Washingtonian Magazine:** one of the "Top Lawyers" in Washington (2004).

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

**American Bar Association (approx. 2002-2004)**
Member

**American Bar Association Consumer Financial Services FTC Subcommittee (1993-1995)**
Vice Chair

**District of Columbia Bar Consumer Committee (1989-1990)**
Co-Chair

10. **Bar and Court Admission**:

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

District of Columbia, admitted in 1978

Indiana, admitted in 1986, voluntarily withdrew in 2009

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

U.S. District Courts for the District of Columbia – approx. 1979

U.S. District Court, Southern District of Indiana – approx. 1987

Court of Appeals for the District of Columbia Circuit -- 1978

U.S. Supreme Court – approx. 1980

11. **Memberships:**
a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

**Weil Family Foundation (approx. 1990-present) (unpaid)**
Director
400 Woodward Rd.
Rose Valley, PA 19063

**Legal Services Corporation Technology Advisory Board (2003) (unpaid)**
Member
3333 K St., N.W.
Washington, DC 20007

**U.S. Government Information Technology Services Board (1999-2000) (unpaid)**
Member
Washington, DC

**Clara Barton Center for Children (1999-2000) (unpaid)**
Director
7425 MacArthur Blvd.
Cabin John, MD 20818

**D.C. Neighborhood Legal Services Program (1990-1992) (unpaid)**
Director
680 Rhode Island Ave. NE
Washington, DC 20002

**Bloomington Community Mediation Center (1987-1988) (unpaid)**
Director
205 S. Walnut St.
Bloomington, IN 47404

**District of Columbia Board of Appeals and Review (1984-1986) (unpaid)**
Member
441 4th Street, NW, Suite 250 North
Washington, DC 20001

**Washington Council of Lawyers (1981-1986) (unpaid)**
Director
555 12th Street, N.W.
Suite 210
Washington, DC 20004

b. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I am not aware that any of the organizations listed in response to Questions 6, 9 and 10 currently or formerly discriminated on the basis of race, sex or religion in any way.

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

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

*I have done my best to identify published materials, including through a review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other materials that I have been unable to identify, find or remember. I have located the following:*

Red Flags Rule Scope Narrowed by Congress, **WilmerHale** (2010) (co-author) (copy supplied).

New Year Brings Three Major Regulatory Deadlines for Financial Institutions, **WilmerHale** (2010) (co-author) (copy supplied).

National Broadband Plan Calls for Enhanced Privacy and Data Security Protections, **WilmerHale** (2010) (co-author) (copy supplied).

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

None.

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

*I have done my best to identify published materials, including through a review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other materials that I have been unable to identify, find or remember. I have located the following:*

October 22, 1991, "FCRA," Senate Subcommittee on Consumer and Regulatory Affairs, Senate Banking, Housing and Urban Affairs Committee (copy supplied).

October 24, 1991, "FCRA," House Subcommittee on Consumer Affairs and Coinage, House Banking, Finance & Urban Affairs Committee (copy supplied).

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May 24, 2000, "Predatory Lending Practices in the Subprime Industry," House Committee on Banking and Financial Services (copy supplied).

June 13, 2000, "Online Profiling: Benefits and Concerns," Senate Committee on Commerce, Science, and Transportation (testified at hearing; prepared statement delivered by FTC Bureau of Consumer Protection Director Jodie Bernstein) (copy supplied).

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

*I have done my best to identify published materials, including through a review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other materials that I have been unable to identify, find or remember. I have located the following:*

May 24, 2011, WilmerHale Annual Intellectual Property Conference, WilmerHale offices, Boston, Massachusetts, speech on privacy and intellectual property.

March 14, 2011, Credit Collections Conference, Miami, Florida, speech on the relationship between the CFPB and FTC regarding debt collection enforcement.

May 7, 2010, Payment Card Institute, Washington, DC, speech on Data Security, ID Theft and Privacy.

May 1, 2009, Financial Markets Association, Crystal City, Virginia, speech on Massachusetts Data Security Regulations.

March 25, 2009, Marsh's Academy of Risk Cyber Risks Seminar, Washington, DC, speech on Data Security.

January 27, 2010, American Conference Institute, 9th National Advanced Forum on the Privacy & Security of Consumer and Employee Information, Washington, DC, speech on a variety of privacy issues, including CAN SPAM and FCRA.

March 19, 2009, American Bar Association/Federal Communications Bar Association, Privacy and Security Conference, Washington, DC, speech on Privacy and Data Security Issues.

March 16, 2009, FTC International Data Security Conference, Washington, DC, speech on data security and response, including best practices.

February 26, 2009, International Association of Privacy Professionals, Washington, DC, speech on FACTA.

March 13, 2009, Investment Advisory Association Compliance Summit, Speech on Regulation S-P.

November 19, 2008, The Knowledge Congress, Washington, DC, Speech on Understanding Regulation S-P: Privacy of Consumer Financial Information.

October 21-23, 2008, speech at the Third Global Credit Reporting Conference on Legal and Regulatory Framework, Enforcement and Supervision of Credit Information Industry, Rio de Janeiro, Brazil.

April 1, 2008, WilmerHale Consumer Credit Client Meeting, Washington, DC, speech on Privacy and Security: New Rules, What's Coming Next, and What It All Means for You.

March 6, 2008, American Bar Association/Federal Communications Bar Association, Washington, DC, speech on Privacy, Data Security, and Media Companies.

May 3, 2007, World Bank Conference, Nairobi, Kenya, speech on cross-border integration to allow for credit information to flow across national lines.

October 5, 2006, Regional Conference on Credit Reporting in Africa, Cape Town, South Africa, speech on Impact of Legal Environment on Development of Credit Reporting.

April 8, 2005, American Conference Institute, Chicago, IL, speech on debt collection.

February 18, 2004, International Association of Privacy Professionals, Washington, DC, speech on EU Safe Harbor.

January 27, 2004, US Commerce Department program on EU Safe Harbor, Philadelphia, PA, speech on EU Safe Harbor.

May 6, 2003, Payment Card Institute, Washington, DC, speech on debt collection.

March 13, 2003, Privacy & American Business, Washington, DC, speech on financial services privacy.

April 11, 2003, Predatory Lending Conference, Orlando, FL, speech on Preventing Exposure to Predatory Practices: A Practical and Legal Guide.

February 12, 2003, Corporate Counsel meeting, Tysons Corner, VA, speech on Complying with Government Demands for Consumer and Business Information.

April 24, 2002, American Bar Association Antitrust Spring Meeting panel on advertising and marketing disclosures.

June 29, 2000, FTC Workshop Competition in the World of B2B Electronic Marketplaces, Washington, DC., transcript: http://www.scribd.com/doc/1168170/229/Gail-Levine-and-David-Medine.

I gave additional speeches while at WilmerHale and a substantial number of speeches while serving at the FTC. However, I did not maintain a list of these speeches nor did I keep any written presentations; most of the speeches did not involve written materials.

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

*I have done my best to identify published materials, including through a review of my personal files and searches of publicly available electronic databases. Despite my searches, there may be other materials that I have been unable to identify, find or remember. I have located the following:*

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"The New FACTs of Life," *Credit Card Management*, March 2004. (copy supplied).

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"Not-So-Uniform Response To Fed's Disclosure Plan," *The American Banker*, December 19, 2003. (copy supplied).

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"Deceptive New-Car Ads, Unfair Practices Get Lots of Mileage at Year's End; Fraud: Women Minorities and the Elderly are the Most Common Victims. However, Dishonest Car Advertising Can Trick Even the Veteran Auto Buyer," *Los Angeles Times*, December 5, 1993, Orange County Edition. (copy supplied).

"YOUR MONEY: Bill collectors' tactics draw growing list of complaints Atlanta Legal Aid, FTC are taking action to protect consumers from illegal practices," *The Atlanta Journal and Constitution*, November 22, 1993. (copy supplied).

"Trans-Union Prohibited from Selling Consumer Data," *Chicago Sun-Times*, September 25, 1993, Late Sports Final. (copy supplied).

"It Pays to Know Rights When Facing Collectors," *Palm Beach Post*, August 9, 1993. (copy supplied).

"What The FTC Didn't Do About Debt Collection Practices," *Sun-Sentinel* (Fort Lauderdale, FL), August 9, 1993. (copy supplied).

"FTC Sues Big Bill Collector, Charges Abuse," *Chicago Sun-Times*, August 4, 1993, Late Sports Final. (copy supplied).

"Bill Collectors Accused of Going Too Far; Collections: Employees of Giant Payco American Illegally Pressured Debtors, A Federal Complaint Alleges," *Los Angeles Times*, August 3, 1993, Home Edition. (copy supplied).

"Firm Accused of Debtor Harassment; FTC Says Agency Used Lies, Threats to Collect; Seeks Penalties," *The Washington Post*, August 3, 1993, Final Edition. (copy supplied).

"U.S. begins bias probe of Shawmut, *The Boston Globe*, March 9, 1993, City Edition. (copy supplied).

"TRW Reaches Credit-Data Agreement; Privacy Advocates Welcome Settlement with FTC," *Plain Dealer* (Cleveland, Ohio), January 13, 1993, Final/All Editions. (copy supplied).

"FTC Accuses Credit Bureau of Privacy Violations," *The Washington Post*, January 13, 1993, Final Edition. (copy supplied).

"Bill Collection Becoming Meaner in Slow Economy," *Louis Post Dispatch* (Missouri), November 22, 1992, Five Star Edition. (copy supplied).

"Executive Summary; Fraud," *InformationWeek*, November 16, 1992. (copy supplied).

"Congress considers lock-in rate protection," *Chicago Sun-Times,* June 5, 1992, Five Star Sports Final. (copy supplied).

"Bill Would Apply Safeguards To Refinancing of Mortgages; House Member Says Abuses by Lenders Are Frequent," *The Washington Post*, May 30, 1992, Final Edition. (copy supplied).

WORLD NEWS TONIGHT WITH PETER JENNINGS, *ABC NEWS*, MAY 27, 1992. (copy supplied).

"What's The Score? Credit Agencies Have to Tell You," *Palm Beach Post* (Florida), February 24, 1992, Final Edition. (copy supplied).

"All About/Debt Collection; Persuading People to Pay Their Bills During Hard Times," *The New York Times*, December 15, 1991, Late Edition – Final. (copy supplied).

"Creditworthy ... McDonnell Settles Applicant Charge," *St. Louis Post Dispatch* (Missouri), October 10, 1991, Five Star Edition. (copy supplied).

"3 firms agree to advise when credit costs jobs," *The Washington Times*, October 10, 1991, Final Edition. (copy supplied).

"Credit Bureau Won't Sell Names," *The Seattle Times*, August 9, 1991, Friday, Final Edition. (copy supplied).

"Don't bank on how-to schemes," *The San Diego Union-Tribune*, May 7, 1991. (copy supplied).

"Those 900 lines take heavy toll," *The San Diego Union-Tribune*, May 7, 1991. (copy supplied).

"Judge Halts Business of 2 Area Credit Card Firms; Baltimore Companies Accused by FTC of Deceptive Advertising in Catalogue Deals," *The Washington Post*, July 28, 1990, Final Edition. (copy supplied).

"U. S. travel firms ordered to pay refunds," *The Toronto Star*, April 28, 1990, Second Edition. (copy supplied).

"Good news, bad news; The tedious road to restitution in travel scams," *Chicago Tribune*, March 4, 1990, Final Edition. (copy supplied).

f. If applicable, list all published judicial opinions that you have written, including concurrences and dissents. Supply the citations for all published judicial opinions to the Committee.

N/A

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

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any

unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

The White House
National Economic Council
Senior Advisor (appointed by Gene Sperling, Director, NEC) 2000-2001

Federal Trade Commission
Bureau of Consumer Protection
Associate Director for Financial Practices (appointed by Barry J. Cutler, Director, Bureau of Consumer Protection) 1992-2000
Assistant Director for Credit Practices (appointed William MacLeod, Director, Bureau of Consumer Protection) 1989-1991

Representative Jonathan B. Bingham, Spring 1975, student intern.

Senator Walter F. Mondale, Fall 1974, student intern.

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

Hillary Clinton for President, 2008, participated in finance committee meetings.

Bill Bradley for US Senate, October 1978, volunteer.

Bella Abzug for US House, Spring 1971, volunteer.

14. **Legal Career:** Answer each part separately.

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

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

I did not clerk for a judge but did a student internship my third year of law school (1977-1978) for US District Judge George N. Leighton (ND Ill.).

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

I have not practiced alone.

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

**WilmerHale (2002 – present)**
Partner
1875 Pennsylvania Ave., N.W.
Washington, DC 20006

**Hogan & Hartson (2001-2002)**

Partner
555 Thirteenth St., N.W.
Washington, DC 20004

**White House National Economic Council (2000-2001)**
Senior Advisor
Washington, DC 20500

**Federal Trade Commission (1989-2000)**
Associate Director for Financial Practices (1992-2000)
Assistant Director for Credit Practices (1989-1991)
Washington, DC 20580

**University of Maryland School of Law (1988-1989)**
Visiting Associate Professor
500 W. Baltimore St.
Baltimore, MD 21201

**Indiana University (Bloomington) School of Law (1986-1988)**
Associate Professor
211 South Indiana Ave.
Bloomington, IN 47405

**The George Washington University Law School (1983-1986)**
Clinical Instructor
2000 H St., N.W.
Washington, DC 20052

**Covington & Burling (1979-1983)**
Associate
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I supervised student mediators at George Washington University Law School but have not mediated cases.

v. whether you have held any judicial office, including positions as an administrative law judge, on any U.S. federal, state, tribal, or local court and if so, please provide the name of the court, the jurisdiction of that court, whether the position was appointed or elected, and the dates of your service.

**District of Columbia Board of Appeals and Review (1984-1986)**
Member, appointed by the Mayor, heard appeal from denial of participation in the Medicare program; also heard employment discrimination cases for the D.C. Human Rights Commission

b. Describe:

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

My first position as a member of the bar was as an associate at Covington & Burling. I worked on a variety of litigation matters including antitrust, contracts and tax. In addition I was engaged in extensive pro bono activities, including spending seven months full time at the Neighborhood Legal Services Program.

In 1983, I left law practice to teach law full time for the next six years. My first teaching position was as a clinical instructor at the George Washington University Law School. I ran two programs: consumer mediation and consumer litigation. The mediation taught students that there were alternative ways to resolve disputes other than litigation. The litigation clinic primarily prosecuted cases on behalf of the District of Columbia government against unscrupulous and unlicensed businesses. After three years at GW, I decided to move to a mix of classroom and clinic teaching. I was hired as a tenure-track Associate Professor of Law at Indiana University. In addition to classroom teaching, I also started a general practice clinical program. Two years later, I accepted a Visiting Associate Professor position at the University of Maryland Law School to help develop the novel Cardin program, blending classroom and clinic teaching.

Starting in 1989, I joined the Federal Trade Commission as an Assistant Director for Credit Practices. In that capacity, I supervised and participated in federal district court litigation against companies and individuals charged with violating Section 5 of the FTC Act, including telemarketers and credit repair scams. In 1983, I became the Associate Director for Credit Practices (later renamed Financial Practices), the head of a Division of about 30 professionals and a Senior Executive Service (SES) position. I was responsible for enforcing the Fair Credit Reporting Act, which among other things protects the privacy of consumer's credit records, in addition to other credit statutes. From 1995 until 2000, I was the lead FTC staffer on Internet privacy issues, conducting workshops, negotiating industry self-regulatory agreements, drafting regulations, testifying in Congress, and bringing enforcement actions. I was a member of the US Government team negotiating the EU Safe Harbor agreement and represented the US at the Organization for Economic Cooperation and Development (OECD) on privacy and data security issues. While at the FTC, I chaired a federal advisory committee on data access and security issues.

Following the FTC, from August 2000 – January 2001, I was a Senior Advisor with the White House National Economic Council. My work including serving on a committee to protect consumer information in bankruptcy proceedings, working with Congress on draft anti-spam legislation, and consulting with HHS on the HIPAA regulations. After the White House, I spent a year at Hogan & Hartson as a partner working on a wide range of Internet privacy issues.

Since 2002, I have been a partner at WilmerHale where my work has been divided between privacy, consumer protection, and financial services, with a considerable amount of overlap.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

My typical clients at WilmerHale have been online companies, retailers, banks, broker dealers, debt collectors, credit bureaus, insurance companies, and media companies. I have advised them on privacy and data security issues as well as defending federal and

state investigations. I advise on a wide range of privacy issues including online, financial, medical, children's, driver's protection, video rental, email marketing, telemarketing, and international data transfers. I have drafted numerous privacy policies as well as information sale and purchase agreements, counseled on information disclosure and usage issues, and advised clients numerous times on how to address data security breaches. In addition to privacy issues, I also advise clients on advertising law, consumer protection, and financial services issues generally.

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

My private practice since 2001 has involved an extremely small amount of litigation-related matters with no court appearances. At Indiana University and George Washington University, I supervised students in litigation matters. While at the FTC, I occasionally appeared in US District Court and argued one administrative appeal to the FTC. At Covington & Burling, I argued a DC Circuit appeal and, while on rotation to the Neighborhood Legal Services Program, regularly appeared in DC Superior Court.

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

Less than one percent of my practice has involved litigation in federal, state or other courts, primarily consulting with other lawyers handling the litigation. I have been directly involved in one minor administrative litigation matter seeking to quash a subpoena which was far less than one percent of my time.

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

Approximately 15 percent of my practice is spent defending investigations and negotiating civil settlements with the Federal Trade Commission that are filed in federal district court. I have not been involved with any criminal matters.

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

None

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

N/A

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

I was on a brief on behalf of the National Organization for Women seeking review of a District Court ruling regarding the Equal Rights Amendment. (Copies supplied).

15. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

Defenders of Wildlife, Inc., Appellant, v. the Endangered Species Scientific Authority, et al, 725 F.2d 726 (D.C. Cir 1984). Defenders of Wildlife, Inc., appealed a District Court order granting the Interior Department's motion to vacate that court's previously issued injunction. The injunction had barred the Department from authorizing the export of bobcats until guidelines were issued satisfying the requirements the court had set out in a prior D.C. Circuit case. The Circuit Court affirmed the District Judge's ruling that Congress, in a subsequent amendment to the Endangered Species Act, Pub.L. No. 97-304, 16 U.S.C. Sec. 1537a, had overruled the prior decision, thereby removing the basis for the injunction. I represented Defenders of Wildlife, participated in writing the briefs and argued the case before the D.C. Circuit. The representation extended from 1981-1984. The case was argued before Judges Wilkey, Bork and Lumbard. Co-counsel were Brice M. Clagett, (deceased) Stephen D. Barnes (now with Barnes Morris Klein Yorn, 2000 Avenue of the Stars, Los Angeles, CA 90067, (310) 319-3900) and Ellen Bass (current contact information not available), Washington, D.C. Opposing counsel were Albert M. Ferlo, Jr., Atty., Dept. of Justice, Washington, D.C. (now with Perkins Coie, 700 Thirteenth St., Washington, DC 20005, (202) 654-6262), with whom Carol E. Dinkins, Asst. Atty. Gen., Dianne H. Kelly and Dirk D. Snel, Attys., Dept. of Justice, Washington, D.C. William A. Hutchins, Washington, D.C., with whom Paul A. Lenzini, Washington, D.C., was on the brief, for appellee, Intern. Ass'n of Fish & Wildlife Agencies. Paul A. Kiefer and Matthew D. Shannon, Washington, D.C., were on the brief, for appellee, Fur Conservation Institute of America. John C. Morrison, Washington, D.C., also entered an appearance for appellee, Fur Conservation Institute of America. Stephen S. Boynton, Washington, D.C., entered an appearance for appellees, Driscoll, et al.

In the Matter of Trans Union Corporation, FTC Slip Copy, Dkt. No. 9255 (Sept. 28, 1994). Respondent TransUnion appealed an Administrative Law Judge's summary decision that it had violated the Fair Credit Reporting Act by selling marketing lists that contained credit information. I acted as FTC Complaint Counsel, supervised the litigation of the case, and argued the appeal before the Federal Trade Commission. The FTC affirmed the Administrative Law Judge's ruling per a decision by Commissioner Yao. The Court of the Appeals for the District of Columbia Circuit reversed and remanded the case for trial. After trial, the ALJ again found for FTC Complaint Counsel. TransUnion unsuccessfully appealed again to the FTC and the Court of Appeals, and certiorari was denied by the United States Supreme Court. My representation covered the filing of the complaint in 1992 until I left the FTC in 2000. Opposing counsel were Phil C. Neal (now with Neal Gerber Eisenberg, Two North LaSalle St., Suite 1700, Chicago, IL 60602, (312) 269-8080, Roger L. Longtin, (now

with DLA Piper, 203 N. LaSalle St., Suite 1900, Chicago, IL 60601, (312) 368-4040) Chicago, IL,

a. the date of representation;

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

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

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

The most rewarding work I have done has been a multi-year pro bono project to help some of the poorest countries in Africa. Specifically, based on my experience in the legislative and enforcement aspects of the US Fair Credit Reporting Act, in conjunction with the World Bank, I have advised Central Banks in Angola, Lesotho, Kenya, Liberia and Sierra Leone on the establishment or improvement of credit reporting in their countries. An effective credit reporting system can reduce loan defaults and expand loan opportunities for small businesses and individuals which can, in turn, spur economic development. In the past couple of years, Sierra Leone has adopted credit reporting legislation I helped draft and Liberia's Central Bank has promulgated credit reporting regulations I helped draft, to create legal structures in those countries that will encourage the development of private sector credit reporting.

Lobbying:

Iron Mountain (2005-2006) – in favor of data security breach legislation

National Association for Information Destruction (2005-2007) – in favor of legislation that would require proper disposal of sensitive consumer information

RFS Finance (2005) – relating to improved methods of preventing fraud and improving risk detection.

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

George Washington University Law School:

-- Ran Consumer HELP Mediation and Litigation Clinics and taught consumer protection course for clinic students. 1983-86.

Indiana University School of Law:

-- Evidence and Trial Practice – 1986-88

-- Clinical program with classroom component including training students on client interview skills – 1986-88

University of Maryland School of Law:

-- Civil Procedure – 1988-89

-- Clinic program representing indigents in civil cases – 1988-89

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

Upon early retirement from WilmerHale in March 2012, I will be entitled to $175,000 annually until I reach regular retirement age of 65, so long as total firm early retirement payments do not exceed a specified percentage of firm income.

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

None.

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

See attached financial disclosure report.

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

22. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Privacy and Civil Liberties Oversight Board'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 Board's designated agency ethics official.

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

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Privacy and Civil Liberties Oversight Board'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 Board's designated agency ethics official.

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

During my legal career to date, I have easily devoted hundreds if not thousands of hours to pro bono activities. This has included working full-time at the Neighborhood Legal Services Program for seven months while an Associate at Covington & Burling, representing indigent citizens of the District of Columbia. I represented Defenders of Wildlife in a DC Circuit appeal challenging Interior Department regulations and the National Organization for Women regarding the Equal Rights Amendment. As noted above, I have spent considerable time providing pro bono assistance to the Central Banks of Angola, Lesotho, Kenya, Liberia and Sierra Leone to assist those countries in developing credit reporting systems, including visits to those countries to meet with key stakeholders. I have assisted, on a pro bono basis, the World Bank in the development of global credit reporting standards. I worked with the Constitution Project on matters relating to video surveillance and classification of government records. The clinical programs I worked in at the Maryland, Indiana and GW law schools were heavily focused on providing free legal assistance to indigents.

**FINANCIAL STATEMENT**

NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 255 | 000 | Notes payable to banks-secured | | | 0 |
| U.S. Government securities-add schedule | | 61 | 000 | Notes payable to banks-unsecured | | | 0 |
| Listed securities-add schedule | 2 | 009 | 600 | Notes payable to relatives | | | 0 |
| Unlisted securities--add schedule | 1 | 166 | 000 | Notes payable to others | | | 0 |
| Accounts and notes receivable: | | | | Accounts and bills due | | | 0 |
| Due from relatives and friends | | | 0 | Unpaid income tax | | | 0 |
| Due from others | | | 0 | Other unpaid income and interest | | | 0 |
| Doubtful | | | 0 | Real estate mortgages payable-add schedule | | | 0 |
| Real estate owned-add schedule | 1 | 000 | 000 | Chattel mortgages and other liens payable | | | 0 |
| Real estate mortgages receivable | | 203 | 500 | Other debts-itemize: | | | 0 |
| Autos and other personal property | | 56 | 000 | | | | |
| Cash value-life insurance | | | 0 | | | | |
| Other assets itemize: | | | | | | | |
| WilmerHale | | 782 | 000 | | | | |
| | | | | | | | |
| | | | | Total liabilities | | | 0 |
| | | | | Net Worth | 5 | 532 | 600 |
| Total Assets | 5 | 532 | 600 | Total liabilities and net worth | 5 | 532 | 600 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | | 0 | Are any assets pledged? (Add schedule) | | | 0 |
| On leases or contracts | | | 0 | Are you defendant in any suits or legal actions? | | | no |
| Legal Claims | | | 0 | Have you ever taken bankruptcy? | | | no |
| Provision for Federal Income Tax | | | 0 | | | | |
| Other special debt | | | 0 | | | | |

**Financial Statement Schedule**

U.S. Government Securities:

I Bonds -- $61,000

Listed Securities:

Johnson & Johnson $41,000
Netflix $3400
UBS $2900
IShares Russell 3000 Index Fund $110,000
DFA International Core Equity Portfolio $266,000
DFA Core Equity Portfolio $449,000
DFA Emerging Markets Core Equity Portfolio $15,000
ING Global Real Estate $5,000
JP Morgan Highbridge Dynamic Commodities $10,000
Nuveen Preferred Securities $8,000
Vanguard Inter Term Tax Exempt $61,000
Vanguard Interm Term Admiral Share $100,000
Vanguard Limited Term Tax Exempt $148,000
Vanguard Ltd Term Tax Exempt Admiral Share $200,000
Schwab S&P 500 Index $2,300
JPMorgan Alerian MLP Index $10,000
Pimco Total Return $136,000
Vanguard Institutional Index $168,000
GRT Value $56,000
Oppenheimer Global $12,000
Tweedy Browne Global Value $67,000
Acadian Emerging Markets $28,000
T. Rowe Price Real Estate $51,000
Pimco High Yield $30,000
Pimco Unconstrained $30,000

Unlisted Securities:

Utah Educational Savings Plan:
- Age-Based Aggressive Growth $437,000
- Institutional Index Fund $23,000

Maryland College Investment Plan:
- Portfolio 2021 $56,000

Thrift Savings Plan: $642,000

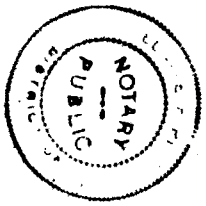
TIAA-CREF:
- TIAA Traditional $8,000

AFFIDAVIT

I, David Medina, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

3/7/12
(DATE)

David Medina
(NAME)




(NOTARY)

Elaine F. Pitts
Notary Public, District of Columbia
My Commission Expires 06-14-2012

**STATEMENT OF JAMES XAVIER DEMPSEY, NOMINEE TO BE A MEMBER OF THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD**

Mr. DEMPSEY. Well, Mr. Chairman, as you know, the questions of technology and security and privacy are of long-running interest to me as they are to you, and if confirmed and if the board comes into operation, I would look forward to working with the Chairman and the other members of the board to establish a sense of priorities. But I think the whole question, as Senator Grassley also referred to, of information sharing is critical.

After 9/11, appropriately in my view, the law was taken down, and agencies were under an imperative and are under an imperative properly to share information. But as the 9/11 Commission recognized, as the Congress recognized, as the agencies themselves recognized, this poses challenges both on the security side, as illustrated by the WikiLeaks situation, and on the privacy side.

So, if confirmed, I would look forward to working with you and with the privacy officers in the various agencies who, I know, are grappling with this issue and to work with the people designing and running these systems, look at what is effective, what are the needs, what is the threat, and then how can we meet the threat with the system of checks and balances, accountability, and the kinds of rules that you referred to.

Chairman LEAHY. Well, you know, we talk about WikiLeaks. There is a case where we had some real—the leaking of parts of it was just embarrassing, but other parts really went at our National security, and in some cases I think a case could be made that people died as a result of it. And that is an easy one. I mean, the fact that it came out and WikiLeaks used it and so on. But we can also go just as average citizens, you might have everything there from a member of your family is undergoing psychiatric help or alcoholic rehabilitation or something like that, and if it is easily available, does that leak out to your embarrassment?

I might ask the same question of everybody else here. Ms. Cook, do you want to add anything to that?

[The biographical information follows.]

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

**QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES**

**PUBLIC**

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

   James Xavier Dempsey

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

   Member, Privacy and Civil Liberties Oversight Board

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

   Primary office:
   55 New Montgomery Street #513
   San Francisco, CA 94105

   CDT's Washington, DC office:
   1634 I Street, NW #1100
   Washington, DC 20006

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

   May 20, 1953 Waterbury, CT

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

   Harvard Law School, 1976-1979, JD 1979
   Yale College, 1971-1975, BA 1975

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

   **Center for Democracy and Technology (1997 – present)**
   Current positions: Vice President for Public Policy; Corporate Secretary
   1634 I Street, NW #1100
   Washington DC 20006

Previous positions: Policy Director (2005-2007); Executive Director (2003 – 2005); Deputy Director (2001-2002); Senior Staff Counsel (1997-2000).

**Center for National Security Studies (1995 – 1997)**
Deputy Director
1120 19th Street NW
8th Floor
Washington, DC 20036

**National Security Archive (1995 – 1997)**
Special Counsel
Gelman Library
Suite 701
2130 H Street, NW
Washington, DC 20037

**Subcommittee on Civil and Constitutional Rights (1985 – 1995)**
Assistant Counsel
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

**Arnold & Porter (1980 -1984)**
Associate Attorney
555 12th Street, NW
Washington, DC 20004

**Massachusetts Supreme Judicial Court (1979 - 1980)**
Law clerk to the Hon. Robert Braucher
Boston, MA

**Palmer & Dodge (Summer 1978)**
Summer law clerk
Boston, MA

**Weil Gotshal & Manges (Summer 1977)**
Summer law clerk
New York, NY

**Civil Liberties Union of Massachusetts (1977-1979)**
Research Assistant
Boston, MA

**VISTA (Volunteers in Service to America) (1975-1976)**
VISTA volunteer: Midlands Community Action Agency, Columbia, SC, and Georgia Department of Corrections, Atlanta, Georgia

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

   None

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

   Phi Beta Kappa

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

   American Bar Association –Member: Approx. 1980 to 1984 or 1985

10. **Bar and Court Admission**:

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

       District of Columbia bar – admitted March 10, 1980

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

       U.S. District Court for the District of Columbia – October 6, 1980
       U.S. Court of Appeals for the District of Columbia Circuit – June 5, 1981
       Supreme Court of the United States – March 28, 1983
       U.S Court of Appeals for the Ninth Circuit – December 27, 1983
       U.S. Court of Appeals for the Fourth Circuit – July 25, 1984
       U.S Claims Court – August 16, 1984

11. **Memberships**:

    a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held.

Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Defending Dissent Foundation (2007 – present)
Vice President and Member, Board of Directors (unpaid)

First Amendment Foundation (2002 – 2007)
Vice President and Member, Board of Directors (unpaid)
(The First Amendment Foundation merged in 2007 with another organization to become the Defending Dissent Foundation.)

The Oversight Project (1997 – 2007)
President and Member, Board of Directors (unpaid)
(The Oversight Project never conducted major activities; it was ended in 2007.)

Digital Policy Institute (2003-2007)
President and Member, Board of Directors (unpaid) (The Digital Policy Institute ceased operation in 2007.)

The Center for Democracy and Technology (CDT) sponsors the Digital Privacy and Security Working Group (DPSWG), a policy forum for computer and communications companies, trade associations and public interest organizations. I have participated in DPSWG since I joined CDT in 1997; I coordinated its meetings and mailing list until 2010. Since 2010, I have coordinated Digital Due Process, a coalition recommending updates to the Electronic Communications Privacy Act.

The Global Internet Policy Initiative was an unincorporated project of CDT and Internews from 2001 to around 2006. I was Policy Director for the project. The project is no longer active.

Rapleaf, Inc., Privacy Advisory Board (2008 – 2010)

Palantir, Inc., Privacy Advisory Committee (2008 – 2010)

Bill of Rights Defense Committee, Advisory Board (2002 – present)

National Strategic Policy Council on Cyber and Electronic Crime of the National Governors Association Center for Best Practices (2006-2007)

Steering Committee of the ANSI-BBB Identity Theft Prevention and Identity Management Standards Panel (2006-2008)

Markle Foundation, Task Force on National Security in the Information Age – member (2004 – present); member of steering committee (2006 - present)

Markle Foundation, Connecting for Health initiative – participant and member of steering committee (2007- 2008)

Industry Advisory Board for the National Counter-Terrorism Center (2005 – 2006)

Transportation Security Administration Secure Flight Working Group (2005)

Conference on Computers, Freedom and Privacy, sponsored by AOL, the Association for Computing Machinery and other for profit and non-profit organizations, Program Committee (2007)

California Identity Theft Summit, sponsored by the California Department of Consumer Affairs, the California Office of Privacy Protection, the California State and Consumer Services Agency and the California District Attorneys Association, Advisory Committee (2007)

California e-Prescribing Task Force, sponsored by the California HealthCare Foundation (2008 - 2009)

State of California Terrorism Threat Assessment Advisory Group, California Office of Homeland Security (2008 – present)

DARPA Privacy Panel (2010 – present)

Janney School, Washington, DC, PTA Vice President (1997- 1999)

Maret School, Washington, DC, Auction committee (2003-2005)

Urban School, San Francisco, CA, Auction committee (2008)

From around 1989 to 2005, I attended and made contributions to St. Columba's Church in Washington, DC. From late 2005 or early 2006 to 2009, I attended and made contributions to St. Aidan's Church in San Francisco, where I served on the stewardship committee for about a year and a half, between 2007 and 2009. I have more recently attended and made contributions to Trinity Church in San Francisco.

I have made financial contributions to charitable organizations over the years. I have not included in the list above any organizations to which I gave funds and did not otherwise participate in programmatic activities, although the organization may label me a member.

b. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None of the organizations I listed in response to 11a above, to my knowledge, currently discriminate or formerly discriminated on the basis of race, sex, or religion, either through formal membership requirements or the practical implementation of membership policies.

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

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

The list below consists of materials identified from my recollection, from my files, and from search of Internet databases. A copy is supplied for each item. Despite these searches, there may be other items I have been unable to identify, find, or remember.

***Publications/Books:***

Deirdre K. Mulligan and Jim Dempsey, "Internet Can Be a Big Benefit for Democracy," San Francisco Chronicle (op-ed), July 4, 2010.

Deven McGraw, James X. Dempsey, Leslie Harris and Janlori Goldman, "Privacy As An Enabler, Not An Impediment: Building Trust Into Health Information Exchange," Health Affairs, Vol, 28, no. 2 (2009).

"Digital Search & Seizure: Updating Privacy Protections To Keep Pace With Technology," article reprinted in course handbook for the Privacy and Security Law Institute 2008 (PLI, June 2008 and June 2009).

"Federal Computer Security Initiative: Welcome but Too Secretive," Forbes online, May 13, 2008.

"The Internet at Risk: The Need for Higher Education Advocacy," EDUCAUSE Review, Vol. 42, No. 6, November/December 2007.

James X. Dempsey and Ira Rubinstein, "Lawyers and Technologists: Joined at the Hip?," Guest Editors' Introduction to IEEE Security and Privacy Magazine, Vol. 4, Issue 3 (May/June 2006).

James X. Dempsey and Lara M. Flint, "Commercial Data and National Security," The George Washington Law Review, Vol 72, Number 6 (August 2004).

"What E-Government Means for Those of Us Who Cannot Type, Local Government Brief," Winter 2003, p. 22.

"Civil Liberties in a Time of Crisis," Journal of the National Council of Jewish Women, Winter 2001/2002. (typescript submitted in hardcopy)

James X. Dempsey and David Cole, Terrorism and the Constitution (New Press, 3rd ed. 2006).

Essays on PATRIOT Act provisions, in "Patriot Debates: Experts Debate the USA PATRIOT Act," Stewart A. Baker and John Kavanagh, editors (published by the American Bar Association Standing Committee on Law and National Security, June 2005).

James X. Dempsey, "Civil Liberties in a Time of Crisis," Human Rights, Winter 2002.

James X. Dempsey, "Freedom of Expression in the IT Era: User Empowerment," edited transcript of a speech to the IPI World Congress and 50th General Assembly (January 2001).

James X. Dempsey and Martin L. Stern, 'Disconnect the FBI Wiretap Plan,' Legal Times, June 15, 1998.

Michael J. O'Neil and James X. Dempsey, 2000 DePaul Business Law Journal: "Critical Infrastructure Protection: Threats To Privacy And Other Civil Liberties And Concerns With Government Mandates On Industry."

Deirdre Mulligan and James X. Dempsey, "Applying Campaign Finance Law to the Internet - Risks to Free Expression and Democratic Values," CFP, April 2000.

James X. Dempsey, "Overview of Criminal Justice Information Systems," CFP, April 2000.

"Communications Privacy In The Digital Age: Revitalizing The Federal Wiretap Laws To Enhance Privacy, " Albany Law Journal of Science & Technology, 1997

"Proprietary Data Hard to Protect in Government Bids" (with James A, Dobkin), Legal Times, May 16, 1983.

"Court Reexamines State, Federal Utility Regulatory Role" (with G. Philip Nowak), Legal Times, October 24, 1983.

"FERC Limits PURPA Electric Transmission Authority" (with G. Philip Nowak), Legal Times, January 30, 1984.

"Protection of Corporate Secrets in Government Contract Proposals and Bids" (with James A. Dobkin), 15 Pub. Con. L.J. 46 (1984).

"Data privacy – Law enforcement's access to your information," in National

Conference on Privacy, Technology and Criminal Justice Information, proceedings of a Bureau of Justice Statistics/SEARCH conference (2001).

"Control y Supervision Legislativa del FBI en Estados Unidos," in Control Democratico en el Mantenimiento de la Seguridad Interior, 1998 (hardcopy attached)

"Control y supervision legislative del FBI en Estados Unidos," in Policia y sociedad democratica, 1998 (hardcopy attached)

"The Terrors of Counterterrorism," The Recorder, May 11, 1995 (hardcopy attached).

***CDT blog entries:***

"A Good Start for the 110th." CDT Blog. Jan. 10, 2007.

"A Global Forum on National Issues." CDT Blog. Nov. 6, 2006.

"A Wake-Up Call for Reform." CDT Blog. Mar. 14, 2007.

"Admin Cyber-Security Plan Raises Concerns over NSA's Role." CDT Blog. Nov. 8, 2007.

"CTO Aneesh Chopra – A Breath of Fresh Air." CDT Blog. Aug. 6, 2009.

"Comey Revelations Highlight Surveillance Concerns." CDT Blog. May 16, 2007.

"Congressional Oversight on Privacy and National Security." CDT Blog. Nov. 10, 2006.

"Does 'Targeting' Authorize the Vacuum Cleaner?" CDT Blog. June 25, 2008.

"ICANN, US Government Affirm Private Sector Lead in Domain Name Governance." CDT Blog. Sept. 30, 2009.

"'Internet Governance:' The Contribution of the IGF." CDT Blog. July 15, 2010.

"More Bad News." CDT Blog. June 9. 2006.

"New Urban Myth: The Internet ID Scare." CDT Blog. Jan. 11, 2011.

"Privacy in the Age of Big Data." CDT Blog. Aug. 20, 2009.

"Progressives Should Embrace Intent Behind 'Violent Radicalization Bill.'" CDT Blog. Dec. 14, 2007.

"Supreme Court Holds Stead on Workplace Privacy." CDT Blog. June 17, 2010.

"The Real Story on Warrantless Surveillance." CDT Blog. Aug. 2, 2007.

"Transparency, Privacy and Financial Services Reform." CDT Blog. April 26, 2010.

"What Do the Twitter 'Subpoenas' Mean?" CDT Blog. Jan. 12, 2011.

"Why the NSA Should Not Lead Cybersecurity Government-Wide." CDT Blog. April 21, 2009.

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

The list below consists of materials identified from my recollection, from my files, and from search of Internet databases. A copy is supplied for each item. Despite these searches, there may be other items I have been unable to identify, find, or remember.

**Markle Foundation- Connecting for Health Initiative:**

"Consumers as Network Participants: Common Framework for Networked Personal Health Information," Connecting for Health, Markle Foundation (June 2008).

"Overview and Principles: Common Framework for Networked Personal Health Information," Connecting for Health, Markle Foundation (June 2008).

"Linking Health Care Information: Proposed Methods for Improving Care and Protecting Privacy", Connecting for Health, Markle Foundation (February 2005).

"Achieving Electronic Connectivity in Healthcare: A Roadmap from the Nation's Public and Private Sector Healthcare Leaders," Connecting for Health, Markle Foundation (Fall 2004).

"Achieving Electronic Connectivity in Healthcare: Summary of Recommendations," Connecting for Health, Markle Foundation (July 2004).

"Achieving Electronic Connectivity in Healthcare: A Preliminary Roadmap from the Nation's Public and Private Sector Healthcare Leaders," Connecting for Health, Markle Foundation (July 2004).

**Markle Foundation-Task Force on National Security in the Information Age**

"Creating a Trusted Network for Homeland Security: Second Report of the Markle Foundation Task Force," Task Force on National Security, Markle Foundation (2003).

"Protecting America's Freedom in the Information Age: A Report of the Markle Foundation Task Force," Task Force on National Security, Markle Foundation, (October 2002).

**CDT Reports-**

"Intermediary Liability: Protecting Internet Platforms for Expression and Innovation," Center for Democracy & Technology (April 2010).

"Patriot Act Sunsets Should Prompt Re-Consideration of Anti-Terror Powers; Adjustments Needed To Protect Civil Liberties," Center for Democracy & Technology, website content (Sept. 16, 2009).

"PASS ID Act Addresses Major Privacy Concerns in REAL ID," Center for Democracy & Technology, website content (June 15, 2009).

"White House Sets Framework for Cybersecurity; Builds in Privacy," Center for Democracy & Technology, website content (May 29, 2009).

"Cybersecurity Program Should Be More Transparent, Protect Privacy," Center for Democracy & Technology, website content (March 30, 2009).

"Domestic Intelligence System Grows without Controls," Center for Democracy & Technology, website content (March 19, 2009).

"Show Us the Data: Most Wanted Federal Documents," Report by the Center for Democracy & Technology and OpenTheGovernment.Org (March 2009).

"Investigative Guidelines Cement FBI Role As Domestic Intelligence Agency, Raising New Privacy Challenges," Center for Democracy & Technology, website content (October 29, 2008).

"Online Consumers at Risk and the Role of State Attorneys General," Center for American Progress and the Center for Democracy & Technology (August 2008).

"Legislation Needed to Correct Widespread Errors in use of National Security Letters," Center for Democracy & Technology, website content (May 14, 2008).

"Governance of Critical Internet Resources: What Does 'Governance' Mean?

What Are 'Critical Internet Resources'?" Prepared by the Center for Democracy & Technology for the Second Internet Governance Forum in Rio de Janeiro, Brazil (Nov. 14, 2007).

"Bills Would Strengthen, Weaken Surveillance Standards," Center for Democracy & Technology, website content (Oct. 26, 2007).

"Federal Appeals Court Holds Email Content Is Constitutionally Protected," Center for Democracy & Technology, website content (July 25, 2007).

"IRS Proposal Could Impact Millions of Internet Users," Center for Democracy & Technology, website content (May 4, 2007).

"Bill Introduced to Reform FBI Data Demands," Center for Democracy & Technology, website content (March 29, 2007).

"The Internet in Transition: 2009 and Beyond, A Platform to Keep the Internet Open, Innovative and Free," Center for Democracy & Technology, website content (Nov. 17, 2006), available at http://old.cdt.org/election2008/.

"ICANN Seeks Input on Improving Transparency and Accountability," Center for Democracy & Technology, website content (Nov. 17, 2006).

"Congress Poised to Consider Dangerous NSA Bills," Center for Democracy & Technology, website content (Sept. 25, 2006).

"FISA 'Modernization' is Dangerous and Premature," Center for Democracy & Technology, website content (Aug. 2, 2006).

"Internet Governance Debate Poses Unique Global Challenges," Center for Democracy & Technology, website content (July 19, 2006).

"Court Upholds Imposition of Technical Design Mandates on the Internet," Center for Democracy & Technology, website content (June 13, 2006).

"Illegal NSA Data Mining Highlights Need for Congressional Oversight," Center for Democracy & Technology, website content (May 11, 2006).

"President Signs PATRIOT Act Reauthorization Bill Lacking Civil Liberties Protections," Center for Democracy & Technology, website content (March 17, 2006).

"Digital Technology Makes Surveillance Easier, Requiring Stronger Privacy Laws," Center for Democracy & Technology, website content (Feb. 22, 2006).

"Congress Begins Deeper Investigation of NSA's Warrantless Wiretapping

Program," Center for Democracy & Technology, website content (Feb. 14, 2006).

"Digital Search & Seizure: Updating Privacy Protections to Keep Pace with Technology," Center for Democracy & Technology (February 2006).

"Congress Needs to Hear About PATRIOT Renewal," Center for Democracy & Technology, website content (Jan. 4, 2006).

"Civil Liberties Crisis Confronts Nation," Center for Democracy & Technology, website content (Dec. 19, 2005).

"PATRIOT Act Deal Falls Short on Civil Liberties Checks and Balances," Center for Democracy & Technology, website content (Dec. 12, 2005).

"Congressional Revolt Over Civil Liberties; PATRIOT Reform Hangs in the Balance," Center for Democracy & Technology, website content (Nov. 11, 2005).

"Federal Appeals Court Reaffirms E-Mail Privacy Protections," Center for Democracy & Technology, website content (Aug. 18, 2005).

"Civil Liberties at Issue in PATRIOT Act Reauthorization," Center for Democracy & Technology, website content (June 2, 2005).

"SAFE Act Would Control PATRIOT Powers," Center for Democracy & Technology, website content (April 26, 2005).

"Federal ID Proposals for US Citizens and Others Grow in Number and Scope," Center for Democracy & Technology, website content (Jan. 18, 2005).

"Technologies That Can Protect Privacy as Information is Shared to Combat Terrorism," Center for Democracy & Technology (May 26, 2004).

"The Internet and Law Enforcement Surveillance: Extension of CALEA to the Internet Would Be Unlawful, Unnecessary and Unwise," Center for Democracy & Technology (May 20, 2004).

"No Design Mandates for Internet, CDT Tells FCC," Center for Democracy & Technology, website content (April 28, 2004).

"Google's GMail Highlights General Privacy Concerns," Center for Democracy & Technology, website content (April 12, 2004).

"The Internet and Law Enforcement Surveillance: Law Enforcement Concerns Can Be Addressed Without Regulation, Which Would Stifle Innovation, Raise Costs, Risk Security," Center for Democracy & Technology (March 19, 2004).

"GAO Echoes CDT Criticisms of CAPPS II; Coalition Calls for Hearings," Center for Democracy & Technology, website content (Feb. 26, 2004).

"Security Holes at DMVs Feed ID Theft, Offer Lessons for National ID Card Debate," Center for Democracy & Technology, website content (Feb. 3, 2004).

"Privacy's Gap: The Largely Non-Existent Legal Framework for Government Mining of Commercial Data," Center for Democracy & Technology (May 19, 2003).

"Part 4: Information Security and Government Policies," in Information Technology Security Handbook (2003).

"The E-Government Handbook for Developing Countries," Project of InfoDev and the Center for Democracy & Technology (November 2002).

"Anti-Terrorism Legislation Gutting Privacy Standards Becomes Law," Center for Democracy & Technology, website content (Oct. 26, 2001).

"Appeals Court Rules on FCC CALEA Decision," Center for Democracy & Technology, website content (Aug. 15, 2000).

"Bridging the Digital Divide: Internet Access in Central and Eastern Europe," Center for Democracy & Technology (2000).

"Square Pegs & Round Holes: Applying Campaign Finance Law to the Internet – Risks to Free Expression & Democratic Values," Center for Democracy & Technology (October 1999).

"'Regardless of Frontiers:' Protecting The Human Right to Freedom of Expression on the Global Internet," Global Internet Liberty Campaign (1998).

**GIPI Reports:**

"A Process for Developing Internet Policy: The Model of the National ICT/Internet Summit - The Case Study of the Kyrgyz Republic," Global Internet Policy Initiative (April 2001).

"Licensing Options for Internet Service Providers," Global Internet Policy Initiative (June 23, 2001, updated Sept. 25, 2002).

"Application of Defamation Laws to the Internet," Global Internet Policy Initiative (October 2001).

"Flat Rate versus Per Minute Charges for Telephone Service: The Relationship between Internet Access and Telephone Tariffs," Global Internet Policy Initiative (Dec. 4, 2001).

"Taxation of E-Commerce," Global Internet Policy Initiative (December 2001).

"Voice-over-IP: The Future of Communications," Global Internet Policy Initiative (April 29, 2002).

"Best Practices for Telecommunications Reform," Global Internet Policy Initiative (May 2002).

"The Keys to the Back Office: Building a Legal and Policy Framework to Attract IT-Enabled Outsourcing," Global Internet Policy Initiative (May 2002).

"Redelegation of Country Code Top Level Domains," Global Internet Policy Initiative (February 2003).

"Trust And Security In Cyberspace: The Legal And Policy Framework for Addressing Cybercrime," Global Internet Policy Initiative (September 2005).

"Privacy and E-Government: Privacy Impact Assessments and Privacy Commissioners –Two Mechanisms for Protecting Privacy to Promote Citizen Trust Online," Global Internet Policy Initiative (May 1, 2003).

"Copyright and the Internet: Building National Legislative Frameworks Based on International Copyright Law," Olena Dmytrenko and James X. Dempsey, Global Internet Policy Initiative (December 2004).

"The Regulatory Framework for E-Commerce –International Legislative Practice," Global Internet Policy Initiative (May 21, 2002).

"Creating the Legal Framework for ICT Development: The Example of E-Signature Legislation in Emerging Market Economies," James X. Dempsey, Global Internet Policy Initiative (2003).

"The International Legal Framework for Data Protection and Its Transposition to Developing and Transitional Countries," Global Internet Policy Initiative (Dec. 28, 2004).

"Management of ccTLDs by Member States of the European Union," Global Internet Policy Initiative (Oct. 26, 2002).

"Building Local E-Government through Public-Private Partnerships: Conference Conclusions," Conference on E-Government in Romania, Global Internet Policy Initiative (2005).

Additionally I managed all web content for the Global Internet Policy Initiative, available at http://www.internetpolicy.net.

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

The list below consists of materials identified from my recollection, from my files, and from search of Internet databases. A copy is supplied for each item. Despite these searches, there may be other items I have been unable to identify, find, or remember.

***Testimony:***

Testimony before the Senate Judiciary Committee, on The Electronic Communications Privacy Act: Promoting Security and Protecting Privacy in the Digital Age, Sept. 22, 2010.

Testimony before the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Civil Liberties on Electronic Communications Privacy Act Reform, May 5, 2010.

Testimony before the House Intelligence Committee on FISA and the Protect America Act, Sept. 18, 2007.

Testimony before the Senate Judiciary Committee on FISA and the Protect America Act Sept. 25, 2007.

Testimony before the House Intelligence Committee on National Security Letters, Mar. 28, 2007.

Testimony before the President's Privacy and Civil Liberties Oversight Board on Privacy and Information Sharing for Counterterrorism, Dec. 5, 2006.

Testimony before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security on Updating FISA, Sept. 6, 2006.

Testimony before the Senate Judiciary Committee on Modernization of the Foreign Intelligence Surveillance Act, July 26, 2006.

Testimony before the House Intelligence Committee on Modernization of the Foreign Intelligence Surveillance Act (FISA), July 19, 2006.

Testimony before the House Committee on Homeland Security, Subcommittee on

Economic Security, Infrastructure Protection, and Cybersecurity on Improving Pre-Screening of Aviation Passengers against Terrorist and Other Watch Lists, June 29, 2005.

Testimony before the Senate Select Committee on Intelligence on USA PATRIOT Act, May 24, 2005.

Testimony before the House Permanent Select Committee on Intelligence on the PATRIOT Act, May 11, 2005.

Testimony before the Senate Committee on the Judiciary on the PATRIOT Act, May 10, 2005.

Testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on Oversight Hearing on Implementation of the USA PATRIOT Act: Section 212, May 5, 2005.

Testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on Implementation of the USA PATRIOT Act: Sections of the Act that Address Crime, Terrorism, and the Age of Technology, April 21, 2005.

Testimony before the Senate Select Committee on Intelligence on USA PATRIOT Act, April 19, 2005.

Testimony before the Senate Committee on the Judiciary on Securing Electronic Personal Data: Striking a Balance Between Privacy and Commercial and Governmental Use, April 13, 2005.

Testimony before the Subcommittee on Telecommunications and the Internet House Committee on Energy and Commerce on Law Enforcement Access to Communications Systems in a Digital Age, Sept. 8, 2004.

Testimony before the House Committee on Government Reform on Moving from 'Need to Know' to 'Need to Share:' A Review of the 9-11 Commission's Recommendations, Aug. 3, 2004.

Testimony before the Senate Committee on Commerce, Science and Transportation on S. 2281, The VOIP Regulatory Freedom Act of 2004, June 16, 2004.

Testimony before the House Committee on the Judiciary Subcommittee on Commercial and Administrative Law on Privacy in the Hands of the Government: The Privacy Officer for the Department of Homeland Security, Feb. 10, 2004.

Testimony before the Senate Committee on the Judiciary on America after 9/11: Freedom Preserved or Freedom Lost? Nov. 18, 2003.

Testimony before the Subcommittee on Commercial and Administrative Law and the Subcommittee on the Constitution of the House Judiciary Committee on The Defense of Privacy Act and Privacy in the Hands of the Government, July 22, 2003.

Testimony before the House Committee on the Judiciary Subcommittee on the Constitution on Anti-Terrorism Investigations and the Fourth Amendment After September 11: Where and When Can the Government Go to Prevent Terrorist Attacks? May 20, 2003.

Testimony before the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations and the Subcommittee for Technology and Procurement Policy of the House Committee on Government Reform on H.R. 3844, the 'Federal Information Security Reform Act of 2002,' May 2, 2002.

Testimony before the House Committee on the Judiciary Forum on National Security and the Constitution on the Nation's Counter-Terrorism Programs and their Implications for Civil Liberties, Jan. 24, 2002.

Testimony before the House Committee on the Judiciary on Legislative Measures to Improve America's Counter-Terrorism Programs, Sept. 24, 2001.

Testimony before the House Subcommittee on the Constitution on privacy legislation, Sept. 6, 2000.

Testimony before the Senate Judiciary Committee on Carnivore. Sept. 6, 2000.

Testimony before the Senate Judiciary Committee on Internet Security and Privacy. May 25, 2000

Testimony before the House Judiciary Subcommittee on the Constitution on 'The Fourth Amendment and the Internet,' April 6, 2000.

Testimony before the Subcommittee on Crime of the House Judiciary Committee and the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee on Internet Denial of Service Attacks and the Federal Response, Feb. 29, 2000.

Testimony before the Commerce Committee on the Wireless Privacy Enhancement Act of 1999 and the Wireless Communications and Public Safety Enhancement Act of 1999, Feb. 3, 1999.

Testimony before the House Committee on the Judiciary Subcommittee on Crime on CALEA Implementation, Oct. 23, 1997.

**Other Communications:**

Comments of the Center for Democracy & Technology regarding 'Cybersecurity, Innovation and the Internet Economy,' Docket No. 100721305-0305-01, before the U.S. Department of Commerce, September 20, 2010.

Comments of the Center for Democracy & Technology regarding the 'Framework for Broadband Internet Service,' GN Docket No. 10-127, before the Federal Communications Commission, July 15, 2010.

Comments of the Center for Democracy & Technology regarding the Notice of Inquiry regarding the 'Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System,' before The National Telecommunications and Information Administration within the U.S. Department of Commerce, June 8, 2009.

Comments of the Center for Democracy & Technology regarding The Continued Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System: Midterm Review of the Joint Project Agreement, before The National Telecommunications and Information Administration within the U.S. Department of Commerce, January 25, 2008.

Joint comments on the 'Petition for Expedited Rulemaking to Establish Technical Requirements and Standards Pursuant to Section 107 (b) of the Communications Assistance for Law Enforcement Act,' before the Federal Communications Commission, July 25, 2007.

Reply Comments by Industry and Public Interest Commenter's in support of the 'Petition for Reconsideration and Clarification of the CALEA Applicability Order' filed by the United States Telecom Association, ET Docket No. 04-295, before the Federal Communications Commission, January 30, 2006.

Comments in support of the Petition for Reconsideration and Clarification of the CALEA Applicability Order, ET Docket No. 04-295, before the Federal Communications Commission, December 30, 2005.

Request for stay pending issuance of subsequent orders and for stay pending judicial review, regarding the Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket No. 04-295., before the Federal Communications Commission, November 23, 2005.

Joint Comments to the further notice of proposed rulemaking, regarding the

'Communications Assistance for Law Enforcement Act and Broadband Access and Services,' ET Docket No. 04-295, before the Federal Communications Commission, November 14, 2005.

Bipartisan Working Group of Former Government Officials: Recommendations Regarding the Expiring Provisions of the Patriot Act, July 17, 2005.

Letter to the Honorable John Sununu, regarding Voice over Internet Protocol (VOIP) serves, June 21, 2004.

Letter to Senator Akaka from the Center for Democracy & Technology, ACLU, and the Electronic Privacy Information Center (EPIC) regarding data mining, May 26, 2004.

Reply Comments of the Center for Democracy & Technology regarding the 'Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act,' before the Federal Communications Commission, April 27, 2004.

Letter to the Honorable Don Young and the Honorable James Oberstar, regarding the Transportation Security Administration's Computer Assisted Passenger Prescreening System (CAPPS II), February 17, 2004.

Comments of the Center for Democracy & Technology on the 'Notice of Status of System Records, Interim Final Notice, 68 Fed. Reg. 45265-01 (Aug. 1, 2003), Docket No. DHS/TSA-2003-01, September 30, 2003.

Comments on TSA's proposed Aviation Security Screening Records System, 68 Fed. Reg. 2101(Jan. 15, 2003), Feb. 24, 2003.

Comments on the 'Petition of the Cellular Telecommunications Industry Association for a Rulemaking to Establish Fair Location Information Practices,' before the Federal Communications Commission, April 6, 2001.

Comments of the Center for Democracy & Technology on the Council of Europe Draft 'Convention on Cyber-crime.' Draft No. 25; before the Council of Europe and the U.S. Department of Justice, February 6, 2001.

Reply Comments of the Center for Democracy & Technology regarding the 'Communications Assistance for Law Enforcement Act,' CC Docket No. 97-213, before the Federal Communications Commission, January 27, 1999.

Comments of the Center for Democracy and Technology on the 'Communications Assistance for Law Enforcement Act,' CC Docket No. 97-213, before the Federal Communications Commission, May 20, 1998.

Comments of the Center for Democracy and Technology regarding the 'Communications Assistance for Law Enforcement Act: Extension of October 1998 Compliance Date,' CC Docket No. 97-213, before the Federal Communications Commission, April 2, 1998.

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

The list below consists of speeches or talks identified from my recollection, from my files, and from search of Internet databases. Despite my searches, there may be other speeches or talks I have been unable to identify, find, or remember.

February 8 or 9, 1994 – spoke on a panel about criminal history records at the "National Conference on Criminal History Records: Brady and Beyond," organized by the Bureau of Justice Statistics, US Department of Justice, Constitution Ave, NW, Washington, DC, and SEARCH, 7311 Greenhaven Drive, Suite 145, Sacramento, California 95831

August 3, 1994 - spoke on a panel about gang databases at the International Symposium, "Criminal Justice Information Systems and Technology: Building the Infrastructure," organized by SEARCH, 7311 Greenhaven Drive, Suite 145, Sacramento, California 95831

October 7, 1998 - Presentation on Protecting the Human Right to Freedom of Expression on the Global Internet, made at the conference on the Public Voice in the Development of Internet Policy, Ottawa, Canada, organized by the Electronic Privacy Information Center, 1718 Connecticut Ave, NW, Suite 200, Washington, DC 20009 http://thepublicvoice.org/events/ottawa98/default.html (PowerPoint attached - hardcopy).

April 2001 – Global Internet Policy initiative, Promoting the Development of the Internet through Legal and Policy Reform, Almaty, Kazakhstan, sponsored by the Open Society Institute 111A Zheltoksan St., Office 9 Almaty 050000 Kazakhstan (PowerPoint attached - hardcopy).

June 2001 – presented on "Content Controls, Freedom of Expression and ISP Liability on the Internet," and "Internet Policy Overview: The legal and

Regulatory Framework Enabling Development of the Internet," at the Advanced Network Workshop, Stockholm, Sweden, sponsored by the Internet Society, 1775 Wiehle Avenue, Suite 201, Reston, VA (PowerPoints (2) submitted electronically)

July 2001 – Internet and Democracy, The Legal and Regulatory Framework, presentation at the National Foreign Affairs Training Center, US Department of State, 2201 C St. NW, Washington, DC (PowerPoint submitted electronically).

July 2001 – spoke about "Internet Policy Overview: The Legal and Regulatory Framework Enabling Development of the Internet as an Engine of Economic Growth," at a telecommunications regulatory study tour training session sponsored by the US Telecommunications Training Institute, 1150 Connecticut Ave, NW, Washington, DC (PowerPoint submitted electronically)

April 2002 – spoke about "Overview of Internet legislation: The Legal and Regulatory Framework for Development of the Internet – Global Perspective," in Tashkent, Uzbekistan, organized by the Global Internet Policy Initiative-UZ, 31 Kamol Jalilov Street, Tashkent and the United national Development Programme, One United Nations Plaza, New York, NY 10017 (PowerPoint submitted electronically)

June 18, 2002 – Tutorial, Legal and Regulatory Issues: A Primer - Consumer Privacy Overview, and Government Surveillance, INET 02, sponsored by the Internet Society, 1775 Wiehle Avenue, Suite 201, Reston, VA 20190-5108 U.S.A., (PowerPoints (3) submitted electronically).

October 2002 – I am submitting electronically a PowerPoint dated October 2002 on the subject "Internet Policy Overview: The Legal and Regulatory Framework Enabling Development of the Internet as an Engine of Economic Growth" – based on a review of my records, I cannot determine whether I actually gave such a presentation in October 2002, let alone where.

April 21, 2003 – I am submitting electronically a PowerPoint dated April 21, 2003 on the subject "Privacy Overview" - based on a review of my records, I cannot determine whether I actually gave such a presentation in April 2003, let alone where.

June 27, 2003 – The Legal and Regulatory Framework Enabling Development of the Internet as an Engine of Economic Growth and Democratization, UNITAR/INTEL Seminar, 2 United Nations Plaza, New York City (PowerPoint submitted electronically)

September 8, 2003 – Protecting Privacy and Freedom of Communication in the Fight against Cybercrime, Southeast Europe Cybersecurity Conference, in Sofia, Bulgaria, sponsored by the United States Government, Department of State, 2201 C Street, NW, Washington, DC and the Government of Bulgaria, http://www.cybersecuritycooperation.org/ (PowerPoint submitted electronically).

March 7, 2004 - spoke at a workshop, in Washington DC, entitled, "Civil Liberties: The Patriot Act: The Toll on Our Rights," convened by the National Council of Jewish Women's Washington Institute, in Washington DC, 1707 L Street, NW, Suite 950, Washington, DC 20036-4206

March 10, 2004 - spoke on CALEA and VoIP at a brown bag lunch meeting of the D.C. Bar's Computer and Telecommunications Law Section, 1101 K Street NW, Suite 200, Washington, DC.

May 11, 2004 – spoke about CALEA at a VoIP conference in Reston. VA, organized by Law Seminars International, 800 Fifth Avenue, Suite 101 Seattle, WA 98104 .

May 18, 2004 – participated in a panel discussion on Internet governance at the Microsoft Government Leaders Forum, One Microsoft Way, Redmond, WA in Seattle, Washington.

June 4, 2004 – spoke about "Human Rights and the War on Terrorism," at the US Foreign Policy Colloquium, sponsored by the National Committee on United States- China Relations, 71 West 23rd Street Suite 1901, New York, NY 10010-4102 (PowerPoint attached – hardcopy)

June 18, 2004 - spoke on a panel on "Government Surveillance: Civil Liberties and the War on Terror" at the National Convention of the American Constitution Society, 1333 H Street, NW, 11th Floor, Washington, DC

July 2004 – "Internet and Democracy: The Legal and Regulatory Framework Enabling Development of the Internet as an Engine of Economic Growth and Democratization," presentation at National Foreign Affairs Training Center, US Department of State, 2201 C St. NW, Washington, DC (PowerPoints (2) submitted electronically).

September 16, 2004 - spoke on cybersecurity issues at the Academy for Educational Development 1825 Connecticut Ave., NW, Washington, D.C. 20009-5721; as part of the DOT-COM/InterAction Speaker Series: Cyber-Security Issues in International Development Environments (PowerPoint submitted electronically and handwritten notes attached in hardcopy

September 30, 2004 - moderated a panel on "Government, Industry and Security" at the Privacy and National Security Forum in Washington, DC, sponsored by the International Association of Privacy Professionals, 75 Rochester Ave., Suite 4 Portsmouth, NH 03801 USA.

October 6, 2004 – presentation on The Patriot Act, Civil Liberties and the War on Terrorism, at LocationOne, 26 Greene Street, New York, New York 10013

October 10, 2004 – spoke on a panel about CALEA at TELECOM04 in Las Vegas, sponsored by the US Telecom Assn, 607 14th Street, NW, Suite 400, Washington, DC 20005

October 16, 2004 - spoke about spam at CPSR's annual conference, "Making the Grade? A Report Card on US Policy for the Information Society," at Georgetown University in Washington, DC. http://cpsr.org/act/events/annconf/annconf04/, Computer Professionals for Social Responsibility, PO Box 20046 Stanford, CA 94309-0046

October 26, 2004 - spoke on a panel about privacy and identity at the Digital ID World Conference in Denver. (I don't know for sure, but as far as I can tell, the Digital ID World Conference series is now run by a company called CXO, which is part of IDG, 492 Old Connecticut Path, P.O. Box 9208, Framingham, MA 01701.)

November 9, 2004 - participated in a panel discussion on Implementing the Executive Order on the Sharing of Terrorism Information at the Potomac Institute for Policy Studies, 901 N. Stuart Street, Suite 200, Arlington, VA 22203

December 13-17, 2004 – spoke on "Information Security – Building Trust in Cyberspace" and "Internet Policy" at iLaw Eurasia, Tallinn, Estonia, organized by CDT and the Berkman Center, Harvard Law School, Cambridge, MA in coordination with the eGovernance Academy Foundation, Tõnismägi 2, 10122 Tallinn, Estonia (PowerPoints (2) submitted electronically)

January 11, 2005 - spoke about privacy and cyber security at "Roadmap to Government and Private Sector Cyber Security," a workshop for legal and cyber security professionals, U.S. Department of Commerce Auditorium, 1401 Constitution Ave, NW, Washington, DC

April 4, 2005- spoke on a panel about privacy and datamining at the 5th Annual Knowledge Management (KM) Conference and Exhibition, sponsored by the E-Gov Institute, now part of 1105 Media, 9201 Oakdale Ave., Suite 101 Chatsworth, CA 91311

May 4, 2005 - participated in a panel discussion at the Center for American Progress, 1333 H Street NW, 10th Floor, Washington DC, 20005 on "No Place to Hide: Where the Data Revolution Meets Homeland Security," video available at http://www.americanprogress.org/events/2005/5/b593305ct782541.html

May 4, 2005 - spoke at the IP-Based Communications Policy Summit in Washington, DC, sponsored by pulver.com, contact info at http://pulver.com/jeff/.

May 17, 2005 - spoke at the Markle Foundation Task Force Conference on Building a Trusted Information Sharing Environment, 10 Rockefeller Plaza, 16th Floor , New York, NY 10020-1903.

May 25, 2005 - participated in a PATRIOT Act Debate at the National Press Club, 529 14th Street Northwest, Washington D.C., DC 20045.

June 1, 2005 - spoke at the Web-Enabled Government Conference, Washington, DC, on the topic "How the Government Uses Private Sector Information," sponsored by the E-Gov Institute, now part of 1105 Media, 9201 Oakdale Ave., Suite 101 Chatsworth, CA 91311

June 7, 2005 – spoke about "The USA PATRIOT Act: Past, Present, Future," on an EDUCAUSE Live! Webcast, sponsored by EDUCAUSE, 1150 18th Street NW, Suite 900, Washington, DC 20036 (PowerPoint submitted electronically).

September 8, 2005 - spoke on a panel at workshop on government use of commercial data, Department of Homeland Security, 301 7th St. SW, Washington, DC, 20006.

September 12-13 – moderated a conference on "Building Local E-Government through Public-Private Partnerships," sponsored by the USAID-funded Romanian Information Technology Initiative Project (RITI dot-Gov), in partnership with the Romanian Ministry of Communications and Information Technology, Bucharest, Romania. USAID, Ronald Reagan Building, Washington, D.C. 20523-0016

September 21, 2005 – spoke on a panel on privacy at Identity 2005, Identity Risk Management Conference, sponsored by ID Analytics, in San Diego, CA, 15253 Avenue of Science, San Diego, CA 92128

October 19, 2005 - spoke on "Cybercrime: legal developments," at the Hispanic National Bar Association, 1900 L Street NW, Suite 700, Washington, DC 20036.

October 25, 2005 – spoke on a panel on CALEA and VoIP at Telecom '05 in Las Vegas, sponsored by the US Telecom Assn, 607 14th Street, NW, Suite 400, Washington, DC 20005.

October 26, 2005 - spoke at a seminar on spyware at SiegeWorks 11501 Dublin Blvd. Suite 101. Dublin, CA 945, sponsored by Computer Associates, 895 Emerson Street, Palo Alto, CA (PowerPoint attached in hardcopy).

October 27, 2005 - spoke at a seminar on spyware at Computer Associates in Rancho Cordova, Calif, sponsored by Computer Associates, 895 Emerson Street, Palo Alto, CA(PowerPoint attached in hardcopy – same as Oct. 26, 2007).

November 29, 2005 - participated in a panel discussion on Public Interest Advocacy in Law and Digital Technology, at Boalt Hall, UC Berkeley, 406 Cory Hl, Berkeley, CA 94720-0001.

January 27, 2006 – spoke on a panel at a conference on Privacy in the Information Age: Databases, Digital Dossiers and Surveillance, sponsored by the Computer

and High Tech Law Journal of Santa Clara Univ. Law School, 500 El Camino Real, Santa Clara, California 95053 .

February 2, 2006 - gave presentations on "Information Security – Building Trust in Cyberspace," "ICTs and Development," and "E-Government Principles: Theory and Practice" at a conference on e-government in Bishkek, Kyrgyz Republic, sponsored by the Civil Initiative on Internet Policy, 40 Mira Ave, Suite 5, Bishkek 720044, Kyrgyz Republic (2 PowerPoints submitted electronically, 1 attached in hardcopy)

February 22, 2006 - spoke at a forum on "NSA Surveillance: Moving Forward," at the Center for Strategic and International Studies 1800 K St. NW, Washington, DC, 20006.

March 16, 2006 - spoke about the NSA domestic wiretap program at the University of San Francisco Law School, 2130 Fulton St, San Francisco, California.

March 22, 2006 – spoke on "The Legal Framework for Creating Trust in Cyberspace: Security and Privacy," at a seminar in Skopje, Macedonia organized by the USAID e-Gov Project in cooperation with the Macedonian Directorate for Security of Classified Information and the Directorate for Personal Data Protection. (PowerPoint submitted electronically)

May 17, 2006 - spoke on a panel on "The Internet, Censorship, and Political Freedom in Contemporary China," at the Asia Society, 500 Washington Street, Suite 350, San Francisco, CA.

June 7, 2006 - spoke on identity authentication at a meeting of the DHS Data Privacy and Integrity Advisory Committee, in San Francisco, CA. The national headquarters for DHS is located at 301 7th St. SW, Washington, DC, 20006 A transcript of the session at which I spoke is available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_advcom_06-2006_mtgminutes_PM.pdf

June 17, 2006 - spoke at a Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 seminar on privacy law in Chicago.

June 24, 2006 – spoke as panel member at the American Library Association annual convention in New Orleans on federal legislative and policy issues affecting libraries, American Library Association, 1301 Pennsylvania Avenue NW, Washington D.C.

September 20, 2006 - spoke on a panel in San Francisco on "net neutrality," sponsored by the Federal Communications Bar, 1020 19th St NW # 325, Washington D.C.

September 27, 2006 – spoke at a conference, "Defining the Acceptable Balance: A Reasoned Approach to Data Retention," in Washington DC, sponsored by ITAA, 601 Pennsylvania Avenue, NW, North Building, Suite 600, Washington, DC 20004.

September 30, 2006 - spoke about privacy on a panel at the University of California, Berkeley Law School, 406 Cory Hl, Berkeley, CA 94720-0001.

October 23, 2006 - participated in a forum on "The Age of Surveillance," at The International Spy Museum, 800 F Street Northwest, Washington D.C., sponsored by the Open Society Foundations, 400 West 59th Street, New York, NY 10019. Audio available at http://www.soros.org/initiatives/usprograms/focus/security/events/surveillance_20061023 .

October 31, November 2, 2006 – spoke on panels at two workshops and on one plenary panel at the Internet Governance Forum, Athens Greece, sponsored by the United Nations, Secretariat of the Internet Governance Forum (IGF), Palais des Nations, CH-1211 Geneva 10, Switzerland (PowerPoint submitted electronically).

December 5, 2006 – spoke on a panel at a public forum of the President's Privacy & Civil Liberties Oversight Board, Eisenhower Executive Office Building, The White House, Washington, DC

February 6, 2007 – spoke on one or more panels at the RSA Conference in San Francisco, sponsored by RSA, 174 Middlesex Turnpike, Bedford, MA 01730, and managed by Nth Degree, 2675 Breckinridge Boulevard, Suite 200, Duluth, GA 30096

February 22, 2007 – Spoke on the topic "Digital Search and Seizure," at Google, 1600 Amphitheatre Parkway, Mountain View, CA, 94043. A video of my presentation is available at http://www.youtube.com/watch?v=pplwMDzd2_0

February 27, 2007 - spoke on panel on the Future of the Internet at the Tech Policy Summit in San Jose, California, organized by Sagescape LLC, 4251 N Brown Ave, Scottsdale, AZ 85251.

April 11, 2007 – spoke on a panel at the California identity theft summit, "Protecting Privacy Online," sponsored by the California Department of Consumer Affairs, the California Office of Privacy Protection, the California State and Consumer Services Agency and the California District Attorneys Association (PowerPoint submitted electronically).

April 25, 2007 – spoke on a panel about privacy at the seminar "Wireless Location Meets Social Networking: A Policy & Practices Dialogue," in Washington, DC, sponsored by the Congressional Internet Caucus Advisory Committee, 1634 I Street, NW, Washington, DC 20006. A video of the event is available at http://www.netcaucus.org/events/2007/location/video.shtml

May 17, 2007 - keynote address on privacy, the Internet and innovation at the EDUCAUSE Policy Conference in Arlington VA, EDUCAUSE, 1150 18th Street NW, Suite 900, Washington, DC 20036. An audio of my remarks is available at http://www.educause.edu/blog/gbayne/2007PolicyConferenceWhyHigherE/166961

June 25, 2007 - spoke on a panel "Privacy and Anonymity," held in San Francisco, at the American Bar Association's National Institute on Computing and the Law, sponsored by the American Bar Association, Criminal Justice Section, Section of Science and Technology Law and the Center for Continuing Legal Education, 321 N. Clark Street, Chicago, IL (PowerPoint submitted electronically).

July 16, 2007 – presentation on major trends in privacy and security law at a seminar in Chicago sponsored by the Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint submitted in hardcopy).

August 12, 2007 - participated in a panel discussion, "Privacy versus Security: Finding a Balance," at the American Bar Association conference in San Francisco, ABA, 321 N. Clark Street, Chicago, IL.

September 24, 2007 – spoke on a panel at the public meeting of the ANSI-BBB ID Theft Prevention and ID Management Standards Panel in Washington, DC, organized by the American National Standards Institute, 25 West 43rd Street, Fourth Floor, New York, NY 10036.

October 31, 2007 – presentation on RFID at public workshop of the California Research Bureau, California State Library, Sacramento, CA (PowerPoint attached in hardcopy).

October 23-24, 2007 - moderated a session on privacy advocacy and participated in a panel on ID theft at the conference in San Francisco of the International Association of Privacy Professionals, 75 Rochester Ave., Suite 4, Portsmouth, NH 03801.

November 12, 2007 - spoke on a panel on Internet governance at the Internet Governance Forum in Rio de Janeiro, Brazil, organized by the United Nations, Secretariat of the Internet Governance Forum (IGF), Palais des Nations, CH-1211 Geneva 10, Switzerland (PowerPoint attached in hardcopy).

April 4, 2008 - participated on panels on national data breach legislation, privacy, and warrantless wiretapping at the RSA conference in San Francisco, sponsored by RSA, 174 Middlesex Turnpike, Bedford, MA 01730, and managed by Nth Degree, 2675 Breckinridge Boulevard, Suite 200, Duluth, GA 30096 (handwritten notes attached in hardcopy).

May 2008 – participated in a webinar on privacy advocacy sponsored by the Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint attached in hardcopy).

June 11, 2008 - spoke to the DHS Data Privacy and Integrity Advisory Committee on the subject of privacy and the counter-terrorism Information Sharing Environment. The national headquarters for DHS is located at 301 7th St. SW, Washington, DC, 20006. A transcript of the session at which I spoke is available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_dpiac_june112008_afternoon_minutes.pdf.

June 22, 2008 - spoke at the PLI seminar on privacy and security law, in San Francisco, sponsored by the Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (handout attached in hardcopy).

July 2008 - spoke at the PLI seminar on privacy and security law, in Chicago, sponsored by the Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint and handout attached in hardcopy).

September 8, 2008 - spoke on a panel on privacy, held at Microsoft, 1065 La Avenida, Building 1 - Silicon Valley Campus, Mountain View, CA 94043 and organized by the Churchill Club, 3150 Almaden Expressway, Suite 214, San Jose, CA 95118.

September 19-20, 2008 - spoke on three panels on privacy issues at the Harvard privacy symposium, Cambridge, MA. Symposium contact is listed as Paul Tunnecliff, 3291 West Wilson Rd., Pahrump, NV 89048. See http://www.privacysumniersymposium.com/.

September 22, 2008 – spoke on "Privacy's Future" at an event organized by the Center for Internet and Society, Stanford Law School, Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610 (PowerPoint submitted electronically)

November 12, 2008 – spoke about "Privacy's Future" at Boalt Law School, UC Berkeley, 406 Cory Hl, Berkeley, CA 94720-0001 (PowerPoint submitted electronically)

December 8, 2008 – spoke at the IP and the Internet Conference in Santa Monica, CA, sponsored by the State Bar of California, 180 Howard Street, San Francisco, CA 94105 (PowerPoint submitted electronically, handwritten notes submitted in hardcopy)

December 10, 2008 - spoke at the IP and the Internet Conference in San Francisco, CA, sponsored by the State Bar of California, 180 Howard Street, San Francisco, CA 94105 (same PowerPoint and handwritten notes as Dec 10)

December 11, 2008 – spoke about "Privacy's Future" at the TRUSTe/IAPP Knowledge Net in Palo Alto, CA, organized by TRUSTe, 55 2nd Street, 2nd Floor, San Francisco, CA 94105 and the International Association of Privacy Professionals, 75 Rochester Ave., Suite 4, Portsmouth, NH 03801 (PowerPoint submitted electronically, notes submitted in hardcopy)

January 14, 2009 - spoke about privacy and cloud computing at the State of the Net conference in Washington, DC, organized by the Internet Caucus Advisory Committee, ICAC, 1634 I Street NW, Washington, DC 20006. Audio available at http://www.netcaucus.org/conference/2009/agenda.shtml.

January 28, 2009 - spoke at a Privacy Day event at the San Francisco Public Library, organized by Microsoft Corporation, One Microsoft Way, Redmond, WA 98052-6399.

March 31, 2009 - participated in a Knowledge Congress webinar on national security access to communications and business records, organized by the Knowledge Group, LLC. 123 Town Square Place, Suite 242 Jersey City, NJ 07310.

April 20, 2009 - spoke about privacy at the Executive Security Action Forum in San Francisco, sponsored by RSA, The Security Division of EMC, 174 Middlesex Turnpike, Bedford, MA 01730.

April 22, 2009 - spoke about privacy and security legislation at the RSA Conference in San Francisco, sponsored by RSA, The Security Division of EMC, 174 Middlesex Turnpike, Bedford, MA 01730

April 23, 2009 - spoke about privacy and data governance at the AOTA Online Trust Town Hall Meeting in San Francisco. Online Trust Alliance, (OTA), PO Box 803, Bellevue, WA 98009-0803

April 29, 2009 - participated in a Knowledge Congress webinar on National Security Investigations - Disclosure Requests and Customer Data, organized by the Knowledge Group, LLC. 123 Town Square Place, Suite 242 Jersey City, NJ 07310 (PowerPoint submitted electronically)

May 13, 2009 - spoke about privacy at the Tech Policy Summit in San Mateo, CA, organized by Sagescape LLC, 4251 N Brown Ave, Scottsdale, AZ 85251

May 14, 2009 – spoke about "User Conduct and User Safety" at the Legal Frontiers in Digital Media conference at Stanford, organized by the Media Law Resource Center and the Stanford Law School Center for Internet & Society.

June 2, 2009 - spoke at PLI's Privacy and Data Security Law Institute in San Francisco, Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint submitted electronically).

June 3, 2009 - spoke at the CDT-TRUSTe Tech Policy Series event on cloud computing. Center for Democracy and Technology, 1634 I Street, NW, Washington DC 20006; TRUSTe, 55 2nd Street, 2nd Floor, San Francisco, CA 94105

July 21, 2009 - spoke at PLI's Privacy and Data Security Law Institute in Chicago. Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019

August 2009 – presented a "Privacy Overview" at the Privacy Academy, sponsored by the National Governors Association, Hall of the States, 444 N. Capitol St., Ste. 267, Washington, D.C. 20001-1512 (PowerPoint submitted electronically)

October 22, 2009 - participated in a panel, "Just How Private? The New Front in Data Privacy" at the BSA 2009 High-Tech General Counsel Forum in San Francisco, CA. Business Software Alliance, 1150 18th Street, N.W., Suite 700, Washington, DC 20036

October 23, 2009 - participated in a panel at a conference on social networking at UC Berkeley law school, 406 Cory Hl, Berkeley, CA 94720-0001.

December 4, 2009 – spoke at a conference on Reforming Internet Privacy Law, sponsored by Silicon Flatirons, a Center for Law, Technology and Entrepreneurship at the University of Colorado Law School, 401 UCB, Wolf Law Building, Boulder, CO 80309. A brief summary of the event is available at http://www.silicon-flatirons.org/news.php?id=782 (PowerPoint submitted electronically)

December 7, 2009 – spoke about "Privacy's Future," at an IAPP KnowledgeNet event, sponsored by the International Association of Privacy Professionals, 75 Rochester Ave., Suite 4, Portsmouth, NH 03801 (PowerPoint submitted electronically)

January 20, 2010 - spoke about the global implications of cybersecurity on a panel at the Global Cybersecurity Policy Conference in Washington, DC, organized by Howe School of Technology Management, Stevens Institute of Technology, Castle Point on Hudson, Hoboken, NJ 07030

January 27, 2010 – spoke on a panel about cloud computing and privacy at the State of the Net conference in Washington, DC, organized by the Internet Caucus Advisory Committee, 1634 I Street NW Suite 1100, Washington, DC 20006

March 19, 2010 - addressed privacy issues posed by the smart grid at a workshop of the California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102 (PowerPoint submitted electronically).

March 23, 2010 – participated in a webinar on "Proposed Changes to the Electronic Communications Privacy Act," sponsored by the American Bar Association, N. Clark Street, Chicago IL (PowerPoint submitted electronically)

April 30, 2010, Spoke about "Smart Privacy: Addressing Privacy Concerns in the California Smart Grid," at an even sponsored by the California Foundation on the Environment and the Economy, Pier 35, Suite 202, San Francisco, CA 94133 (PowerPoint submitted electronically)

May 25, 2010 – spoke about the legal standards for government access to personal information at the PLI Privacy and Security Law Institute in San Francisco, CA. Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint submitted electronically)

June 9, 2010 – described the Electronic Communications Privacy Act and proposals for reform in webinar, sponsored by EDUCAUSE, 1150 18th Street NW, Suite 900, Washington, DC 20036. An audio recording is available at http://www.educause.edu/Resources/GovernmentAccesstoElectronicCo/206152. (PowerPoint submitted electronically)

July 20, 2010 - spoke about the legal standards for government access to personal information at the PLI Privacy and Security Law Institute in Chicago, IL. Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint submitted electronically)

July 30, 2010 – spoke about standards for government access to communications at the Burton Group Catalyst Conference in San Diego. Burton Group, 7090 Union Park Center, Suite 200, Midvale, UT, 84047-6051 (PowerPoint submitted electronically).

August 24, 2010 - participated in a panel on privacy and government surveillance, sponsored by the American Constitution Society, San Francisco. American Constitution Society 1333 H St, NW, 11th Floor Washington, DC 20005

September 15, 2010 – spoke to a law school class about Standards for Government Access to Communications Data, Golden Gate Law School, Mission Street, San Francisco, CA (PowerPoint submitted electronically)

November 10, 2010 - spoke about the Electronic Communications Privacy Act at a luncheon meeting of the Association of Corporate Counsel in Palo Alto. Association of Corporate Counsel, 1025 Connecticut Avenue NW, Suite 200, Washington, DC 20036 (PowerPoint submitted electronically).

January 7, 2011 - participated in a panel discussion at an event on the National Strategy for Trusted Identities in Cyberspace, in Palo Alto, CA, sponsored by the Churchill Club, 3150 Almaden Expy # 214, San Jose, CA 95118-1253 and Stanford University, 450 Serra Mall, Stanford, CA 94305. A raw transcript of the event is available at https://docs.google.com/View?id=dfxgcdfc_307dj3hkvdz.

January 18, 2011 – spoke on a panel about cloud computing at the 2011 State of the Net Conference, sponsored by the Internet Caucus Advisory Committee, 1634 I Street, NW, Washington, DC 20006. Video of the panel is available at http://www.youtube.com/watch?v=HbDbOadEV7w

January 25, 2011 - participated in a panel discussion on privacy and cybersecurity at "Washington Meets Silicon Valley: The Outlook for the Technology Industry in the New Congress," in Menlo Park, CA, sponsored by Patton Boggs LLP, 2550 M Street, NW, Washington, DC 20037, and the Information Technology Industry Council (ITI), 1101 K St, NW Suite 610, Washington, D.C. 20005

January 26, 2011 - spoke on a panel on location privacy, in San Francisco, sponsored by the Churchill Club, 3150 Almaden Expy # 214, San Jose, CA 95118-1253

February 16, 2011 – spoke about "Government Access to Communications and Other Data – Updating the Rules," at the RSA Conference, sponsored by RSA, 174 Middlesex Turnpike, Bedford, MA 01730, and managed by Nth Degree, 2675 Breckinridge Boulevard, Suite 200, Duluth, GA 30096 (PowerPoint with handwritten notes attached in hardcopy)

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

The list below consists of interviews identified from my recollection, from my files, and from search of Internet databases. Despite these searches, there may be other interviews I have been unable to identify, find, or remember.

"Facebook Less Private in U.S. Courtrooms," CALGARY SUN, Jan. 29, 2011.

"Wyden Eyes Legislation to Limit Warrantless Cell Phone Tracking," TALKING POINTS MEMO, Jan. 28, 2011.

"Privacy Hawks Reopen Debate on Data," POLITICO, Jan. 13, 2011.

"Following WikiLeaks on Twitter?" FAST COMPANY, Jan. 13, 2011

Podcast "NSTIC is Not a National ID," SECUREID NEWS, Jan. 13, 2011. Available at http://www.secureidnews.com/2011/01/13/episode-68-nstic-is-not-a-national-id

"New Urban Myth: the Internet ID Scare," STATES NEWS SERVICE, Jan. 11, 2011.

"Commerce Department to Head Web Identity Initiative," TECH WEB, Jan. 10,

2011.

"Commerce Secretary Brings Business-Friendly Message to Silicon Valley," SAN JOSE MERCURY News, Jan. 7, 2011.

"Warrantless Cell Phone Search and Data Privacy," KQED RADIO, Jan. 5, 2011. Available at http://www.kqed.org/a/forum/R201101051000

"Federal Court In Ohio Upholds e-mail Privacy," THE ASSOCIATED PRESS, Dec. 15, 2010.

"Anti-Terrorism Flaw Not Fixed," CHICAGO TRIBUNE, Oct. 4, 2010.

"FBI May Win Right to Tap Online Communications," THE GAZETTE, Sept. 28, 2010.

"Feds Want to Broaden Internet Wiretap Power," TECH WEB, Sept. 27, 2010.

"Obama Seeks Easier Net Wiretaps," THE STREET, Sept. 27, 2010.

"U.S. Tries to Make it Easier to Wiretap Internet," THE NEW YORK TIMES, Sept. 27, 2010

"Civil Libertarians Wish CDT-Led Coalition Would Go Further on Changing ECPA," COMMUNICATIONS DAILY, Aug. 26, 2010.

"AT&T Equalize Privacy Restrictions by Cutting Telcos', Raising Cable's, Web Companies'," COMMUNICATIONS DAILY, July 19, 2010.

"Court Upholds Search of Police Officer's Texts," USA TODAY, June 18, 2010.

"Supreme Court Rejects Sweeping Decision in Texting," COMMUNICATIONS DAILY, June 18, 2010.

"Silicon Valley Readies for Privacy Battle," SAN JOSE MERCURY NEWS, June 14, 2010.

"It's Not Just Drug Dealers Who Buy Prepaid Phones," THE NEW YORK TIMES, May 30, 2010.

"Google, Microsoft Push to Overhaul Online Privacy Law," SAN JOSE MERCURY NEWS, Mar. 31, 2010.

"Advocacy Groups, Companies Call for an Update of the Privacy Framework for Law Enforcement Access to Digital Information," CENTER FOR DEMOCRACY AND TECHNOLOGY PRESS RELEASE, Mar. 30, 2010.

"CDT Urges Supreme Court to Preserve Workplace Privacy," TARGETED NEWS

SERVICE, Mar. 24, 2010.

"Machines Slowly Mastering Art of Recognizing Faces," NATIONAL PUBLIC RADIO, Jan. 22, 2010. Available at http://www.npr.org/templates/story/story.php?storyId=122857725

"Slimmed-Down ICANN Pact with U.S. Sets up Review Teams, Draws Praise," WASHINGTON INTERNET DAILY, Oct. 1, 2009.

"Govt Review: No Privacy Problems in Cyber Security," THE ASSOCIATED PRESS, Sept. 18, 2009.

"Cloud Computing Pay-As-You-Go data Storage, Software is Cheap; but is it Safe?" ST. LOUIS POST-DISPATCH, Aug, 2, 2009.

"Analysts Turn To Software for Spotting Terrorists," NATIONAL PUBLIC RADIO, July, 14, 2009.

"A Tech Fix for Illegal Government Snooping," NATIONAL PUBLIC RADIO, July 13, 2009.

"Security Breach on Fighter Project," AUSTRALIAN, BROADCASTING CORPORATION, April 22, 2009.

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"Draft Order Would Limit Government Secrecy but Drop Public Interest Trust," THE ASSOCIATED PRESS, Jan. 19. 1995.

September 27, 2006 – spoke at a conference, "Defining the Acceptable Balance: A Reasoned Approach to Data Retention," in Washington DC, sponsored by ITAA, 601 Pennsylvania Avenue, NW, North Building, Suite 600, Washington, DC 20004.

September 30, 2006 - spoke about privacy on a panel at the University of California, Berkeley Law School, 406 Cory Hl, Berkeley, CA 94720-0001.

October 23, 2006 - participated in a forum on "The Age of Surveillance," at The International Spy Museum, 800 F Street Northwest, Washington D.C., sponsored by the Open Society Foundations, 400 West 59th Street, New York, NY 10019. Audio available at http://www.soros.org/initiatives/usprograms/focus/security/events/surveillance_20061023 .

October 31, November 2, 2006 – spoke on panels at two workshops and on one plenary panel at the Internet Governance Forum, Athens Greece, sponsored by the United Nations, Secretariat of the Internet Governance Forum (IGF), Palais des Nations, CH-1211 Geneva 10, Switzerland (PowerPoint submitted electronically).

December 5, 2006 – spoke on a panel at a public forum of the President's Privacy & Civil Liberties Oversight Board, Eisenhower Executive Office Building, The White House, Washington, DC

February 6, 2007 – spoke on one or more panels at the RSA Conference in San Francisco, sponsored by RSA, 174 Middlesex Turnpike, Bedford, MA 01730, and managed by Nth Degree, 2675 Breckinridge Boulevard, Suite 200, Duluth, GA 30096

February 22, 2007 – Spoke on the topic "Digital Search and Seizure," at Google, 1600 Amphitheatre Parkway, Mountain View, CA, 94043. A video of my presentation is available at http://www.youtube.com/watch?v=pplwMDzd2_0

February 27, 2007 - spoke on panel on the Future of the Internet at the Tech Policy Summit in San Jose, California, organized by Sagescape LLC, 4251 N Brown Ave, Scottsdale, AZ 85251.

April 11, 2007 – spoke on a panel at the California identity theft summit, "Protecting Privacy Online," sponsored by the California Department of Consumer Affairs, the California Office of Privacy Protection, the California State and Consumer Services Agency and the California District Attorneys Association (PowerPoint submitted electronically).

April 25, 2007 – spoke on a panel about privacy at the seminar "Wireless Location Meets Social Networking: A Policy & Practices Dialogue," in Washington, DC, sponsored by the Congressional Internet Caucus Advisory Committee, 1634 I Street, NW, Washington, DC 20006. A video of the event is available at http://www.netcaucus.org/events/2007/location/video.shtml

May 17, 2007 - keynote address on privacy, the Internet and innovation at the EDUCAUSE Policy Conference in Arlington VA, EDUCAUSE, 1150 18th Street NW, Suite 900, Washington, DC 20036. An audio of my remarks is available at http://www.educause.edu/blog/gbayne/2007PolicyConferenceWhyHigherE/166961

June 25, 2007 - spoke on a panel "Privacy and Anonymity," held in San Francisco, at the American Bar Association's National Institute on Computing and the Law, sponsored by the American Bar Association, Criminal Justice Section, Section of Science and Technology Law and the Center for Continuing Legal Education, 321 N. Clark Street, Chicago, IL (PowerPoint submitted electronically).

July 16, 2007 – presentation on major trends in privacy and security law at a seminar in Chicago sponsored by the Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint submitted in hardcopy).

August 12, 2007 - participated in a panel discussion, "Privacy versus Security: Finding a Balance," at the American Bar Association conference in San Francisco, ABA, 321 N. Clark Street, Chicago, IL.

September 24, 2007 – spoke on a panel at the public meeting of the ANSI-BBB ID Theft Prevention and ID Management Standards Panel in Washington, DC, organized by the American National Standards Institute, 25 West 43rd Street, Fourth Floor, New York, NY 10036.

October 31, 2007 – presentation on RFID at public workshop of the California Research Bureau, California State Library, Sacramento, CA (PowerPoint attached in hardcopy).

October 23-24, 2007 - moderated a session on privacy advocacy and participated in a panel on ID theft at the conference in San Francisco of the International Association of Privacy Professionals, 75 Rochester Ave., Suite 4, Portsmouth, NH 03801.

November 12, 2007 - spoke on a panel on Internet governance at the Internet Governance Forum in Rio de Janeiro, Brazil, organized by the United Nations, Secretariat of the Internet Governance Forum (IGF), Palais des Nations, CH-1211 Geneva 10, Switzerland (PowerPoint attached in hardcopy).

April 4, 2008 - participated on panels on national data breach legislation, privacy, and warrantless wiretapping at the RSA conference in San Francisco, sponsored by RSA, 174 Middlesex Turnpike, Bedford, MA 01730, and managed by Nth Degree, 2675 Breckinridge Boulevard, Suite 200, Duluth, GA 30096 (handwritten notes attached in hardcopy).

May 2008 – participated in a webinar on privacy advocacy sponsored by the Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint attached in hardcopy).

June 11, 2008 - spoke to the DHS Data Privacy and Integrity Advisory Committee on the subject of privacy and the counter-terrorism Information Sharing Environment. The national headquarters for DHS is located at 301 7th St. SW, Washington, DC, 20006. A transcript of the session at which I spoke is available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_dpiac_june112008_afternoon_minutes.pdf.

June 22, 2008 - spoke at the PLI seminar on privacy and security law, in San Francisco, sponsored by the Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (handout attached in hardcopy).

July 2008 - spoke at the PLI seminar on privacy and security law, in Chicago, sponsored by the Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint and handout attached in hardcopy).

September 8, 2008 - spoke on a panel on privacy, held at Microsoft, 1065 La Avenida, Building 1 - Silicon Valley Campus, Mountain View, CA 94043 and organized by the Churchill Club, 3150 Almaden Expressway, Suite 214, San Jose, CA 95118.

September 19-20, 2008 - spoke on three panels on privacy issues at the Harvard privacy symposium, Cambridge, MA. Symposium contact is listed as Paul Tunnecliff, 3291 West Wilson Rd., Pahrump, NV 89048. See http://www.privacysumniersymposium.com/.

September 22, 2008 – spoke on "Privacy's Future" at an event organized by the Center for Internet and Society, Stanford Law School, Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610 (PowerPoint submitted electronically)

November 12, 2008 – spoke about "Privacy's Future" at Boalt Law School, UC Berkeley, 406 Cory Hl, Berkeley, CA 94720-0001 (PowerPoint submitted electronically)

December 8, 2008 – spoke at the IP and the Internet Conference in Santa Monica, CA, sponsored by the State Bar of California, 180 Howard Street, San Francisco, CA 94105 (PowerPoint submitted electronically, handwritten notes submitted in hardcopy)

December 10, 2008 - spoke at the IP and the Internet Conference in San Francisco, CA, sponsored by the State Bar of California, 180 Howard Street, San Francisco, CA 94105 (same PowerPoint and handwritten notes as Dec 10)

December 11, 2008 – spoke about "Privacy's Future" at the TRUSTe/IAPP Knowledge Net in Palo Alto, CA, organized by TRUSTe, 55 2nd Street, 2nd Floor, San Francisco, CA 94105 and the International Association of Privacy Professionals, 75 Rochester Ave., Suite 4, Portsmouth, NH 03801 (PowerPoint submitted electronically, notes submitted in hardcopy)

January 14, 2009 - spoke about privacy and cloud computing at the State of the Net conference in Washington, DC, organized by the Internet Caucus Advisory Committee, ICAC, 1634 I Street NW, Washington, DC 20006. Audio available at http://www.netcaucus.org/conference/2009/agenda.shtml.

January 28, 2009 - spoke at a Privacy Day event at the San Francisco Public Library, organized by Microsoft Corporation, One Microsoft Way, Redmond, WA 98052-6399.

March 31, 2009 - participated in a Knowledge Congress webinar on national security access to communications and business records, organized by the Knowledge Group, LLC. 123 Town Square Place, Suite 242 Jersey City, NJ 07310.

April 20, 2009 - spoke about privacy at the Executive Security Action Forum in San Francisco, sponsored by RSA, The Security Division of EMC, 174 Middlesex Turnpike, Bedford, MA 01730.

April 22, 2009 - spoke about privacy and security legislation at the RSA Conference in San Francisco, sponsored by RSA, The Security Division of EMC, 174 Middlesex Turnpike, Bedford, MA 01730

April 23, 2009 - spoke about privacy and data governance at the AOTA Online Trust Town Hall Meeting in San Francisco. Online Trust Alliance, (OTA), PO Box 803, Bellevue, WA 98009-0803

April 29, 2009 - participated in a Knowledge Congress webinar on National Security Investigations - Disclosure Requests and Customer Data, organized by the Knowledge Group, LLC. 123 Town Square Place, Suite 242 Jersey City, NJ 07310 (PowerPoint submitted electronically)

May 13, 2009 - spoke about privacy at the Tech Policy Summit in San Mateo, CA, organized by Sagescape LLC, 4251 N Brown Ave, Scottsdale, AZ 85251

May 14, 2009 – spoke about "User Conduct and User Safety" at the Legal Frontiers in Digital Media conference at Stanford, organized by the Media Law Resource Center and the Stanford Law School Center for Internet & Society.

June 2, 2009 - spoke at PLI's Privacy and Data Security Law Institute in San Francisco, Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint submitted electronically).

June 3, 2009 - spoke at the CDT-TRUSTe Tech Policy Series event on cloud computing. Center for Democracy and Technology, 1634 I Street, NW, Washington DC 20006; TRUSTe, 55 2nd Street, 2nd Floor, San Francisco, CA 94105

July 21, 2009 - spoke at PLI's Privacy and Data Security Law Institute in Chicago. Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019

August 2009 – presented a "Privacy Overview" at the Privacy Academy, sponsored by the National Governors Association, Hall of the States, 444 N. Capitol St., Ste. 267, Washington, D.C. 20001-1512 (PowerPoint submitted electronically)

October 22, 2009 - participated in a panel, "Just How Private? The New Front in Data Privacy" at the BSA 2009 High-Tech General Counsel Forum in San Francisco, CA. Business Software Alliance, 1150 18th Street, N.W., Suite 700, Washington, DC 20036

October 23, 2009 - participated in a panel at a conference on social networking at UC Berkeley law school, 406 Cory Hl, Berkeley, CA 94720-0001.

December 4, 2009 – spoke at a conference on Reforming Internet Privacy Law, sponsored by Silicon Flatirons, a Center for Law, Technology and Entrepreneurship at the University of Colorado Law School, 401 UCB, Wolf Law Building, Boulder, CO 80309. A brief summary of the event is available at http://www.silicon-flatirons.org/news.php?id=782 (PowerPoint submitted electronically)

December 7, 2009 – spoke about "Privacy's Future," at an IAPP KnowledgeNet event, sponsored by the International Association of Privacy Professionals, 75 Rochester Ave., Suite 4, Portsmouth, NH 03801 (PowerPoint submitted electronically)

January 20, 2010 - spoke about the global implications of cybersecurity on a panel at the Global Cybersecurity Policy Conference in Washington, DC, organized by Howe School of Technology Management, Stevens Institute of Technology, Castle Point on Hudson, Hoboken, NJ 07030

January 27, 2010 – spoke on a panel about cloud computing and privacy at the State of the Net conference in Washington, DC, organized by the Internet Caucus Advisory Committee, 1634 I Street NW Suite 1100, Washington, DC 20006

March 19, 2010 - addressed privacy issues posed by the smart grid at a workshop of the California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102 (PowerPoint submitted electronically).

March 23, 2010 – participated in a webinar on "Proposed Changes to the Electronic Communications Privacy Act," sponsored by the American Bar Association, N. Clark Street, Chicago IL (PowerPoint submitted electronically)

April 30, 2010, Spoke about "Smart Privacy: Addressing Privacy Concerns in the California Smart Grid," at an even sponsored by the California Foundation on the Environment and the Economy, Pier 35, Suite 202, San Francisco, CA 94133 (PowerPoint submitted electronically)

May 25, 2010 – spoke about the legal standards for government access to personal information at the PLI Privacy and Security Law Institute in San Francisco, CA. Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint submitted electronically)

June 9, 2010 – described the Electronic Communications Privacy Act and proposals for reform in webinar, sponsored by EDUCAUSE, 1150 18th Street NW, Suite 900, Washington, DC 20036. An audio recording is available at http://www.educause.edu/Resources/GovernmentAccesstoElectronicCo/206152. (PowerPoint submitted electronically)

July 20, 2010 - spoke about the legal standards for government access to personal information at the PLI Privacy and Security Law Institute in Chicago, IL. Practicing Law Institute, 810 Seventh Avenue, 21st Floor, New York, NY 10019 (PowerPoint submitted electronically)

July 30, 2010 – spoke about standards for government access to communications at the Burton Group Catalyst Conference in San Diego. Burton Group, 7090 Union Park Center, Suite 200, Midvale, UT, 84047-6051 (PowerPoint submitted electronically).

August 24, 2010 - participated in a panel on privacy and government surveillance, sponsored by the American Constitution Society, San Francisco. American Constitution Society 1333 H St, NW, 11th Floor Washington, DC 20005

September 15, 2010 – spoke to a law school class about Standards for Government Access to Communications Data, Golden Gate Law School, Mission Street, San Francisco, CA (PowerPoint submitted electronically)

November 10, 2010 - spoke about the Electronic Communications Privacy Act at a luncheon meeting of the Association of Corporate Counsel in Palo Alto. Association of Corporate Counsel, 1025 Connecticut Avenue NW, Suite 200, Washington, DC 20036 (PowerPoint submitted electronically).

January 7, 2011 - participated in a panel discussion at an event on the National Strategy for Trusted Identities in Cyberspace, in Palo Alto, CA, sponsored by the Churchill Club, 3150 Almaden Expy # 214, San Jose, CA 95118-1253 and Stanford University, 450 Serra Mall, Stanford, CA 94305. A raw transcript of the event is available at https://docs.google.com/View?id=dfxgcdfc_307dj3hkvdz.

January 18, 2011 – spoke on a panel about cloud computing at the 2011 State of the Net Conference, sponsored by the Internet Caucus Advisory Committee, 1634 I Street, NW, Washington, DC 20006. Video of the panel is available at http://www.youtube.com/watch?v=HbDbOadEV7w

January 25, 2011 - participated in a panel discussion on privacy and cybersecurity at "Washington Meets Silicon Valley: The Outlook for the Technology Industry in the New Congress," in Menlo Park, CA, sponsored by Patton Boggs LLP, 2550 M Street, NW, Washington, DC 20037, and the Information Technology Industry Council (ITI), 1101 K St, NW Suite 610, Washington, D.C. 20005

January 26, 2011 - spoke on a panel on location privacy, in San Francisco, sponsored by the Churchill Club, 3150 Almaden Expy # 214, San Jose, CA 95118-1253

February 16, 2011 – spoke about "Government Access to Communications and Other Data – Updating the Rules," at the RSA Conference, sponsored by RSA, 174 Middlesex Turnpike, Bedford, MA 01730, and managed by Nth Degree, 2675 Breckinridge Boulevard, Suite 200, Duluth, GA 30096 (PowerPoint with handwritten notes attached in hardcopy)

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

The list below consists of interviews identified from my recollection, from my files, and from search of Internet databases. Despite these searches, there may be other interviews I have been unable to identify, find, or remember.

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Podcast "NSTIC is Not a National ID," SECUREID NEWS, Jan. 13, 2011. Available at http://www.secureidnews.com/2011/01/13/episode-68-nstic-is-not-a-national-id

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"Commerce Secretary Brings Business-Friendly Message to Silicon Valley," SAN JOSE MERCURY News, Jan. 7, 2011.

"Warrantless Cell Phone Search and Data Privacy," KQED RADIO, Jan. 5, 2011. Available at http://www.kqed.org/a/forum/R201101051000

"Federal Court In Ohio Upholds e-mail Privacy," THE ASSOCIATED PRESS, Dec. 15, 2010.

"Anti-Terrorism Flaw Not Fixed," CHICAGO TRIBUNE, Oct. 4, 2010.

"FBI May Win Right to Tap Online Communications," THE GAZETTE, Sept. 28, 2010.

"Feds Want to Broaden Internet Wiretap Power," TECH WEB, Sept. 27, 2010.

"Obama Seeks Easier Net Wiretaps," THE STREET, Sept. 27, 2010.

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"Civil Libertarians Wish CDT-Led Coalition Would Go Further on Changing ECPA," COMMUNICATIONS DAILY, Aug. 26, 2010.

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"Court Upholds Search of Police Officer's Texts," USA TODAY, June 18, 2010.

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"Silicon Valley Readies for Privacy Battle," SAN JOSE MERCURY NEWS, June 14, 2010.

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"CDT Urges Supreme Court to Preserve Workplace Privacy," TARGETED NEWS

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"Slimmed-Down ICANN Pact with U.S. Sets up Review Teams, Draws Praise," WASHINGTON INTERNET DAILY, Oct. 1, 2009.

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

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

I have not held any public office. My employment with government entities is listed above, as is membership on or participation in governmental advisory boards or groups. I have not been a candidate for elective office. In 2008, President George W. Bush nominated me to be a member of the Privacy and Civil Liberties Oversight Board. The Senate took no action on any of President Bush's nominations to the PCLOB.

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

I have not held any office in any political party or election committee, nor have I ever held a position in a political campaign. In the late 1980s or early 1990s, I participated to a small degree in a volunteer body drafting issue memos for a Democratic presidential candidate; it may have been for Michael Dukakis, but I cannot remember for sure. In 2004, I spent several hours doing turn-out-the-vote work in Philadelphia on behalf of the Democratic Party.

14. **Legal Career:** Answer each part separately.

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

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

**Massachusetts Supreme Judicial Court (1979 - 1980)**
Law clerk to the Hon. Robert Braucher
Boston, MA

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

I have never practiced alone.

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

**Center for Democracy and Technology (1997 – present)**
Current positions: Vice President for Public Policy; Corporate Secretary
1634 I Street, NW
#1100
Washington DC 20006

Previous positions: Policy Director (2005-2007); Executive Director (2003 – 2005); Deputy Director (2001 – 2002); Senior Staff Counsel (1997 – 2000).

**Center for National Security Studies (1995 – 1997)**
Deputy Director
1120 19th Street NW
8th Floor
Washington, DC 20036

**National Security Archive (1995 – 1997)**
Special Counsel
Gelman Library
Suite 701
2130 H Street, NW
Washington, DC 20037

**Subcommittee on Civil and Constitutional Rights (1985 -1995)**
Assistant Counsel
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 200515

**Arnold & Porter (1980 -1984)**
Associate Attorney
555 12th Street, NW

Washington, DC 20004

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

N/A

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

As an Associate at Arnold & Porter, I performed typical associate duties: legal research, memo writing, document review, drafting of briefs and other pleadings, and drafting of contracts.

In 1985, I became an Assistant Counsel to the House Judiciary Committee. I researched legal issues, drafted memos for the chairman and members of the subcommittee, planned hearings, assisted in the drafting of legislative language, and drafted committee reports.

In 1995, I joined the Center for National Security Studies, where I analyzed legislative proposals and wrote policy papers on matters related to domestic intelligence, terrorism and government surveillance. I also served as special counsel to the non-profit National Security Archive, assisting in the preparation and appeal of FOIA requests.

At the Center for Democracy and Technology, which I joined in 1997, my legal work has focused on legal and policy analysis.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

As an Associate at Arnold & Porter, typical clients of the firm included corporations large and small and a municipal utility district. My main substantive areas of practice were government and commercial contracts, anti-trust and federal energy regulation. In addition, I provided pro bono representation to several death row inmates in post conviction proceedings.

At the Subcommittee, my main substantive areas were oversight of the Federal Bureau of Investigation, privacy and civil liberties. I worked on issues at the intersection of national security and constitutional rights, including terrorism, counterintelligence, and electronic surveillance, as well as on crime issues, including the procedures for the federal death penalty, remedies for racial bias in death sentencing, information privacy, and police brutality.

At the Center for National Security Studies and the National Security Archive, the main client was the Archive itself, in its pursuit of FOIA requests.

The Center for Democracy & Technology does not have clients per se. My main area of focus has been the privacy and other civil liberties issues that arise in the national security and law enforcement contexts, including electronic surveillance, information sharing for counter-terrorism purposes, airline passenger screening, cybersecurity and other issues. I have also been extensively involved in CDT's international projects, providing advice to Internet policy reformers in developing and transitional countries, studying and writing about the international policy framework for the Internet, and engaging in international discussions on Internet policy.

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

   i. Indicate the percentage of your practice in:
      1. federal courts – 75%
      2. state courts of record – 5%
      3. other courts;
      4. administrative agencies – 20%

I am not a litigator. A very small percentage of my practice has been in litigation. I have appeared in court only on a few occasions. I have contributed to briefs in a variety of cases, but, with the exception of death row habeas corpus cases, I have rarely been the lead writer on a brief. My name appears on the briefs in the following published opinions:

*In re Sealed Case* 310 F.3d 717 (For. Intel Sur. Ct Rev. 2002)

Issue: Whether the Foreign Intelligence Surveillance Act, as amended by the Patriot Act, was constitutional.

On amicus brief with CDT/ACLU/EFF/EPIC and Center for National Security Studies

*United States Telecom Ass'n v. FCC*, 227 F.3d 450 (D.C. Cir. 2000).

Issue: Challenge to FCC order requiring telecommunication carriers to make certain modifications to their networks to facilitate government interception.

On the brief with Eugene Scalia, John H. Harwood, II, Lynn R. Charytan, Michael Altschul, Jerry Berman, Lawrence E. Sarjeant, Linda L. Kent, John W. Hunter and Julie E. Rones (Ted Olson argued)

*Texas Independent Producers Legal Action Ass'n v. IRS*, 605 F. Supp. 538 (D.D.C. 1984)

Counsel, with Stephen M. Sacks, Arnold & Porter, James Craig Dodd, Jones, Gungoll, Jackson, Collins & Dodd

My only significant litigation experience was in working on several habeas corpus post conviction cases while I was at the law firm, prior to 1985.

ii. Indicate the percentage of your practice in:
1. civil proceedings - 100% (includes habeas corpus post-conviction proceedings)
2. criminal proceedings.

c. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Between 1980 and 1985, I participated as associate counsel in three habeas corpus post-conviction cases that were tried to final decision:

*Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984)

Ruling: Dismissal of defendant's habeas corpus petition affirmed.

Counsel also included Gerald T. Zerkin, Zerkin, Wright & Heard, and Richard J. Wertheimer

*Stevens v. Zant*, 580 F. Supp. 322 (S.D. Ga 1984)

Habeas corpus denied

Counsel, with John Paul Batson, Batson & Shurtleff, Daniel A. Rezneck & Steven G. Reade

*Stevens v. Kemp*, 254 Ga. 228; 327 S.E.2d 185 (1985)

State court habeas proceeding.

Counsel, with John P. Batson, Batson & Shurtleff, Daniel A. Rezneck, Steven G. Reade, Arnold & Porter, Washington, D.C., Edward L. Wolf

During that same time period, I was associate counsel on other civil cases, but in more of a supporting role. These tended to be complex and lengthy cases, involving many lawyers. I cannot recall any cases that proceeded to verdict, judgment or final decision.

Between 1980 and 1985, I participated as associate counsel in a few government contract matters involving bid protests on behalf of commercial clients. None of these was before a court. I cannot recall the exact nature of

the decision-maker, but in at least one matter it was an administrative law judge.

While special counsel to the National Security Archive, I was counsel for the plaintiff in *Devine v. CIA*, D.D.C – FOIA case filed March 1996.

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

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

I have never argued before the Supreme Court. I have assisted in drafting briefs that were filed in the Supreme Court, and my name may appear on one or more briefs, but upon search of the CDT website I could not find any Supreme Court brief that bears my name.

15. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   a. the date of representation;

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

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

I described above the cases in which I participated.

16. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s).

(Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As Assistant Counsel to the House Judiciary Committee, the most significant pieces of legislation that I worked on were the omnibus crime bills (1988 and 1994) and the Communications Assistance for Law Enforcement Act (1994). My participation in these activities consisted of studying the issue at hand, talking to experts in the field, organizing hearings, meeting with Executive Branch officials to better understand their interests, drafting memos for the Chairman and members of the Subcommittee, assisting in the drafting of legislation, drafting of committee reports or sections of committee reports, and otherwise assisting the Subcommittee chair and chief counsel of the Subcommittee.

At the Center for National Security Studies, my most significant activities, consisting of research and writing, focused on the antiterrorism legislation of 1996.

At CDT, my most significant activities centered around the PATRIOT Act and the 2007 and 2008 amendments to FISA – writing and publishing analyses of the legislative proposals and testifying before this and other Congressional Committees. More recently, I have coordinated the formation of a coalition supporting updates to the Electronic Communications Privacy Act. I am also very proud of the work I have done advising reformers and government officials in developing and transitional countries on legal and policy reforms associated with oversight of intelligence agencies and the framework for Internet development.

Within the limits of the provisions of the Internal Revenue Code governing tax-exempt organizations, I have lobbied on behalf of the organizations for which I have been employed, namely the Center for National Security Studies and the Center for Democracy and Technology. My lobbying activities have been limited, such that I have never been required to register as a lobbyist.

On behalf of the Center for National Security Studies (1995-1997) and the Center for Democracy and Technology (1997 – present), my lobbying activities have consisted mainly in discussions (face-to-face, telephonic, or by e-mail) with Congressional staff (and to a small extent with Members of Congress) about pending legislation; preparation for such meetings; drafting of analyses of legislative proposals; coordination with other organizations engaged in lobbying activities; and, to a limited degree, drafting of grassroots calls for action.

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

I have not taught a course. I have been a "guest" speaker in courses taught by others on a few occasions. These are the ones I can recall: two appearances at a course on Internet law taught by Sharon Anolik at Golden Gate University, one appearance in a course taught by Prof. Joel Paul at UC Hastings, one appearance at a course on

telecommunications policy taught by John Podesta at Georgetown University Law School, one appearance at a course on national security law taught by John Marsh at William & Mary, two appearances at a course taught by Sec. Marsh at George Mason University Law School, and several appearances at courses taught by Dan Kuehl at the National Defense University.

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

    Since the position for which I am nominated is a part-time position, I plan to continue in my current position as Vice President for Public Policy at the Center for Democracy & Technology. I do expect future income from two employer retirement accounts; CDT and the Thrift Savings Plan account created during my tenure as a Congressional staffer. Additionally, I may continue to receive a small amount of royalties from my book, Terrorism and the Constitution.

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

    Yes, since the position for which I am nominated is a part-time position, I plan to continue in my current position as Vice President for Public Policy at the Center for Democracy & Technology.

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

    See attached financial disclosure report.

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

    See attached Net Worth Statement.

22. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

In connection with the nomination process, I have consulted with the Office of Government Ethics to identify potential conflicts of interest. I will resolve any potential conflicts of interest in accordance with the terms of an ethics agreement I have entered into with the Office of Government Ethics.

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

In connection with the nomination process, I have consulted with the Office of Government Ethics to identify potential conflicts of interest. I will resolve any potential conflicts of interest in accordance with the terms of an ethics agreement I have entered into with the Office of Government Ethics.

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

While I was in private practice as an associate attorney at the law firm of Arnold & Porter, I spent a significant percentage of my time on pro bono matters, representing indigent individuals on death row in their post-conviction proceedings. More recently, I have served in an unpaid capacity on the board of directors or advisory boards of several non-profit public interest organizations. Since 2007, I have been one of the vice presidents and a member of the board of directors of the Defending Dissent Foundation, a small grass-roots oriented non-profit that seeks to ensure that domestic intelligence and national security activities do not improperly intrude upon First Amendment rights. Prior to that, from 2002 – 2007, I was vice president and a member of the board of directors of the First Amendment Foundation, a small non-profit that advocated in favor of strong protection of First Amendment rights. I also serve on the advisory board of the Bill of Rights Defense Committee.

**FINANCIAL STATEMENT**

NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 56 | 194 | Notes payable to banks-secured | | | 0 |
| U.S. Government securities-add schedule | | | 0 | Notes payable to banks-unsecured | | | 0 |
| Listed securities-add schedule | | 515 | 410 | Notes payable to relatives | | | 0 |
| Unlisted securities--add schedule | | | 0 | Notes payable to others | | | 0 |
| Accounts and notes receivable: | | | 0 | Accounts and bills due | | | 0 |
| Due from relatives and friends | | | 0 | Unpaid income tax | | | 0 |
| Due from others | | | 0 | Other unpaid income and interest | | | 0 |
| Doubtful | | | 0 | Real estate mortgages payable-add schedule | | 667 | 963 |
| Real estate owned-add schedule | 1 | 630 | 000 | Chattel mortgages and other liens payable | | | 0 |
| Real estate mortgages receivable | | | 0 | Other debts-itemize: | | | 0 |
| Autos and other personal property | | 150 | 000 | | | | |
| Cash value-life insurance | | | 0 | | | | |
| Other assets itemize: | 1 | 352 | 454 | | | | |
| See schedule | | | | | | | |
| | | | | | | | |
| | | | | Total liabilities | | 667 | 963 |
| | | | | Net Worth | 3 | 704 | 058 |
| Total Assets | 3 | 704 | 058 | Total liabilities and net worth | 3 | 036 | 095 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | | 0 | Are any assets pledged? (Add schedule) | | | No |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| On leases or contracts | | | 0 | Are you defendant in any suits or legal actions? | | | No |
| Legal Claims | | | 0 | Have you ever taken bankruptcy? | | | No |
| Provision for Federal Income Tax | | | 0 | | | | |
| Other special debt | | | 0 | | | | |

**Financial Statement**
Net Worth Schedules

| Listed Securities | | |
|---|---|---|
| Davis Funds | | $116,835 |
| | Davis New York Venture Fund Class A | 116,835 |
| RBC Advisor Services | | $174,665 |
| | Vanguard Tax Exempt Money Mkt Fund | 8,404 |
| | Berkshire Hathaway | 16,022 |
| | Brown & Brown | 14,723 |
| | Capitalsource Inc | 596 |
| | Devon Energy Corp | 1,963 |
| | Fastenal | 5,691 |
| | Goldman Sachs | 9,249 |
| | Homefed Corp | 22 |
| | JP Morgan Chase | 2,757 |
| | Leucadia National | 3,910 |
| | Martin Marietta Materials | 5,996 |
| | McDonalds | 1,919 |
| | MDC Holdings | 547 |
| | Moody's | 2,787 |
| | NVR | 3,455 |
| | Symetra | 2,329 |
| | Sysco | 1,617 |
| | Toll Bros | 6,023 |
| | US Bancorp | 5,394 |
| | Vulcan Materials | 8,872 |
| | Wells Fargo | 13,791 |
| | YUM Brands | 19,620 |
| | Arch Capital | 8,805 |
| | Assured Guaranty | 1,505 |
| | Fairfax Financial Holdings | 28,669 |
| Morgan Stanley Smith Barney | | $81,854 |
| | Cash Balance | - 73 |
| | New Perspective Fund Class A | 40,003 |
| | Washington Mutual Investors Fund | 41,924 |
| Morgan Stanley Smith Barney (spouse) | | $142,056 |
| | Arch Capital | 9,245 |
| | Assured Guaranty Ltd | 1,327 |
| | Brown & Brown | 11,252 |
| | Capitalsource Inc | 2,308 |
| | Fairfax Financial Holdings | 26,667 |
| | Fastenal | 5,691 |
| | Goldman Sachs | 2,522 |
| | JP Morgan Chase | 2,545 |
| | Leucadia National | 3,939 |
| | Martin Marietta Materials | 2,767 |
| | McDonalds | 1,919 |

| | | |
|---|---|---|
| Moodys | 3,450 | |
| NVR | 28,332 | |
| Symetra Financial | 2,261 | |
| Sysco | 1,470 | |
| Toll Bros | 2,185 | |
| US Bancorp Del | 6,203 | |
| Vulcan Materials | 7,541 | |
| Wells Fargo | 15,526 | |
| YUM Brands | 4,905 | |

Real Estate Owned/Mortgages

| | | |
|---|---|---|
| San Francisco, CA | | $1,100,000 |
| MetLife | 522,321 | |
| Wellfleet, MA | | $530,000 |
| HSBC | 145,642 | |

Other Assets

| | |
|---|---|
| Thrift Savings Plan | $153,364 |
| CDT Retirement Savings Account | $252,698 |
| TIAA-CREF | $44,189 |
| TIAA-CREF (spouse) | $790,829 |
| UC Retirement Savings Account (spouse) | $111,374 |

AFFIDAVIT

I, James X. Dempsey, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

3/31/11
(DATE)

(NAME)

See Below PK.
(NOTARY)

State of California County of
San Francisco
Subscribed and sworn to (or affirmed)
Before me on this 31 day of March 20 11, by
James X. Dempsey
PK [redacted] proved to me on
the basis of satisfactory evidence to be the
person(s) who appeared before me.
Signature Pamela Kahn
Questionnaire for non-Judicial nominees
(Seal)

PAMELA KAHN
Commission # 1894856
Notary Public - California
San Francisco County
My Comm. Expires Aug 3, 2014

**STATEMENT OF ELISEBETH COLLINS COOK, NOMINEE TO BE A MEMBER OF THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD**

Ms. COOK. I would echo Mr. Dempsey's thoughts on this issue. I would just add that, if confirmed, one of the things I think you see today is development of technological privacy enhancements at the same time that you see development of the ability of the government to use analytical tools. So with respect to large sets of data, if confirmed, I would look forward to working with privacy officers, working with Congress, and working with the agencies to ensure that as they use their enhanced or additional tools, they are taking care to also put into place appropriate enhanced safeguards.

Chairman LEAHY. Ms. Brand, do you want to add anything to that?

[The biographical information follows.]

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

**QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES**

**PUBLIC**

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

   Elisebeth Collins Cook
   Elisebeth Bridget Collins

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

   Member, Privacy and Civil Liberties Oversight Board

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

   Freeborn & Peters LLP
   311 S. Wacker, Suite 3000
   Chicago, IL 60606

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

   December 1975; Edina, MN

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

   Harvard Law School, 1997-2000; J.D. awarded June 2000

   University of Chicago, 1993-1997; B.A. awarded June 1997

   While at the University of Chicago, I attended classes at Université de Paris, Sorbonne and Université de Paris, Nanterre, through a study abroad program (June 1995 - March 1996).

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

   Freeborn & Peters LLP
   311 S. Wacker, Suite 3000
   Chicago, IL 60606
   Partner

   May 2009-September 2009
   United States Senate, Committee on the Judiciary

152 Senate Dirksen Office Building
First & Constitution, NE
Washington, DC 20002
Republican Chief Counsel, Supreme Court Nominations

March 2005-January 2009
United States Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue, NW
Washington, DC 20530
Assistant Attorney General, June 2008-January 2009
Acting Assistant Attorney General, January 2008-June 2008
Deputy Assistant Attorney General, October 2006-January 2008
Counselor, Spring 2006-October 2006
Senior Counsel, March 2005-Spring 2006

November 2002-March 2005
Cooper & Kirk, PLLC
1500 K Street, NW
Washington, DC 20005
Associate

August 2001-August 2002
United States Court of Appeals for the District of Columbia Circuit
Honorable Laurence H. Silberman
333 Constitution Avenue, NW
Washington, DC 20001
Judicial Law Clerk

August 2000-August 2001
United States District Court for the Southern District of Texas
Honorable Lee H. Rosenthal
515 Rusk Street
Houston, TX 77002
Judicial Law Clerk

Summer 2000
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036
Summer Associate

October 1998-April 2000
Harvard Law School Professors Hal Scott and Charles Fried
1563 Massachusetts Avenue
Cambridge, MA 02138
Research Assistant

Summer 1999
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20007
Summer Associate

Summer 1998
Salès, Vincent & Associés
43 Rue de Faubourg St. Honoré
Paris, France 75008
Summer Associate

Summer 1997
Century Pool Management
5020 Nicholson Ct., Suite 201
Lifeguard/Pool Manager

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

   I have not served in the military, and am not required to register for selective service.

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

   *Legal Times*, Washington D.C., "40 Under 40," 2009
   Edmund J. Randolph Award for service to the United States Department of Justice Criminal Division Award, 2008
   Intelligence Community Legal Award, 2007
   Attorney General Awards (2), 2006
   Phi Beta Kappa
   Honors in History, French and the College (University of Chicago)
   Theodore Neff Prize for Excellence in French Language and Literature (University of Chicago)
   Jane Morton Scholar (extracurricular and academic achievement) (University of Chicago)
   Cum Laude (Harvard Law School)
   Community Service Award (Harvard Law School)

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

   American Bar Association

   Federalist Society
   Co-Chair, Administrative Law (Judicial Review) Practice Group (app. 2004)

10. **Bar and Court Admission**:

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

       Virginia, 10/00

District of Columbia, 11/02
Illinois, 06/10

There have been no lapses in membership.

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

Supreme Court of the United States, 11/3/08
District of Columbia courts, 11/02
Supreme Court of Virginia, 10/28/02
United States Court of Appeals for the Second Circuit, 5/1/07*
United States Court of Appeals for the Third Circuit, 2/03/04
United States Court of Appeals for the Fourth Circuit, 10/28/02
United States Court of Appeals for the Ninth Circuit, 4/18/06
United States Court of Appeals for the District of Columbia Circuit, 6/03/03
United States Court of Appeals for the Federal Circuit, 5/03/03
United States District Court for the District of Columbia, 6/02/03
United States District Court for the Eastern District of Virginia, 1/28/04
United States District Court for the Northern District of Illinois, 01/10
United States Court of Federal Claims, 12/09/02

*The Second Circuit membership expired upon departure from government service.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Harvard Law Society of Illinois, Board of Directors (2010-present)
HLS Women's Alliance of Chicago, Co-Chair (2010-present)
Chicago Republican Women's Network (2010-present)
Harvard Law School Alumni Association (2000-present)
Terrorist Screening Center Board of Governance (July 2006-January 2009)
University of Chicago Alumni Association (1997-present)
McLean Baptist Church (app. 1983-present)

b. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None of the organizations listed above discriminate or have discriminated to the best of my knowledge, although the HLS Women's Alliance of Chicago targets female participation at events.

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

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

July 11, 2008 Letter to the Editor of the *New York Times*: "Justice and Trafficking"
August 11, 2008, *U.S. News & World Report*, "A Media Shield Would Imperil our National Security"

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

None.

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

April 3, 2008 testimony before the Senate Judiciary Committee, Hearing on Nominations (relevant transcript portions attached; complete hearing record (beginning at page 1071) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:47450.pdf

September 23, 2008 testimony before the Senate Select Committee on Intelligence, New Attorney General Guidelines for Domestic Intelligence Collection (written testimony attached; archived video of hearing at http://intelligence.senate.gov/hearings.cfm?hearingId=3588)

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

NAPABA (National Asian Pacific American Bar Association) Southeast Regional Conference, National Press Club, March 18, 2006
PATRIOT Act and civil liberties after 9/11

Houston Federalist Society, Houston, TX, February 23, 2007
Goals and Priorities of the Department of Justice and Office of Legal Policy

Federal Bar Association Panel, Crystal City, VA, March 24, 2007
Courts-specific legislative agenda, court security, judicial pay raises, and judicial nominations.

Fairfax County sponsored panel on Identity Theft, Fairfax, VA, April 12, 2007
Identity Theft, President's Task Force

National Youth Leadership Forum, Washington, DC, November 20, 2007
The Department of Justice and the Office of Legal Policy

Prior to 2008, I did not speak from notes or prepared texts. After 2008, on occasion I would speak from notes or prepared texts; however, I did not take copies of the speeches from the Department of Justice and have been unable to find online versions of those speeches.

August 18-22, Billings, Montana, participation in conference Interdepartmental Tribal Justice, Safety, Wellness consultation, with remarks specifically about implementation of the SORNA registry

September 9, 2008, 2008 National Conference on Human Trafficking, speech on the efforts of the Department of Justice to combat human trafficking

October 23, 2008 (app.) National Congress of American Indians annual conference/trade show, remarks on potential legislation addressing crime in Indian Country

November 18, 2008, remarks on Department of Justice efforts to combat human trafficking, at 9th Annual Gulf States LECC/VW Conference, Tampa, FL

December 2009, remarks and Q&A regarding reauthorization of the USA PATRIOT ACT, phone conference organized by the Federalist Society (outline attached)

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

September 2008, numerous interviews with print media regarding Attorney General Guidelines for Domestic FBI Operations (articles attached)

November 15, 2008 (app.), participation in Seattle press conference on joint Federal, State, Local, and private efforts to combat online child predators

December 2008, interview with ABC News regarding Department of Justice implementation of DNA collection laws (did not air)

January 2009, interview with Fox News regarding Department of Justice implementation of DNA collection laws (did not air, article reflecting interview attached)

January 2009 (app.), interview with Judicature (magazine of the American Judicature Society), excerpts published in May-June 2009 volume (article attached)

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

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

United States Department of Justice
Office of Legal Policy
Assistant Attorney General, June 2008-January 2009
Acting Assistant Attorney General, January 2008-June 2008
Deputy Assistant Attorney General, October 2006-January 2008
Counselor, Spring, 2006-October 2006
Senior Counsel, March, 2005-Spring 2006
Appointed

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

It is possible that I have been a member of the Republican National Committee by virtue of having paid to attend a function in January 2005.
I also contributed legal services in 2004 to Lawyers for Bush/Cheney 2004.

14. **Legal Career:** Answer each part separately.

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

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

I served as a clerk to the Honorable Laurence H. Silberman, United States Court of Appeals for the District of Columbia Circuit, from August 2001-August 2002

I also served as a clerk to the Honorable Lee H. Rosenthal, United States District Court for the Southern District of Texas, August, 2000-August, 2001

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

I have never practiced law alone.

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

January 2010-present
Freeborn & Peters LLP
311 S. Wacker, Suite 3000
Chicago, IL 60606
Partner

May 2009-September 2009
United States Senate, Committee on the Judiciary
Senate Dirksen Office Building, Room 152
First and Constitution, NE.
Washington, DC 20002
Republican Chief Counsel, Supreme Court Nominations

March 2005-January 2009
United States Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue, NW
Washington, DC 20530
Assistant Attorney General, June 2008-January 2009
Acting Assistant Attorney General, January 2008-June 2008
Deputy Assistant Attorney General, October 2006-January 2008
Counselor, Spring 2006-October 2006
Senior Counsel, March 2005-Spring 2006

November 2002-March 2005
Cooper & Kirk, PLLC
1500 K Street, NW
Washington, DC 20005
Associate

Summer 2000
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036
Summer Associate

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

b. Describe:

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

After law school, I joined Gibson, Dunn & Crutcher, as a Summer Associate. I worked on a variety of commercial litigation projects—both trial and appellate.

I then clerked for two years—one year at the District Court level, one year at a Court of Appeals. During that time, I performed typical law clerk duties, including observing court proceedings and assisting my judges as they required.

Upon completion of my second clerkship, I joined Cooper & Kirk, PLLC as an associate. While at Cooper & Kirk, I had the opportunity to work on a broad range of litigation, from trial to appellate to Supreme Court. A significant percentage of my practice focused on *Winstar* litigation—litigation that resulted from the Savings and Loan crisis of the 1980s. With respect to the *Winstar* litigation, I performed a wide range of duties, including serving as the sole associate on one trial and second chair in another trial, taking and defending depositions, drafting and arguing motions, and drafting appellate briefs.

At the Department of Justice, my work was primarily policy focused, although I also did significant work with respect to judicial nominations and regulations. The Office of Legal Policy is charged with developing, coordinating, and effectuating major policy initiatives of the Department of Justice. While at the office, I worked on a range of policy issues from national security to the President's Identity Theft Task Force. My work included drafting legislation, commenting on proposed legislation, briefing Administration officials, Members of Congress and congressional staff, and developing policy initiatives. In addition, I worked on the drafting and implementation of the Attorney General Guidelines for Domestic FBI Operations, the Adam Walsh Act, and efforts to expand DNA collection by federal agencies.

As Republican Chief Counsel, Supreme Court Nominations, I was responsible for the day-to-day activities concerning the nomination of now-Justice Sotomayor. My work included review and analysis of cases, articles, speeches, and other materials. I also briefed Senators and staff.

Currently, I am working as a litigation partner in a mid-size Chicago law firm. I have primarily focused on general civil litigation, although I have assisted my partners from time to time as questions relating to federal criminal investigations have arisen. I have also provided counseling to clients regarding a potential defamation lawsuit and a potential declaratory judgment action regarding state agency action, as well as policy advice concerning a potential change to the Illinois Supreme Court Rules.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

At Cooper & Kirk, PLLC, I spent significant time on a school desegregation case, assisting in the representation of a school district seeking unitary status. Other types of litigation included representation of attorneys who had been called before a grand jury investigating their clients, and counseling of a former Member of Congress concerned about a possible ethics investigation. Typical clients included Ford Motor Company, Bank of America, and Marion County School District.

While at the Department of Justice, I represented the United States in several immigration cases, including serving as counsel of record on briefs in the courts of appeals and arguing two cases in the courts of appeals.

Currently, I represent a range of mid-size companies facing legal challenges. These legal issues include breach of contract and tort claims, and potential involvement in criminal investigations. A typical client is Trustmark Insurance Company.

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

While in private practice, my practice was almost exclusively litigation. I appeared in court fairly frequently, particularly in 2004. While in government service I have appeared in court infrequently. I currently appear in court infrequently.

1. Indicate the percentage of your practice in:
   (A) federal courts: 98%
   (B) state courts of record: 2%
   (C) other courts.

2. Indicate the percentage of your practice in:
   (A) civil proceedings: 95%
   (B) criminal proceedings: 5%

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

I have tried two non-jury cases to verdict. In the first trial, I was the sole associate counsel, on the second trial I was second chair.

1. What percentage of these trials were:
   (A) jury;
   (B) non-jury: 100%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any

oral argument transcripts before the Supreme Court in connection with your practice.

I have not argued before the Supreme Court. I assisted in drafting two amicus briefs, one as a summer associate in *Board of Regents v. Southworth*, 98-1189, and one as an associate at Cooper & Kirk, PLLC, in *Silveira v. Lockyer*, cert. denied. It is possible that I contributed to other petitions for or oppositions to petitions for certiorari, but I do not recall.

15. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

*Citizens Federal Bank v. United States*, 92-656; App. April 2004-March 2005 United States Court of Federal Claims; Judge George Miller

Citizens Savings Bank sued the United States for money damages arising out of a breach of contract that was entered into as part of the Savings & Loan crisis of the 1980s. This case is a *Winstar* case. Citizens prevailed in the Court of Federal Claims and was awarded almost $19 million in damages. I served as second chair during the trial and was heavily involved in all aspects of pre-and post-trial briefing. After I left the firm, Citizens prevailed on appeal, and the damages have been awarded.

Co-Counsel:
David Thompson
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Delisa Sanchez
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-616-0337

2. *American Capital Corporation v. United States*, 95-523C; App. March 2004-March 2005; United States Court of Federal Claims; Judge Braden

In this case, another *Winstar* case, American Capital Corporation and the FDIC sued the United States for money damages arising out of a breach of contract that was entered into as part of the Savings & Loan crisis of the 1980s. American Capital prevailed in the Court of Federal Claims and was awarded almost $109 million in damages. I was the sole associate on the trial, and participated in all aspects of pre- and post-trial briefing. After I left the firm, the case was argued on appeal, and approximately $34 million in damages were ultimately awarded.

Co-Counsel:

Michael W. Kirk
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Bill Ryan (now at)
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006
202-207-9190

3. *Vodnar v. Gonzales*, 04-74132; May-June 2006; United States Court of Appeals for the Ninth Circuit; Chief Judge Schroeder, Judges Graber and Duffy (SDNY)

Mr. Vodnar, an ethnic Hungarian from Romania, petitioned for review of an order of the Board of Immigration Appeals (BIA) which summarily affirmed an IJ's denial of withholding of removal and relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Court of Appeals held that substantial evidence supported IJ's adverse credibility finding and denied the petition. I argued the appeal on behalf of the Government.

Co-Counsel:
Jonathan Cohn
United States Department of Justice
(now at) Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8110

Opposing Counsel:
Jagdip Singh Sekhon
Sekhon & Sekhon
601 Montgomery Street, Suite 402
San Francisco, CA 94111-2607
Unknown

4. *Mirza v. Gonzales*, 05-2800-ag; April-May 2007; United States Court of Appeals for the Second Circuit; Judges Walker, Cabranes, and Goldberg (CIT)

Mr. Mirza petitioned for review of order of Board of Immigration Appeals (BIA) denying his motion to reopen removal proceedings. The Court of Appeals held that the I-130 application for immigration of relative, applied for on alien's behalf by his second United States wife, was insufficient to establish alien's eligibility for adjustment of status and denied his petition review. I argued the appeal on behalf of the government.

Co-Counsel:
Thomas Dupree
United States Department of Justice
(now at) Gibson Dunn
1050 Connecticut Ave., N.W.

Washington, DC 20036
202-955-8547

Opposing Counsel:
Matthew L. Guadagno
305 Broadway, Suite 100
New York, NY 10007
212-267-2555

5. *Ford Motor Company v. United States*, 03-5092; App. March 2003-March 2005; United States Court of Appeals for the Federal Circuit; Judges Newman, Schall, and Linn

Ford Motor Company filed suit against United States asserting claim under provisions of World War II contract for its share of cost of environmental clean-up of factory site where it had built bombers. The United States Court of Federal Claims, granted government summary judgment for the United States. On appeal, the Court of Appeals held that the claim was not time-barred and that Ford Motor Company was entitled to recover costs of environmental cleanup. I was very involved in briefing the appeal on behalf of Ford Motor Company. After I left the firm, the case settled.

Co-Counsel:
Michael W. Kirk
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Kyle Chadwick
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-616-0476

6. *Granite Management Company v. United States*, 04-5065; App. February 2004-March 2005; United States Court of Appeals for the Federal Circuit; Judges Mayer, Friedman, and Clevenger

In this *Winstar* case, Granite Management brought a suit for money damages against the United States arising out of the Savings & Loan crisis of the 1980s. The Court of Federal Claims entered summary judgment for company on issue of liability but granted summary judgment for the United States as to damages. After I left the firm, the Federal Circuit largely affirmed as to damages, but remanded for consideration of one theory of recovery. I am unaware of the current status of the claims. I was the sole associate on the case and assisted in the briefing before the trial and appellate courts.

Co-Counsel:
Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW

Washington, DC 20036
202-220-9600

Opposing Counsel:
Tarek Sawi
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-616-0320

7. *United States v. Marion Country School District*, 5:78-cv-22-OC-20; United States District Court for the Middle District of Florida; Judge Schlesinger

The United States originally sued Marion Country School District for civil rights violations, and the parties entered into a Consent Decree. Cooper & Kirk was engaged in 2004 to seek unitary status and release of Marion Country from the Consent Decree. I assisted in preparing the school district for a Unitary Status hearing, which was held after I left the firm. Marion County's Motion for Unitary Status was granted in January, 2007, and the case dismissed.

Co-Counsel:
Michael W. Kirk
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Tamara Kassabian
United States Department of Justice
601 D Street, NW
Washington, DC 20004
202-616-3899

8. *Rozhelyuk v. Gonzales*, 05-75480; App. May 2006-February 2007; United States Court of Appeals for the Ninth Circuit; Judges Beezer, Fernandez, and McKeown

Lidiya Rozhelyuk and her 14-year-old daughter, Nataliya Sorokhan, natives and citizens of the Ukraine, petition for review of the Board of Immigration Appeals' decision that affirmed the Immigration Judge's denial of their applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). The Ninth Circuit denied the petition for review. I served as counsel of record on behalf of the government in the Ninth Circuit and briefed the petition for review.

Co-Counsel:
Jonathan Cohn
United States Department of Justice
(now at) Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

202-736-8110

Opposing Counsel:
Leah W. Hurwitz, Esq.
2727 Camino del Rio South, Suite 110
San Diego, CA 92108
(619) 239-7855

9. *Vasquez-Arellanes v. United States*, 05-76399; App. April 2006-January 2009; United States Court of Appeals for the Ninth Circuit; No Panel Identified by the time I left government service.

In this immigration case, the petitioner sought review of an Immigration Judge's decision to deny her cancellation of removal for nonpermanent residents, and the Board of Immigration Appeals' affirmance of that decision. The petitioner contends that the Immigration Judge erroneously concluded that she lacked the requisite good moral character. I served as counsel of record for the government and briefed the petition for review in the Ninth Circuit.

Co Counsel:
Jonathan Cohn
United States Department of Justice
(now at) Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8110

Opposing Counsel:
Daphna Mendelson
295 89th Street, Suite 201
Daly City, California 94015
650-757-8500

10. *AmBase Corporation v. United States*, 93-531C; App. November 2002-March 2005; United States Court of Federal Claims; Judge Loren Smith

In this *Winstar* suit, a holding company which owned defunct thrift and corporation which owned all of holding company's stock brought suit for money damages against the United States alleging that enactment of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) breached a contract. The Federal Deposit Insurance Corporation (FDIC) intervened as successor to rights of thrift. AmBase filed a motion to dismiss the FDIC, and motion to define the measure of damages. Judge Smith held that there was jurisdiction to review the FDIC's administration of the thrift receivership when determining the value of damages to be awarded to thrift shareholders. I assisted in the briefing before the Court of Federal Claims.

Co-Counsel:
Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
David Levitt
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-307-0309

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

    In my current role, a good portion of my legal activities includes counseling regarding potential litigation. As examples, I have counseled a client contemplating a lawsuit based on defamatory statements, as well as a client contemplating a declaratory judgment action concerning a state regulatory agency. Neither have filed suit as of yet.

    As Republican Chief Counsel, Supreme Court Nomination, my work did not involve litigation. I analyzed legal materials and briefed Senators and staff as to their import.

    While at the Department of Justice, very little of my work involved litigation; instead, I worked primarily on development of legal policy, regulations, and judicial nominations. This work included drafting legislation, analyzing legislative proposals, and implementing statutory requirements.

    While in private practice prior to joining the Department of Justice, I was involved in some legal activities that did not involve litigation; for example, I assisted in the representation of a former Member of Congress who was concerned that he could be the subject of an ethics investigation. I also assisted in counseling a client as to the potential ramifications of a legislative proposal for that client's organization.

    I have not performed any lobbying.

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

    In October 2010, I taught one session of an Evidence seminar at Chicago-Kent School of Law. We discussed various issues relating to the admissibility of evidence and differing standards for private and public actors to obtain admissible evidence. There was no syllabus for the course.

    In February 2011, I taught one session of an Evidence seminar at Chicago-Kent School of Law. We discussed the impact of technology on the Rules of Evidence. There is no syllabus for the course.

18. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted

contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

Pursuant to agreement, Cooper & Kirk, PLLC and Freeborn & Peters LLP hold 401(k) accounts for me.

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

    Yes. I anticipate continuing my practice as a litigation partner at Freeborn & Peters LLP.

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

    Please see attached financial disclosure report.

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

    Please see attached Net Worth Statement and SF-450 on file with the Committee.

22. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

       In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice'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 Department's designated agency ethics official. I am not aware of any other potential conflicts of interest.

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

       In connection with the nomination process, I have consulted with the Office of Government Ethics and the Department of Justice'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 Department's designated agency ethics official. I am not aware of any other potential conflicts of interest.

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

While at Cooper & Kirk, I assisted in multiple representations undertaken for reduced fees or pro bono. For example, I assisted in the drafting and filing of a brief on behalf of a public interest organization seeking to protect its First Amendment rights. In addition, I assisted in the representation of an individual challenging a federal regulation that had been construed to prohibit him from sending a bible, political magazines, and other material to his son, who was then serving in Kuwait or Saudi Arabia.

At the Department of Justice, I took the opportunity to provide pro bono services at a legal clinic in Washington, D.C.

I am currently working with a number of my partners to support a range of charitable organizations, including those dedicated to providing reduced rate or pro bono legal services. In addition, I have served as a moot court judge both for Northwestern University Law School and for the American Bar Association. On election day, after participating in relevant training, I provided legal support to poll watchers across Illinois.

**FINANCIAL STATEMENT**

NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 31 | 220 | Notes payable to banks-secured | | 2 | 213 |
| U.S. Government securities-add schedule | | 7 | 450 | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | 399 | 315 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | | | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | | |
| Due from relatives and friends | | | | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | | |
| Real estate owned-add schedule | | | | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 45 | 000 | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| | | | | | | | |
| | | | | Total liabilities | | 2 | 213 |
| | | | | Net Worth | | 480 | 772 |
| Total Assets | | 482 | 985 | Total liabilities and net worth | | 482 | 985 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | NO | | Are any assets pledged? (Add schedule) | | NO | |
| On leases or contracts | | NO | | Are you defendant in any suits or legal actions? | | NO | |
| Legal Claims | | NO | | Have you ever taken bankruptcy? | | NO | |
| Provision for Federal Income Tax | | NO | | | | | |
| Other special debt | | NO | | | | | |

**Net Worth Schedules**

| | |
|---|---|
| U.S. Government Securities | |
| Series EE and I Bonds | $7,450 |
| | |
| Listed Securities | |
| Evergreen | $21,398 |
| 401(k) (James Cook) | $40,034 |
| 401(k), TSP (Elisebeth Cook) | $134,704 |
| Roth IRA | $2,418 |
| Wells Fargo Investment Account | $160,744 |
| Commerce Bank | $40,017 |
| Total Listed Securities | $399,324 |

AFFIDAVIT

I, ELISEBETH COLLINS COOK, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

March 7, 2011
(DATE)

Elisebeth C. Cook
(NAME)

Kathy A. Abbott
(NOTARY)

OFFICIAL SEAL
KATHY A ABBOTT
Notary Public - State of Illinois
My Commission Expires Jan 26, 2014

The New York Times
nytimes.com

July 22, 2008

# LETTER; Justice and Sex Trafficking

To the Editor:

Re "The Justice Department, Blind to Slavery" (Op-Ed, July 11):

We take issue with John R. Miller's characterization of the Department of Justice's work in the fight against sex trafficking and the department's commitment to rescuing victims of this horrendous crime.

The department has convicted hundreds of sex traffickers for prostituting children and forcing women into prostitution. We have rescued hundreds upon hundreds of victims. And we strongly support Congressional reauthorization of the Trafficking Victims Protection Act, which made these successes possible.

But we oppose provisions in the bill passed by the House of Representatives that would divert our focus away from the worst of the worst cases by making all prostitution a federal crime.

Dozens of law enforcement agencies, women's and immigrants' groups, crime victims' rights organizations and policy experts have written Congress sharing the department's concern.

Elisebeth C. Cook

Assistant Attorney General

Department of Justice

Washington, July 11, 2008

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Monday, June 14, 2010

# Two Takes: A Media Shield Would Imperil Our National Security

## Protecting people who leak vital information illegally would hurt our national safety

*By Elisebeth C. Cook*
Posted August 11, 2008

A media shield's appeal is understandable. A free press that informs the public and holds government accountable is a bedrock principle of our society and one that we are committed to defend. But creating a new privilege for journalists to withhold the identity of confidential sources, as Congress is considering, would do more harm than good.

In the real world, such a privilege would adversely affect our ability to keep the country safe from terrorists and other criminals. This impact has led the heads of all federal government agencies in the intelligence community to oppose the proposed legislation. While the media shield bill includes "exceptions" for national security and serious crimes, they are inadequate. First, they are largely prospective and would not apply after a crime has been committed. Second, we would still have to produce classified and sensitive information in order to compel reporters to disclose their sources. Third, even if we meet the bill's exacting standard, judges could still prevent us from obtaining critical source information. This would undermine, if not eviscerate, the government's ability to obtain information that could be necessary to protect national security, investigate acts of terrorism, or identify leakers of classified information.

These defects are compounded by the fact that a shield would apply to a virtually limitless class of people. Indeed, the bill's definition of journalism is so broad that essentially anyone who regularly disseminates information of public interest would qualify—as would his or her supervisor, employer, parent company, subsidiary, or affiliate.

**Highly classified.** Two real-world examples, cited by supporters of the legislation, underscore the government's concerns about this legislation. The existence of a highly classified program that allowed us to monitor the finances of terrorist organizations and their backers was leaked to reporters who then ran a story detailing its operations. This

disclosure compromised one of our most valuable programs and made harder our efforts to track terrorist financing. There is no credible allegation that the program violated U.S. law, and the newspaper's own ombudsman later concluded that the article should not have been published.

In another case, the government developed a plan to go to court, freeze the assets, and search the premises of two nonprofit organizations suspected of supporting terrorists. Information about the plan was leaked to two reporters, who called the groups seeking comment on the impending searches and asset freezes—alerting them to the government's actions and potentially threatening the safety of the agents executing the search warrants, to say nothing of the harm done to the investigation. The reporters refused to identify their sources and challenged efforts by the government to obtain phone company records indicating who might have leaked the information.

Such cases, in which confidential sources broke the law by leaking classified or other sensitive information, with serious consequences for national security and law enforcement, are telling. Media advocates evidently believe that such leaks ought to and will be protected by a shield law. One of the goals of the legislation, we are told, is to ensure that sources will feel free to talk to reporters—another way of saying that it is designed to ensure that we will have more such leaks. The sources in these cases broke the law in order to reveal information that showed not that the government was acting improperly but that it was doing its job appropriately and effectively. Of course, the fact that these and other leaks made their way into the news media in the absence of a shield law makes them odd examples to cite as evidence for its necessity.

This is a complex issue involving some of our most cherished values and our most important responsibilities as a government. The balance between such interests is not always clear and can lead people of good faith to disagree. But the proposed bill overly restricts the government's ability to obtain information critical to protecting national security and enforcing laws.

*Join the debate—tell us what you think about a shield law to protect confidential sources. Post your thoughts here.*

**Tags:** journalism | media | law | national security

# Question 12(c)

souri. All four enjoy the strong support of their home State Senators. We will also consider the nominee for Assistant Attorney General for the Office of Legal Policy in the Department of Justice.

We will proceed in the following manner. After opening statements from any Committee members, we would like for the Senators present to introduce their nominees. Then we will invite the nominees themselves to take the oath, as well as present any opening remarks or introduce their family and their friends. Then we will take the time for questions.

Senator Specter is here, and we ask him for his comments.

**STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. Well, thank you very much, Mr. Chairman. I am delighted to see our colleagues, Senator Warner and Senator Bond, here today for purposes of making introductions. Senator Webb has just joined us. We welcome the nominees and their families and we will do our best to process these nominations through the Committee for up-or-down votes.

Earlier today in this room we had an extended discussion on the confirmation process. I think it is only fair to let all the nominees and others interested in what is going on, candidly, about the difficulties of the confirmation process. We have had a practice of slow-downs during the last 2 years of a presidency. It happened in the last 2 years of President Reagan, the last 2 years of President Bush the first, and happened in the tenure of President Clinton, where Republicans were in control for 6 years.

In 2005, we had very extended filibusters and challenge of changing the rules on filibustering with the so-called Constitution, or nuclear, option. It is my hope we'll be able to process these nominees. We're obviously concerned about the qualifications. As the Chairman, Senator Kohl, has commented, lifetime appointments are very, very important. But I do believe we need to proceed with the hearings and evaluation and vote up or down on these nominees. I will do my best to move the process forward.

So, on with the show, Mr. Chairman.

Senator KOHL. Thank you very much, Senator.

Senator SPECTER. Senator Warner is next to you.

Senator KOHL. If you would like to make your introduction, Senator Warner.

**PRESENTATION OF MARK DAVIS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA AND DAVID J. NOVAK NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator WARNER. Thank you, Mr. Chairman, and my lifetime friend, Senator Specter. Senator Specter and I have been here, we're going into our 30th year in this institution. I value the friendships that I've had with you, sir, and Senator Specter, and the chairman of this Committee, Chairman Leahy, and many others. I've appeared before this Committee, I'm not sure how many times, Mr. Chairman, but I know that I have either introduced or

sat here on behalf of every member of the Federal judiciary in the Commonwealth of Virginia.

I just think it's one of the most important functions of a United States Senator to work with the President, to work with his colleagues in the Senate, in the advice and consent process. I commend you, Mr. Chairman, for the dedicated work that you had.

Today, our two nominees are from Virginia. It's an unusual situation. I'm privileged to introduce Chief Judge Spencer, the Federal District Court of the Eastern District of Virginia, who has come on behalf of the candidates today. I'd ask if Judge Spencer might rise to be recognized. Thank you, Your Honor.

We also have Judge Morrison of the State Court of Virginia who has come on behalf of—Judge Morrison, we thank you.

Now, Mr. Chairman, I would like unanimous consent to place into the record my statement. I see my colleague is here. I can be very brief, because the records speak for themselves and need not have this old, crackly voice here, which is not working too well today, to cover it.

The first nominee I'd like to address is Judge Davis. He's Chief Judge on a division of our State Court. This young man started in my office as an intern, Mr. Chairman, and then came back and worked on the staff in my office. His whole judicial career, up through his position as Chief Judge, is carefully outlined in this statement. Without any hesitation, I unequivocally back this nomination and am very, very proud to see one of my staff members come before the U.S. Senate to be recognized under the advice and consent constitutional procedures for elevation to the judiciary. I thank you.

Next, is a gentleman, Mr. Novak, whom I have come to know in the process with my good friend, Senator Webb and I. We work together as a team and we interview extensively many, many individuals carefully before we first submit the names to the President, and then before we come here. I wish to thank Senator Webb. I've worked in a similar capacity with all of my partners here in the Senate and the State of Virginia, be they Republican or Democrat, to see that we put forward for the judiciary only those we deem qualified.

Now, this young man, having been a Federal prosecutor myself many, many years ago, I would call him the prosecutor's prosecutor. He has done so much in his lifetime in the prosecutorial work to see that people are fairly prosecuted and to carry out the law of the land, which allegedly has been broken in the various prosecutions. Again, his entire biography and all the important positions that he's held are captured in detail in my statement. Likewise, I put my unequivocal support behind this fine gentleman.

I wish to also bring to the Chairman's attention and that of the distinguished Ranking Member that I have spoken to either the Senators themselves or their senior staff on behalf of this Committee. There is a matter with Mr. Novak. It's being reviewed within the Department of Justice. There's knowledge in here with your staff, and I'm confident that this matter will be completely resolved prior to the action of this Committee.

And last, Mr. Chairman, I introduce Ms. Elisebeth Cook. Now, each of these distinguished candidates has their family here. Per-

haps, I think your protocol is, when they come they introduce their own families. She's joined by members of her family today. This fine nominee is nominated to serve as the Assistant Attorney General responsible for leading the Office of Legal Policy, or the OLP, as we know it. That serves as the principal office for the planning, development, and coordination of high-priority policy initiatives from the Department of Justice, and works closely with the President on the selection process for the Federal judiciary.

Again, Phi Beta Kappa. I need not go further. It's all in here, an extraordinary career for this magnificent female professional.

I thank you, distinguished Chairman and the distinguished Ranking Member, and ask again that my full statement be placed in the record.

Senator KOHL. Thank you, Senator Warner. It shall be done, without objection.

[The prepared statement of Senator Warner appears as a submission for the record.]

Senator KOHL. Senator Webb, would you like to speak?

**PRESENTATION OF MARK S. DAVIS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA AND DAVID J. NOVAK, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA BY HON. JIM WEBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator WEBB. Thank you, Mr. Chairman and Ranking Member Specter. I would like to begin by associating myself with all the remarks of our senior Senator from Virginia. Actually, as he was giving his remarks, I was sitting here remembering that, 24 years ago this very month, Senator Warner sat next to me during my confirmation hearing to be Assistant Secretary of Defense, and introduced me. So when we're talking about trying to move things forward in a bipartisan manner here in the Senate, that is one example among many of how we have been able to work over many years together.

I would like to add my own strong support for the nominations of Judge Mark Davis and Mr. David Novak, and also I'm pleased to join Senator Warner in introducing Elisebeth Cook Collins, who is a Virginian who has been nominated as Assistant Attorney General for Legal Policy at the Department of Justice. We all know the role that the Constitution assigns the Senate in the advice and consent process with respect to our judgeships. These are lifetime appointments.

Virginians expect our Senators to take very seriously our constitutional duties and to look beyond party affiliations to impartial, balanced, fair-minded criteria in examining those people who we are going to trust in those fiduciary responsibilities.

Senator Warner and I, early on, undertook a careful and deliberative joint process in order to find the most qualified judicial nominees. This process involved a thorough records review, rigorous interviews jointly held, asking for the opinions of the bar associations, many different bar associations in Virginia, and through that process we jointly concurred in the high qualifications of Judge Davis, and also Mr. Novak.

So, without going into any duplicative detail in terms of qualifications, I would ask that my full statement be inserted into the record of this hearing, and I would like to associate myself in full measure with what Senator Warner has already said.

Senator KOHL. Thank you, Senator Webb. Without objection, it will be done.

Senator WEBB. Thank you, Mr. Chairman.

[The prepared statement of Senator Webb appears as a submission for the record.]

Senator KOHL. We have two Senators from Missouri with us at this point. Senior Senator Chris Bond?

**PRESENTATION OF DAVID GREGORY KAYS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI AND STEPHEN N. LIMBAUGH, JR., NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI BY HON. CHRISTOPHER S. BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator BOND. Thank you very much, Mr. Chairman, Senator Specter.

I, too, would associate myself with the general comments made by the distinguished senior Senator from Virginia. He always says it well, and he did again today. I thank the members of the Committee for holding this hearing to consider the nominations for the Eastern and Western Federal District Court benches in Missouri, the Honorable Stephen Limbaugh and the Honorable Greg Kays, or as he's known in the formal papers, as David Gregory Kays, so there is no confusion about referring to him by his middle name.

Your holding these hearings today, reporting these nominees favorably, and ensuring the full Senate approve their nomination will help show that the Federal judicial nominating process can work to provide Federal judges our courts so desperately need.

I'm so pleased and proud to be able to be here today, along with my colleague, Senator McCaskill, to introduce such outstanding nominees to the Federal bench. Both Judge Kays and Judge Limbaugh share bipartisan support, both have fine judicial minds, and are public servants. They both represent the values and character of my Missouri constituents.

Judge Kays hails from Lebanon, Missouri, a mid-sized city in Southwest Missouri. Folks from Southwest Missouri are hard-working, God-fearing, family loving. Of course, I like to think of all Missourians that way, but they're particularly proud to do so. But you will see today, as I see, that Judge Kays' sharp legal mind and record of experience as a State Circuit Court judge—that's a trial judge—are matched equally by a midwesterner's modesty, earnestness, and commitment to duty and service.

Now, Kansas City is in the Western District of Missouri and produces many big-city lawyers and judges, some of whom I was also proud to recommend, but I am especially happy that this occasion will allow the nomination and hopeful confirmation of a judge from Laclede County.

Judge Limbaugh also hails from a mid-sized city, Cape Girardeau, on the Mississippi River in southeastern Missouri. Judge Limbaugh and his entire family, which includes more than

souri, a fairly small community in southwest Missouri that I feel very close to.

As to Judge Limbaugh, I consider him a friend. I think that I would quote briefly from a letter that was sent to me by Judge Wolfe of the Missouri Supreme Court: "Judge Limbaugh has served with distinction on the Missouri Supreme Court for many years, and two judges that are on the court that came to the court through Democratic Governors have expressed publicly what a fine judge he is." This letter is particularly meaningful because not only was he appointed by Governor Carnehan, but he had served in Governor Carnehan's administration. He wrote this letter, referring to Judge Limbaugh, "He is a magnificent judge. He is civil, he is polite, he is extremely conscientious and hardworking. Most of all, he truly cares about the law. He is the kind of judge with whom you can disagree and the matter is never disagreeable."

There have been many kind words said about Judge Stephen Limbaugh in terms of his work, his collegiality, but once again, he is a former trial judge. He came to the Supreme Court, the highest appellate court in our State, from a courtroom. I think it's wonderful that he wants to return to a courtroom, because I think the essence of a trial judge is one who understands that the battle before him is one that it is an honor to be in a position to make decisions as to the law and to try to make sure that law is applied fairly, regardless of who comes to the courtroom.

So I think these are two outstanding nominees and I'm proud of the bipartisan manner in which my colleague, the senior Senator from Missouri—

Senator BOND. Thank you.

Senator MCCASKILL.—has worked with me on these nominations. I recommend them to the Committee, I recommend them to the Senate, and I appreciate your time today.

Thank you very much.

Senator KOHL. Well, we thank both the senior and the junior Senator from Missouri. We appreciate your being here.

At this point we'd like to call all five nominees to come forward and to remain standing. If you'll raise your right hand, I'll administer the oath.

[Whereupon, the nominees were duly sworn.]

Senator KOHL. You may be seated.

Starting with Ms. Cook, we will ask each nominee to introduce themselves, make any brief comments you'd like to make, and introduce members of your family as you may see fit.

Ms. Cook.

**STATEMENT OF ELISEBETH C. COOK, NOMINATED TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE**

Ms. COOK. Thank you, sir. First, I wanted to take you for taking the time to chair this hearing today, and Senator Specter, for being here today. I also wanted to thank the Chairman for scheduling this hearing. I wanted to thank the President for this nomination and the Attorney General for the faith that he has placed in me.

I also wanted to take the opportunity to introduce my family members who are here. My parents, Tom and Martha Collins, and

my husband, Jim Cook. Jim's parents, Ron and Maryann, were hoping to come today, but Maryann's mother is not well so they were unable to make it.

Senator SPECTER. Would you ask your relatives to stand so we can greet them?

Ms. COOK. Please stand.

Senator SPECTER. Nice to have you all here.

Ms. COOK. And I also wanted to thank my friends and colleagues who have taken time out of their busy schedules to be here today.

Senator KOHL. Thank you, Ms. Cook.

Mr. Davis.

[The biographical information follows.]

an Assistant D.A. in a very good District Attorney's Office. Not as good as when I was District Attorney, but very good.

[Laughter.]

The vote has started. I'm going to excuse myself, Mr. Chairman.

Senator KOHL. Thank you.

Senator SPECTER. I expect to have a replacement Republican Senator arriving shortly.

Senator KOHL. Thank you, Senator Specter.

There is a vote, as he said, so we'll recess for perhaps 10 minutes. I'll get back here as soon as I can and then we'll proceed with questions.

[Whereupon, at 2:49 p.m. the hearing was recessed.]

AFTER RECESS [3:07 p.m.]

Senator KOHL. The hearing will resume. We will commence questioning for Ms. Cook.

Ms. Cook, one of your primary responsibilities at the Office of Legal Policy is the selection of judicial nominees. With time is very short before the next election, what has your office done to encourage the White House to identify consensus nominees like the ones who are before us today who can be confirmed? Do you believe that it is important to consult and get the approval of home State Senators before nominations are made?

Ms. COOK. Thank you for that question. The Office of Legal Policy within the Department of Justice does play a supporting role in the selection process for judicial nominees. Ultimately the decision of whether or not to nominate an individual is the President's decision, but the Department, and my office in particular, does play a supporting role in that process.

You had asked specifically about consultation. The consultation process is one out of the White House council's office. It is not one of the areas where the Department of Justice would play a role.

Senator KOHL. Ms. Cook, during the tenure of Attorney General Gonzales there was a perception that politics played a significant role in the decisions made at the Department. Was there a similar problem at OLP? What will you do to ensure that this does not become a problem, should you be confirmed?

Ms. COOK. Let me explain a little bit about how the Office of Legal Policy is currently staffed. I am the Acting Assistant Attorney General right now, there are three Deputy Attorney Generals, and a Chief of Staff on the senior staff. They are all career attorneys. They have all been at the Department longer than I have. One of my goals, if confirmed, would be to make the Office of Legal Policy a place where they will want to stay long after I am gone. If confirmed, in any of my decisions, I would hope to have their input and their experience in that decision-making process.

Senator KOHL. Thank you.

Ms. Cook, while OLP is known primarily for its role in filling judicial vacancies, it also plays a role at the Justice Department in conducting policy reviews of legislation implementing Department initiatives, among other things. Can you tell us what your priorities will be in that area for the rest of this administration?

Ms. COOK. If confirmed, my priorities would be to institutionalize the gains that we have made in areas such as combatting violent crime, combatting child exploitation, combatting identity theft, and

combatting human trafficking. These are areas where my office has been very involved in the past in the development of initiatives, in assessing legislation, and I would hope to continue to prioritize those, if confirmed.

Senator KOHL. What will be your biggest challenge, do you imagine, over the next several months?

Ms. COOK. I think the biggest challenge that we will face is the fact that the administration is ending. But from my perspective, now is the time to institutionalize the gains that we have made in numerous areas and to make sure that the Department continues to be a place where great professionals want to work.

Senator KOHL. Where do you think you may have some problems that you will have to deal with, that you might warn us?

Ms. COOK. I'm not aware of any specific areas, but I can tell you that, should areas arise where we feel we could use, for example, additional authorities, we would welcome the opportunity to work with this committee.

Senator KOHL. Thank you, Ms. Cook.

Ms. COOK. Thank you.

Senator KOHL. Judge Davis and others, during Chief Justice Roberts' nomination hearing, much was made of his suggestion that his job as a judge was little more than that of an umpire calling balls and strikes. I'm sure you recollect that. Some of us, in response, suggested that this analogy might be a little too simple, because all umpires, after all, have different zones with respect to balls and strikes. That is because they bring their own unique life experiences to the bench. No two people are exactly similar.

So would you comment on the Chief Justice's comparison to the role of a judge being like that of an umpire?

Mr. DAVIS. Well, Senator—

Senator KOHL. Would you agree with him or do you think the Chief Justice was wrong?

[Laughter.]

I dare you to answer that question, yes or no.

[Laughter.]

Mr. DAVIS. Senator, it is a metaphor, I guess, that he chose to use. I would say that I see the role of a judge as to uphold the rule of law. That's what I've tried to do in the past 5 years while I've served, and to look to the Constitution, to look to the statutes that are passed by this body, and to try to do the best job possible to make sure that everybody in the court is heard, they're heard in a fair manner, and that the process plays out in an open and fair manner.

I think that's the way that I see the role of the judge, to make sure that in the courtroom that happens, that everyone in the adversarial process has the opportunity to be heard and to make sure that the rule of law is what governs the outcome.

Senator KOHL. All right.

Judge Kays.

Mr. KAYS. Thank you, Senator. I agree with much of what Judge Davis has stated. You know, one of the challenges that I think people on the bench—judges have is to ensure that when people leave the courtroom they have a sense that they were treated fairly and

JOINT STATEMENT OF

ELISEBETH COLLINS COOK
ASSISTANT ATTORNEY GENERAL

AND

VALERIE CAPRONI
GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE

ENTITLED

"NEW ATTORNEY GENERAL GUIDELINES FOR DOMESTIC INTELLIGENCE COLLECTION"

PRESENTED

SEPTEMBER 23, 2008

**Joint Statement of**
**Elisebeth Collins Cook**
**Assistant Attorney General, Office of Legal Policy**
**Department of Justice**
**and**
**Valerie Caproni**
**General Counsel**
**Federal Bureau of Investigation**

**Select Committee on Intelligence**
**United States Senate**

**"New Attorney General Guidelines for Domestic Intelligence Collection"**

**September 23, 2008**

Mr. Chairman, Vice Chairman Bond, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the Attorney General's Guidelines for Domestic FBI Operations. We believe that these guidelines will help the FBI continue its transformation from the pre-eminent law enforcement agency in the United States to a domestic intelligence agency that has a national security mission and law enforcement mission.

The new guidelines provide more uniform, clear, and straightforward rules for the FBI's operations. They are the culmination of prior efforts to revise the FBI's operating rules in the wake of the September 11 terrorist attacks. They are consistent with and help implement the recommendations of several distinguished panels for the FBI to coordinate national security and criminal investigation activities and to improve its intelligence collection and analytical capabilities.

These guidelines will protect privacy rights and civil liberties, will provide for meaningful oversight and compliance, and will be largely unclassified. Consequently,

the public will have ready access in a single document to the basic body of operating rules for FBI activities within the United States. The guidelines will take the place of five existing sets of guidelines that separately address, among other matters, criminal investigations, national security investigations, and foreign intelligence collection. They are set to take effect on October 1, 2008.

We have greatly appreciated the interest of this Committee and others in these guidelines. Over the past six weeks, we have made a draft of the guidelines available for review to the Members and staff of this Committee, the House Permanent Select Committee on Intelligence, the Senate Judiciary Committee, and the House Judiciary Committee. We have provided briefings (and made the draft guidelines available for review) to a wide range of interested individuals and groups, including Congressional staff, public interest groups ranging from the American Civil Liberties Union (ACLU) to the Arab-American Anti-Discrimination Council (ADC) to the Electronic Privacy Information Center (EPIC), and a broad set of press organizations. The dialogue between the Department and these individuals and groups has been, in our view, both unprecedented and very constructive. We have appreciated the opportunity to explain why we undertook this consolidation, and we are amending the draft guidelines to reflect feedback that we have received.

## I. Purpose of the Consolidation Effort

Approximately 18 months ago, the FBI requested that the Attorney General consider combining three basic sets of guidelines—the General Crimes Guidelines, which

were promulgated in 2002, the National Security Investigative Guidelines (NSIG), which were promulgated in 2003, and a set of guidelines that are called the Supplemental Foreign Intelligence Guidelines, which were promulgated in 2006.

This request was made for three primary reasons. First, the FBI believed that certain restrictions in the national security guidelines were actively interfering with its ability to do what we believe Congress, the 9/11 Commission, WMD Commission, and the President and the American people want the FBI to do, which is to become an intelligence-driven agency capable of anticipating and preventing terrorist and other criminal acts as well as investigating them after they are committed. The clear message to the FBI has been that it should not simply wait for things to fall on its doorstep; rather, it should proactively look for threats within the country, whether they are criminal threats, counterintelligence threats, or terrorism threats.

Second, the FBI believed that some of the distinctions between what an agent could do if investigating a federal crime and what an agent could do if investigating a threat to national security were illogical and inconsistent with sound public policy. Specifically, the FBI argued that there was not a good public policy rationale for (a) the differences that existed, and (b) the guidelines that governed national security matters to be more restrictive than those that governed criminal matters.

Third, the FBI concluded that having inconsistent sets of guidelines was problematic from a compliance standpoint. The FBI made its request for consolidation after the Inspector General had issued his report on the use of National Security Letters. That report helped crystallize for the FBI that it needed stronger and better internal

controls, particularly to deal with activities on the national security side, as well as a robust compliance program. The FBI argued that, from a compliance standpoint, having agents subject to different rules and different standards depending on what label they gave a matter being investigated was very problematic. The FBI asserted that it would prefer one set of rules because compliance with a single set of rules could become, through training and experience, almost automatic.

The Department agreed with the merits of undertaking this consolidation project, and the result is the draft guidelines we are discussing today. These guidelines retain the same basic structure of predicated investigations on the one hand, and pre-investigative activity on the other—currently called threat assessments on the national security side and prompt and limited checking of leads on the criminal side. The standard for opening a preliminary investigation has not changed and will not change.

The most significant change reflected in the guidelines is the range of techniques that will now be available at the assessment level, regardless of whether the activity has as its purpose checking on potential criminal activity, examining a potential threat to national security, or collecting foreign intelligence in response to a requirement. Specifically, agents working under the general crimes guidelines have traditionally been permitted to recruit and task sources, engage in interviews of members of the public without a requirement to identify themselves as FBI agents and disclose the precise purpose of the interview, and engage in physical surveillance not requiring a court order. Agents working under the national security guidelines did not have those techniques at their disposal. We have eliminated this differential treatment in the consolidated

guidelines. As discussed in more detail below, the consolidated guidelines also reflect a more comprehensive approach to oversight.

## II. Uniform Standards

The guidelines provide uniform standards, to the extent possible, for all FBI investigative and intelligence gathering activities. They are designed to provide a single, consistent structure that applies regardless of whether the FBI is seeking information concerning federal crimes, threats to national security, foreign intelligence matters, or some combination thereof. The guidelines are the latest step in moving beyond a reactive model (where agents must wait to receive leads before acting) to a model that emphasizes the early detection, intervention, and prevention of terrorist attacks, intelligence threats, and criminal activities. The consolidated guidelines also reflect the FBI's status as a full-fledged intelligence agency and member of the U.S. Intelligence Community. To that end, they address the FBI's intelligence collection and analysis functions more comprehensively. They also address the ways in which the FBI assists other agencies with responsibilities for national security and intelligence matters.

The issuance of these guidelines represents the culmination of the historical evolution of the FBI and the policies governing its domestic operations that has taken place since the September 11, 2001, terrorist attacks. In order to implement the decisions and directives of the President and the Attorney General, to respond to inquiries and enactments of Congress, and to incorporate the recommendations of national

commissions, the FBI's functions needed to be expanded and better integrated to meet contemporary realities. For example, as the WMD Commission stated:

> [C]ontinuing coordination . . . is necessary to optimize the FBI's performance in both national security and criminal investigations . . . . [The] new reality requires first that the FBI and other agencies do a better job of gathering intelligence inside the United States, and second that we eliminate the remnants of the old "wall" between foreign intelligence and domestic law enforcement. Both tasks must be accomplished without sacrificing our domestic liberties and the rule of law, and both depend on building a very different FBI from the one we had on September 10, 2001. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 466, 452 (2005).)

To satisfy these objectives, the FBI has reorganized and reoriented its programs and missions, and the guidelines for FBI operations have been extensively revised over the past several years. For example, the Attorney General issued revised versions of the principal guidelines governing the FBI's criminal investigation, national security investigation, and foreign intelligence collection activities successively in 2002, 2003, and 2006.

Despite these revisions, the principal directives of the Attorney General governing the FBI's conduct of criminal investigations, national security investigations, and foreign intelligence collection have persisted as separate documents that impose different standards and procedures for comparable activities. Significant differences exist among the rules these separate documents set for core FBI functions. For example, even though activities that violate federal criminal laws and activities that constitute threats to the national security oftentimes overlap considerably, FBI national security investigations have been governed by one set of rules and standards, while a different set of rules and

standards has applied to the FBI's criminal investigations generally. These differences have created unfortunate situations where the same kind of activity may be permissible for a criminal investigation but may be prohibited for a national security investigation.

As an example of how the prior guidelines treated comparable activities differently based on how those activities were categorized, consider the question of what the FBI can do in public places. Under the multiple guidelines regime, the rules were different if the FBI received a tip that a building was connected to organized crime as opposed to a tip that the building was connected to a national security matter, such as international terrorist activity. The rules for how long the FBI could sit outside the building, or whether the FBI could follow someone exiting the building down the street, were different; specifically, more restrictive on the national security side and difficult to apply. It makes no sense that the FBI should be more constrained in investigating the gravest threats to the nation than it is in criminal investigations generally.

Similarly, under the prior guidelines, human sources—that is, "informants" or "assets"—could be tasked proactively to ascertain information about possible criminal activities. Those same sources, however, could not be proactively tasked to secure information about threats to national security, such as international terrorism, unless the FBI already had enough information to predicate a preliminary or full investigation.

The consolidated guidelines we are discussing today carry forward and complete this process of revising and improving the rules that apply to the FBI's operations within the United States. The new guidelines integrate and harmonize these standards. As a result, they provide the FBI and other affected Justice Department components with

clearer, more consistent, and more accessible guidance for their activities by eliminating arbitrary differences in applicable standards and procedures dependent on the labeling of similar activities ("national security" versus "criminal law enforcement"). In addition, because these guidelines are almost entirely unclassified, they will make available to the public the basic body of rules for the FBI's domestic operations in a single public document.

## III. Coordination and Information Sharing

In addition to the need to issue more consistent standards, the FBI's critical involvement in the national security area presents special needs for coordination and information sharing with other DOJ components and Federal agencies with national security responsibilities. Those components and agencies include the Department's National Security Division, other U.S. Intelligence Community agencies, the Department of Homeland Security, and relevant White House agencies and entities. In response to this need, the notification, consultation, and information-sharing provisions that were first adopted in the 2003 NSIG are perpetuated in the new guidelines.

## IV. Intelligence Collection and Analysis

Additionally, the new guidelines carry out a significant area of reform by providing adequate standards, procedures, and authorities to reflect the FBI's character as a full-fledged domestic intelligence agency—with respect to both intelligence collection and intelligence analysis—and as a key participant in the U.S. Intelligence Community.

In relation to the collection of intelligence, legislative and administrative reforms expanded the FBI's foreign intelligence collection activities after the September 11, 2001, terrorist attacks. These expansions have reflected the FBI's role as the primary collector of intelligence within the United States—whether it is foreign intelligence or intelligence regarding criminal activities. Those reforms also reflect the recognized imperative that the United States' foreign intelligence collection activities inside the United States must be flexible, proactive, and efficient in order to protect the homeland and adequately inform the United States' crucial decisions in its dealings with the rest of the world. As the WMD Commission stated in its report:

> The collection of information is the foundation of everything that the Intelligence Community does. While successful collection cannot ensure a good analytical product, the failure to collect information . . . turns analysis into guesswork. And as our review demonstrates, the Intelligence Community's human and technical intelligence collection agencies have collected far too little information on many of the issues we care about most. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 351 (2005).)

The new guidelines accordingly provide standards and procedures for the FBI's foreign intelligence collection activities that are designed to meet current needs and

realities and to optimize the FBI's ability to discharge its foreign intelligence collection functions.

In addition, enhancing the FBI's intelligence analysis capabilities and functions has consistently been recognized as a key priority in the legislative and administrative reform efforts following the September 11, 2001, terrorist attacks. Both the Joint Inquiry into Intelligence Community Activities and the 9/11 Commission Report have encouraged the FBI to improve its analytical functions so that it may better "connect the dots."

> [Counterterrorism] strategy should . . . encompass specific efforts to . . . enhance the depth and quality of domestic intelligence collection and analysis . . . . [T]he FBI should strengthen and improve its domestic [intelligence] capability as fully and expeditiously as possible by immediately instituting measures to . . . significantly improve strategic analytical capabilities . . . . (Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. Rep. No. 351 & H.R. Rep. No. 792, 107th Cong., 2d Sess. 4-7 (2002) (errata print).)
>
> A "smart" government would *integrate* all sources of information to see the enemy as a whole. Integrated all-source analysis should also inform and shape strategies to collect more intelligence . . . . The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to "connect the dots." (Final Report of the National Commission on Terrorist Attacks Upon the United States 401, 408 (2004).)

The new guidelines accordingly incorporate more comprehensive and clear authorizations for the FBI to engage in intelligence analysis and planning, drawing on all lawful sources of information. The guidelines will allow the FBI to do a better job of being an intelligence-driven agency.

To be an intelligence-driven agency, the FBI needs to be asking questions. What is the threat within our environment? To give an example, without the new quidelines, if the question were asked of a Special Agent in Charge (SAC) of an FBI field office, "Do you have a problem of theft of high technology or theft of classified information within your domain?" the answer would be phrased in terms of how many cases were open. But the number of cases open is a reflection only of what has already been brought to the FBI's attention; it is not an accurate measure of the true scope of a given risk.

The new guidelines will allow the FBI fundamentally to change who it approaches in answering the types of questions that we believe this Committee and the American people would like it to be answering. If a field office is seeking to assess whether it has a substantial threat within its area of responsibility of theft of classified or sensitive technology, it might begin the analytic work necessary to reach a conclusion by considering whether there are research universities in the area that are developing the next generation of sensitive technology or doing basic research that will contribute to such technology and considering whether there are significant defense contractors in the area. From there, the field office should compare those potential vulnerabilities with specific intelligence regarding the intentions of foreign entities to unlawfully obtain sensitive technology.

If an SAC determines that, within his or her area of responsibility, sensitive technology is being developed at a local university that is of interest to foreign powers, the SAC should then determine whether there are individuals within the field office's area of responsibility that pose a threat to acquire that technology unlawfully. In this

example, a logical place to start would be to look at the student population to determine whether any are from or have connections to the foreign power that is seeking to obtain the sensitive technology.

Under existing guidelines, agents are essentially limited to working overtly to narrow the range of potential risks from the undoubtedly over-inclusive list of students with access. They can talk to existing human sources, and they can ask them: "Do you know anything about what's going on at the school? Do you know any of these students?" If the agent does not have any sources that know any of the students, then the assessment is essentially stopped from a human source perspective, because recruiting and tasking sources under the national security guidelines is prohibited unless a preliminary investigation is open. Similarly, the agent also cannot do a pretext interview without a preliminary investigation open, but the agent does not have enough information at that point to justify opening a preliminary investigation. An overt interview in the alternative may be fine in a wide range of scenarios, but could result in the end of an investigation by tipping off a potential subject of that investigation.

At the end of the day, the inability to use techniques such as recruiting and tasking of sources, or engaging in any type of interview other than an overt one, was inhibiting the FBI's ability to answer these types of intelligence-driven questions.

The ability to use a wider range of investigative techniques at the assessment stage, prior to the opening of a predicated investigation, is a critical component of the FBI's transformation into an intelligence-driven organization. Since 2003, we have had the ability to conduct threat assessments to answer questions such as whether we have

vulnerabilities to or a problem with the theft of sensitive technology in a particular field office. With the new consolidated guidelines, the FBI will now have the tools it needs to ascertain the answer to those questions more efficiently and effectively.

## V. Oversight and Privacy and Civil Liberties

The new guidelines take seriously the need to ensure compliance and provide for meaningful oversight to protect privacy rights and civil liberties. They reflect an approach to oversight and compliance that maintains existing oversight regimes that work and enhances those that need improvement.

As a result of the stand up of the National Security Division, and the reports by the Inspector General on the use of National Security Letters, the Department and the FBI have been engaged in extensive efforts to reexamine and improve our oversight and compliance efforts in the national security area. Our assessment has been that oversight in the criminal arena is provided through the close working relationship between FBI agents and Assistant U.S. Attorneys (AUSAs), as well as the oversight that comes naturally in an adversarial system for those investigations that ripen into prosecutions. Oversight on the national security side is different because of more limited AUSA involvement and because ultimate criminal prosecutions are less frequent in this area.

Traditionally, on the national security side, oversight was accomplished through two primary means: notice and reporting to then-Office of Intelligence Policy and Review, now a part of the National Security Division, and through filings with the FISA Court. We believe that conducting oversight in this manner was not as effective as the

system set forth in the new guidelines. The prior oversight system was based primarily on reporting and generated many reports from the FBI to the Department that did not provide meaningful insight into the FBI's national security investigations. Thus, the Department's oversight resources were not focused on those activities that should have been the highest priority—namely, those activities that affected U.S. persons. Moreover, to the extent that the process relied in part in filings with the FISA court for more in-depth oversight, it was under-inclusive. Many national security investigations proceed without ever seeking or obtaining an order from the FISA Court. The guidelines establish an approach to oversight that focuses the Department's oversight efforts on protecting the civil liberties and privacy rights of Americans in all national security investigations.

The new guidelines accomplish oversight on the national security side in a number of ways. The guidelines require notifications and reports by the FBI to the National Security Division concerning the initiation of national security investigations and foreign intelligence collection activities in various contexts. They also authorize the Assistant Attorney General for National Security to requisition additional reports and information concerning such activities. Additionally, many other Department components and officials are involved in ensuring that activities under the guidelines are carried out in a lawful, appropriate, and ethical manner, including the Justice Department's Office of Privacy and Civil Liberties and the FBI's Privacy and Civil Liberties Unit, Inspection Division, Office of General Counsel, and Office of Inspection and Compliance. A significant component of the oversight that will be provided by the

National Security Division will come in the form of "National Security Reviews," which are the in-depth reviews of national security investigations that the National Security Division and the FBI's Office of General Counsel commenced following the Inspector General's report on National Security Letters in 2007.

Moreover, the new guidelines carry over substantial privacy and civil liberties protections from current investigative guidelines. They continue to prohibit the FBI from investigating or maintaining information on United States persons in order to monitor activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. In connection with activities designed to collect foreign intelligence in response to Intelligence Community requirements, where the lawful activities of U.S. persons can be implicated, the guidelines require the FBI to operate openly and consensually with U.S. persons, if feasible. Additionally, as the Attorney General emphasized when he testified before the Senate Judiciary Committee, the guidelines prohibit practices (such as racial or ethnic "profiling") that are prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

The issue of how investigators may take race, ethnicity, or religion into account during an investigation is a difficult question, but it is not a new question. We have long recognized that it is not feasible to prohibit outright the consideration of race, ethnicity or religion—the description of a suspect may include the race of the perpetrator, and groups (such as Aryan Brotherhood, La Cosa Nostra, or the IRA) that are under investigation may have membership criteria that tie to race, ethnicity, or religion. But it is also the case that it cannot be, and should not be, permissible to open an investigation based only on an

individual's perceived race, ethnicity, or religion. We believe that the balance struck in 2003 in this regard—reflected in the Attorney General's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies—is the appropriate one, and we have not changed that balance.

These guidelines continue to require notice to appropriate Department officials when investigations involve domestic public officials, political candidates, religious or political organizations, or the news media. Moreover, as a matter of FBI policy, the FBI imposes higher levels of approval on many activities that have an academic nexus, reflecting the American tradition of academic freedom in our institutions of higher learning.

Finally, these guidelines operate in conjunction with numerous privacy and civil liberties officials and components within the FBI and Department of Justice. As mentioned earlier, the vast majority of the new guidelines will be made available to the public, thereby providing the public with more ready access to the rules governing FBI activities within the United States. Before the consolidated guidelines take effect, the FBI will carry out comprehensive training to ensure that their personnel understand these new rules and will be ready to apply them in their operations. Indeed, this training is already underway. The FBI is also developing appropriate internal policies to implement and carry out the new guidelines. These policies cannot afford agents or supervisors more flexibility than the guidelines themselves but can, and in several cases do, set forth additional restrictions.

## VI. Conclusion

Over the last seven years, the FBI has altered its organizational structure, and the Attorney General has issued new policies to guide the FBI as it seeks to protect the United States and its people from terrorism, intelligence threats, and crime, while continuing to protect the civil liberties and privacy of it citizens. The changes reflected in the new guidelines are necessary in order for the FBI to continue its important transformation to being an intelligence-driven organization. We believe that using intelligence as the strategic driver for the FBI's activities will improve its ability to carry out its national security, criminal law enforcement, and foreign intelligence missions.

Thank you again for the opportunity to discuss these issues with you, and we will be happy to answer any of your questions.

# Question 12(d)

December 2009 Call Regarding USA PATRIOT ACT Reauthorization

Lone Wolf

- Allows intelligence investigators to use FISA authorities where they can provide probable cause that the target is a terrorist, but cannot demonstrate a connection to a specified foreign power or terrorist organization.
- Available only with respect to non-USPers, and there must be a link to "international terrorism" as defined by FISA
- Added in 2004, by section 6001 of the Intelligence Reform and Terrorism Prevention Act
- Before 2004, had to demonstrate that the target was an agent of or acting on behalf of a foreign power
- Often called the Moussaoui fix because there were widespread reports that agents did not get a FISA search warrant for his computer because they could not show the link.
- The Department of Justice has indicated that this authority has not been used. However, the Department supports reauthorization of the provision, given the potential consequences of unavailability should it sunset. Two scenarios come to mind: a falling out among thieves—where an individual severs ties with a terrorist organization, or an individual who "self-radicalizes"
- The Senate Judiciary version would extend the sunset to 2013, the House Judiciary version would allow the provision to sunset.

National Security Letters

Background

- Very valuable tool for national security investigators, comparable to an administrative subpoena. They are almost invariably accompanies by a nondisclosure requirement.
- Outset of investigations, allow investigators to obtain specified information from specified institutions.
- There are a number of NSL provisions, but most focus is on the provision in ECPA-- non-content information such as subscriber information related to a telephone number and toll billing information—the numbers that have been dialed.
- The current standard is relevance to an authorized national security investigation—comparable to a grand jury subpoena. Prior to the Patriot Act, a higher standard than the relevance standard, and very high sign-off requirements.
- Patriot Act made the National Security Letters a "bread and butter" tool for national security investigators. No sunset was provided.

- One of the few tools that can be used absent a grand jury or AUSA. But, not self-executing.
- As part of the reauthorization process, numerous civil liberties safeguards were provided with respect to the use of NSLs, including most notably providing a means for challenging the nondisclosure requirement that generally accompanies an NSL. The 2006 reauthorization also clarified that recipients could consult with a lawyer, required some public reporting, and directed the Inspector General to review the FBI's use of NSLs.
- The Inspector General's report identified significant deficiencies related to the FBI's use of NSLs—most notably the use of so-called "exigent letters," with internal tracking, and with overcollection.
- As a result of the IG report, the FBI made significant changes to the way that it used NSLs—starting with eliminating the use of "exigent letters." The FBI has updated its tracking information, so there is a better sense of how and when NSLs are being used.
- In the context of overhaul of internal oversight—new compliance division within FBI, dedicated oversight in Main Justice—oversight not confined to FISA authorities.

Divide into three separate aspects—the standard for the NSL, the nondisclosure requirement, and other issues such as minimization.

First, both bills would impose a sunset in 2013, returning to pre-Patriot language

Second, both bills would have the effect of changing the substantive standard for issuance of the NSL:

- Current standard is relevance to an authorized national security investigation—this does not include threat assessments, instead it must be a preliminary or full investigation
- Senate requires separate writing for the files, with specific facts indicating that the information sought will be relevant to an authorized investigation
- House states that no NSL shall issue absent certification for files with specific and articulable facts giving reason to believe information sought will pertain to a terrorist or a spy.
- The House bill will effectively be a return to the pre-Patriot days—significant operational difficulties.

Third, both bills would amend the judicial review provisions for the nondisclosure requirement, leaving intact the review provisions for the NSL itself

- Currently, recipient must challenge. A high-ranking official must certify that one of the enumerated harms (e.g., to national security, an investigation, or to a person) may occur. Judge required to defer to this judgment absent bad faith.
- Senate bill—recipient gives notice to the government, government files for an order. Bill requires a certification from high-ranking official that one of the delineated harms may occur. Judge must give this certification substantial weight. Then shall enter the nondisclosure order if makes such a finding.

- House bill requires certification supported by specific and articulable facts. There is no deference required to the judgment of the Executive branch official.
- The government has historically argued that some measure of deference must be accorded. [That said, the process aspects are similar to what the Second Circuit imposed in 2008 through a panel decision—one that was not taken en banc and no Supreme Court review sought.]

Fourth, both bills would impose minimization procedures regarding the acquisition, retention, and dissemination of information obtained through NSLs.

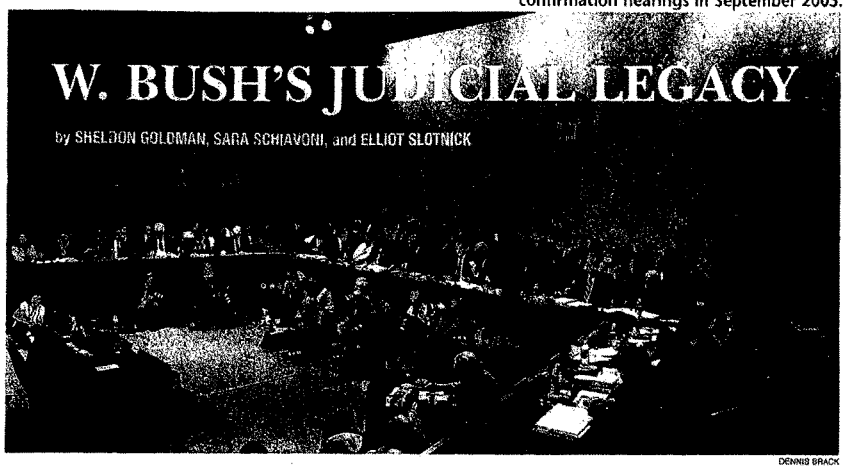
- Minimization historically applied to things like full-content surveillance or search warrants, given the privacy interests at stake. Over time, a movement to impose statutory minimization requirements—in 2006, it was with respect to business records. This year, with respect to pen registers and NSLs.
- Currently, there are no statutory requirements. However, after IG reports, FBI done a good deal of thinking about how to treat NSL information—regarding overcollection and stale information. That said, NSLs tend to provide the classic dots to be connected—a phone number that seems like the pizza delivery guy this time suddenly becomes relevant when it turns out the next cell just happens to use the same delivery service.
- Interesting to see what the government will say about these procedures—historically been loathe to destroy information it has

Civil Immunity for Electronic Communications Services Providers

- Added to FISA as part of the FISA Amendments Act of 2008, after a good deal of discussion
- Designed to offer retroactive immunity to companies that had assisted the government with a good faith basis that their actions were legal
- Numerous companies facing difficult civil litigation
- As was explained throughout the process, the government depends upon the assistance of third parties, and it seems inherently unfair to then leave those companies subject to law suits. It will also have a chilling effect going forward.
- Not carte blanche for the companies— Need a certification from the AG to this effect--A court then reviews the certification
- limited to the period between September 11 and January 2007; in cases without a court order, needs to be activities that were done pursuant to a written directive from the AG (or comparable official) indicating that the activities were authorized by the President and were lawful.
- Some want to roll back the immunity and simply let the cases proceed; others would substitute the government for the private parties. Both have raised concerns about disclosure of information and the fairness point.

# Question 12(e)

Judge John Roberts appears before the Senate Judiciary Committee during his confirmation hearings in September 2005.



DENNIS BRACK

# W. BUSH'S JUDICIAL LEGACY

by SHELDON GOLDMAN, SARA SCHIAVONI, and ELLIOT SLOTNICK

# MISSION ACCOMPLISHED

George W. Bush's legacy includes the appointment of like-minded Supreme Court justices and lower court judges selected by a process structured to achieve that result.

George W. Bush left the White House on January 20, 2009, with an overall legacy that is sure to be debated for some time. That legacy includes the worst financial crisis since the Great Depression, a country at war on two fronts, a crushing deficit, and much unfinished business on the domestic policy front ranging from health care to tax policy. He left office with Democrat Barack Obama winning the White House in the 2008 presidential election with a decisive electoral college and popular vote margin, in marked contrast to the elections of 2000 and 2004 and with Democrats firmly in control of both houses of Congress. He left office with a presidential approval rating that, according to a CBS tracking poll, was the lowest of any president since polling began.[1] Yet, George W. Bush left a judicial legacy that even his political opponents concede has had a major impact in the reshaping of the federal judiciary. Indeed, as we suggest here, his judicial legacy may well be Bush's most enduring accomplishment.

The last two years of the Bush presidency were different than his first six years. The congressional elections of 2006 saw the Republicans lose control of both houses of Congress. Ongoing crises both international and domestic no doubt took their toll on the President's ability to pursue his agenda. Democratic control of the Senate, although by a slim margin, meant that it would be harder for the President to gain confirmation of his judicial nominees, especially those perceived by Democrats and liberal interest groups as too ideologically committed to an activist conservative agenda.

Nevertheless, when the last two years of the Bush presidency were over, 58 of the 79 nominees to the federal district courts and 10 of the 22 nominees to the appeals courts of general jurisdiction submitted to the 110th Congress were confirmed by the Senate. In percentages, 73 percent of the district court nominees and 46 percent of the appeals court nominees were confirmed. This was

The authors would like to thank the dedicated staffs of Senators Patrick Leahy and Arlen Specter at the Senate Judiciary Committee. We deeply appreciate their taking the time to speak with us. In addition, members of the Bush administration, and several people outside government gave generously of their time and offered valuable help. We are especially thankful to Nan Aron, Elisabeth Cook, Curt Levey, Nicholas Rossi, Kate Todd, and Jay Sekulow. Thanks are due to Dustin Koenig for transcribing the interviews. Errors of fact and interpretation are solely the responsibility of the authors.

1. See http://latimesblogs.latimes.com/presidentbush/polls/ viewed May 2, 2009.

a confirmation rate that modestly exceeded the historic low rates during Clinton's last two years in office (also with an opposition controlled Congress).[2]

This article continues the story of W. Bush's judicial appointments, a story that follows the format of previous articles in our biennial accounting of judicial selection during each previously completed Congress.[3] We pay particular attention to the demographic portrait of the Bush appointments to the lower federal courts and appointment and confirmation processes during Bush's last two years in office (that is, during the life of the 110th Congress). We also consider the broader question of Bush's judicial legacy.

Our sources of data include personal interviews with officials in the White House, Department of Justice, and the Senate who played a role in either the nomination or confirmation process (or both) and interest group observers who ranged across the ideological spectrum. For the demographic data on the appointees, we relied on the questionnaires that judicial nominees complete for the Senate Judiciary Committee. Other sources of demographic or background data include newspaper articles and biographical directories.[4] Data on political party affiliation or preference was collected not only from the just mentioned sources but in some instances from the Registrar of Voters or Boards of Elections for the counties in which the appointees maintained their primary residence.

We first examine the selection process, particularly during the President's last two years in office, followed by a consideration of the confirmation process during this period of divided government. Subsequent sections consider the demographic portrait of the last two years' appointees to the district and appeals courts compared to the appointees from the first six years; a comparison of the nontraditional to the traditional appointees; and then a comparison of the demographic profile of the entire cohort of Bush appointees for each of those courts compared to the demographic profiles of the judiciaries of Bush's four immediate predecessors. We conclude with a summary assessment of Bush's judicial legacy followed by our take on what we can expect from the Obama presidency.

## The politics of selection

While the politics surrounding judicial selection and confirmation during the final two years of the W. Bush presidency were not without interest, for a number of reasons it would be fair to say that the excitement, drama, and attention by the American public and the media waned significantly from the previous six years. This was the case for a number of inter-related and quite understandable reasons.

Some of these were historical and institutional in nature. First, any lame duck president is unlikely to enjoy the cache to press forward with large numbers of nominees when the Senate is controlled by the opposition party hopeful of winning the presidency in the upcoming election and enjoying its judicial spoils.

Indeed, under the ill-defined "Thurmond Rule" (discussed below), so named for the South Carolina Senator who is said to have originated the norm when he was ranking minority member of the Senate's Judiciary Committee, there comes a time in a presidency, which has generally fallen at an undetermined date in the late Spring or early Summer, prior to a national election, when the curtain comes down on Judiciary Committee processing of presidential nominees and all judicial vacancies remain open for the next occupant of the White House to fill. Beyond such historical and institutional reasons for a restrained pace of advice and consent in a lame duck presidency there are a number of circumstances somewhat unique to the context in which the W. Bush administration found itself in its last two years that created an especially challenging judicial selection environment.

For one, the administration had enjoyed extraordinary success in nominating and seating two strong conservative courts of appeals judges to the Supreme Court vacancies created by the death of Chief Justice Rehnquist and the retirement of Justice O'Connor. The relatively swift and smooth confirmation processes enjoyed by John Roberts and Samuel Alito were major triumphs for the W. Bush presidency and, despite the misstep of the ill-fated nomination of Harriet Miers, when all was said and done, the President's political base had gotten all, perhaps more, than they could have hoped for. Successfully appointing Chief Justice Roberts and Justice Alito, in short, energized the conservative Republican base and appeared to be such striking selection successes that, almost by definition, they would be difficult if not impossible acts to follow in the President's last two years in office, particularly absent a third opportunity to seat a justice on the Supreme Court.

Relatedly, the President had also enjoyed extraordinary success in seeing numerous prominent conservatives, many with a strong Federalist Society pedigree, successfully seated on the U.S. courts of appeals. Indeed, throughout the W. Bush presidency, while a good deal of

2. The figures for Clinton's last two years were 57 of 83 district court nominees (68.7%) and 13 of 32 (40.6%) appeals court nominees confirmed.

3. An accounting of the W. Bush administration's selection of judges and the accompanying confirmation politics during the three previous sessions of Congress is recounted in Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?* 86 JUDICATURE 282 (2003); Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *W. Bush's judiciary: The First Term Record*, 88 JUDICATURE 244 (2005); and Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *Picking judges in a time of turmoil: W. Bush's judiciary during the 109th Congress*, 90 JUDICATURE 252 (2007).

4. See THE AMERICAN BENCH, WHO'S WHO (national and regional editions), MARTINDALE-HUBBELL LAW DIRECTORY, and THE JUDICIAL STAFF DIRECTORY.

political gain could be made by highlighting the relatively few appellate nominees who could not get confirmed, with the Democrats being accused of utilizing unprecedented obstruction and delay tactics, the reality is that a veritable all-star team of conservative judges with strong appeal to the Republican base had been seated on the appellate bench during the first six years of the W. Bush presidency.

Among the many examples are Janice Rogers Brown, Jay Bybee, Brett Kavanaugh, Michael McConnell, Priscilla Owen, Jeffrey Sutton, and William Pryor. In the wake of such an impressive roster, only partially documented here, it is little wonder that the selection momentum would slow down in the administration's lame duck period that corresponded, as well, to a relatively low judicial vacancy rate and a selection pool that, perhaps, was not as wide and deep as that available earlier in the W. Bush presidency.

Additional political and institutional factors also played a significant part in ratcheting down the pace and expectations for judicial selection politics in the 110th Congress. The Democratic majority controlling the Senate was now relatively consolidated and strong and Patrick Leahy, the Judiciary Committee Chair, found in ranking minority committee member Arlen Specter an arguably more congenial "leader of the opposition" than had existed for several years in the Leahy-Orrin Hatch pairing.

Indeed, there had been several storms and dramas in the earlier W. Bush years, such as debates over the propriety of Democratic filibustering of judicial nominees, the appropriateness of Republicans resorting to the "nuclear option" as a mechanism to break any filibusters with a "simple" majority, instead of the required 60 votes for attaining cloture, and the pivotal role of the bipartisan "Gang of Fourteen." The "Gang" was composed of seven nominally moderate Democrats and seven like-minded Republicans whose agreement led to the survival of the filibuster power while also seating a number of conservative W. Bush nominees. This was accomplished while bypassing the Senate leadership in an effort to keep the institution from, literally, shutting down. Such events now seem from a distant past, with limited relevance for the judicial selection processes that were played out in the altered context of the 110th Congress.

All of these observations and related concerns were the subjects of our intensive field interviews conducted in early December, 2008, and January 2009, with key judicial selection participants in the W. Bush White House Counsel's office, the Justice Department's Office of Legal Policy, Senate Judiciary Committee staff, and interest group advocates both supportive and critical of the administration's judicial selection behavior. While the multiple perspectives shared with us ran a wide spectrum, we think the weight of the documentation provided well sustains our analysis and conclusions.

## The selection process

The central role judicial appointments played in the administration's domestic policy agenda must be highlighted as the judicial selection processes put in place at the outset of W. Bush's tenure were structured to achieve a lasting legacy on the federal bench. Despite the above mentioned events of the past two years, what did not change was this administration's continued focus on their overarching goal of staffing the federal bench with judges, "who would faithfully interpret the Constitution... and not use the courts to invent laws or dictate social policy."[5] This was patently obvious from our conversations with individuals inside the administration—their message was clear. As Assistant Attorney General Beth Cook noted, "it has been business as usual... judicial nominations have continued to be a priority for this President, we have maintained the same standards and approach to judicial selection and confirmation."[6]

The fundamental structures and processes by which judicial nominees were selected remained remarkably stable across the eight years W. Bush was in office. Judicial selection activity was centered in two different locales, the Department of Justice's Office of Legal Policy (OLP) and the White House Counsel's office.

However, the majority of the actors changed as the Justice Department encountered higher than usual turnover just prior to and shortly after Attorney General Alberto Gonzales resigned mid-way through 2007. Former district court judge Michael Mukasey was nominated and subsequently confirmed as his replacement, and shortly thereafter former Deputy Beth Cook assumed the responsibilities of Rachel Brand as Assistant Attorney General, Office of Legal Policy.[7] Cook confirmed her predecessor's description of the division of labor between the OLP and White House, "Selection is an area where we work together very closely....OLP does continue to have the day-to-day responsibilities for specific vets and background, but... it's an area where we make sure the White House is up-to-date." When consultation with home state senators is necessary, "the White House is in the lead." Subsequent confirmation "is a collaborative effort." When asked directly about who takes the initiative in seeking out nominees, Cook reiterated that, "the consultation process has been run out of the White House, and as far as I know that's been the case throughout this administration."

The internal advisory group at the heart of judicial selection starting with the Reagan presidency and continuing during the Bush years was

5. George W. Bush, *President Bush Discusses Judicial Accomplishments and Judicial Philosophy*. Speech given at the Hilton Cincinnati Netherland Plaza, Cincinnati, OH. October 6, 2008.

6. Interview with Beth Cook, December 15, 2008. This citation and all undocumented citations throughout the remainder of this article are taken from extensive field interviews conducted in December, 2008 and January 2009 in Washington and/or in telephone interviews conducted after our return from the field. In some instances, as per our agreement when granted an interview, the names of our sources will not be included in the citation. We have, however, included an accurate characterization of the judicial selection involvement of all interviewees whether they are identified by name or not.

7. Mukasey is the the first federal court judge to serve in the position since Griffin Boyett Bell served as President Carter's Attorney General.

**Bush appointee Priscilla Owen ( Fifth Circuit Court of Appeals).**

the Judicial Selection Committee, a joint enterprise between the White House and Justice Department. Echoing her previous sentiment that there has been no diminution to the attention paid to judicial selection, Assistant Attorney General Cook affirmed,"The Judicial Selection Committee... has continued to exist throughout the end of this President's time for background and review... It's a regularly scheduled meeting, and it does meet as needed."

When asked about the specific participants on the committee, Cook, similar to her predecessors, described the players, though not in great detail, "It's the same as it has been throughout the Administration, which is those individuals with a voice in the process, and with equity in the process are at the table. It is the Attorney General and the White House Counsel who are the primary participants of the Judicial Selection Committee." Rumors to the contrary, Associate White House Counsel Kate Todd reiterated that it's, "Only government folks, not third parties in those meetings."

The third parties Todd evoked include the so-called "four horsemen"— Jay Sekulow of the American Center for Law and Justice (ACLJ), Leonard Leo of the Federalist Society, C. Boyden Gray, former White House Counsel to President H.W. Bush and former head of the Committee for Justice, and Edwin Meese, III, Attorney General during the Reagan years and now at the Heritage Foundation. These actors were a guiding force for the judicial selection processes in the W. Bush White House.

While reaffirming their participation, Sekulow offered a glimpse at the level of presidential involvement even at this late stage of the game. "At the end of the day, these were his picks. The President makes his selection and then we were kind of outside counsel, if you will, shepherding them through. But it was really handled internally, inside the White House." When specifically asked about how involved the President was, Sekulow responded, "Very.... He was in the loop the entire way through. He took it very seriously." It even appears that the President was quite active in the selection not only of Supreme Court nominees but of circuit court judges as well. Jay Sekulow confirmed, "Yes, absolutely. He relied on his staff for information and expertise, but yes." Clearly W. Bush's continued involvement in the selection of judges for the courts of appeals, even after the successful confirmations of Roberts and Alito, demonstrated his full commitment to the selection of like-minded jurists.

## Winding down

Throughout our examination of the selection processes during Bush's tenure, a few issues persisted year after year—questions surrounding consultation with senators and renomination of controversial nominees—but these seemed to lose import as the curtain fell on the Bush administration's time in office. The thrust of our most recent interviews centered around the question of how the winding down of W. Bush's term impacted the judicial selection process during the 110th Congress, both in terms of the quality of the nominees and the continued commitment of the administration. This, of course, depends somewhat on the vantage point from which the selection process is viewed.

Summarizing the administration's position, Beth Cook argued,

> It's absolutely our experience that we have sought quality candidates, that we have maintained the same positions in what this President is looking for, in terms of judicial philosophy and in terms of the caliber of potential nominees. The process of consultation and the importance of consultation have also been the same throughout the administration. So from our perspective certainly nothing has changed. I don't think we've seen a ratcheting down. Certainly folks within the administration continued to approach the issue of nominations and confirmations with equal levels of commitment and enthusiasm. This remains a priority.

Reaffirming this sentiment, Jay Sekulow, when asked if he saw a change in the types of nominees put forth in the last two years, responded, "No, this President was very consistent in the way he viewed the judicial philosophies of the people he was trying to get confirmed. He never wavered from that commitment."

Not all of the participants saw the administration's actions in such absolutist terms. Intimating that recognition of the changed political context did alter how the administration approached judicial selection and the resulting nominees, Curt Levey, Executive Director of the conservative Committee for Justice, opined,

> Maybe there was a slight diminution in the quality of the nominees, but that could have been for a lot of reasons. It could have been you've already appointed the best people. It could be that his popularity sunk so low that he had very little leverage...I'm not sure he ever had leverage with the Democratic senators, but much of the ballgame from our perspective is energizing the Republican senators...It could have to do with the fact that, after you see your nominees get demonized, it makes you a little shy. If you're asking me, do I think every nominee was great, no. But I think you have to be realistic. And I think given the roadblocks that he faced, both in terms of ideological opposition and in having to work with [certain] senators..., at least to some degree, I really can't find a lot to criticize.

Further, as Levey's comments underscore, any changes in the kind of nominees the administration put

forward during this period reflected different political imperatives than had been in play at the beginning of the administration nearly eight years earlier. "I know a lot of people in the base are not happy with him having nominated Gregory and Parker. A lot of people still criticize that. I think it was a good try. It didn't work and the Democrats gave nothing in return." This reference is, of course, to judges who were Democrats that President Bush nominated to the circuit courts, as part of his first set of nominees, perhaps as an "olive branch" to the opposition.

In perhaps the most pragmatic assessment of how the political landscape impacted the selection process in the 110th Congress, Jay Sekulow acknowledged, "The President had a specific judicial philosophy he was looking for in his nominees, which is his prerogative according to the Constitution.... I think you have to be realistic. When the Senate leadership changed, it changed the equation." For the administration's harshest critics, however, such as Nan Aron, President and founder of the liberal Alliance for Justice, this was a simple matter.

> What we saw was typical of the last two years of an administration—a president who is weaker, has less support, can no longer claim a mandate... a tired Republican army, and excitement about Democratic candidates—so a whole number of factors created a tempered political environment for the Republicans. What you also see at the end of an administration is the pushing of the bottom of the barrel. Those nominees at the bottom of the barrel, those who have no support from senators, and those are always the most problematic.

Even though the administration denied they altered their selection processes over the last two years, there is some evidence to the contrary. At the end of the 109th Congress there were a number of controversial courts of appeals nominations languishing in the Senate Judiciary Committee, and the pattern in prior congressional sessions had been for the administration to simply renominate them. However, W. Bush did not push forward with renomination and in fact withdrew the names of four ideologically extreme nominees in January, 2007.

Staff members of senators on the Judiciary Committee, both Democratic and Republican, acknowledged this attempt to "ratchet down the controversy" surrounding judicial selection. A senior staffer on the Democratic side commented, "We could sense a change, they sort of saw the time winding down, and finally came around to, 'let's start working out some deals.'...They pulled a very controversial nominee in Virginia for the Fourth Circuit that both Webb and Warner opposed... and put in somebody they could confirm." Aides to senators on the other side of the aisle concurred. "We certainly saw, like the Helene White situation, where there was more of an effort to compromise and try to work out some deals. But I think overall, Bush was realistic in a lot of ways trying to nominate people—if you had two Democratic home-state senators, often trying to work with those senators."

However, there remains some disagreement over who should get the most credit for lowering the temperature and, indeed, some believe the closer working relationship between Specter and Leahy made a real difference. Democratic staffers opined,

> There was, in the last two years, I thought, less fighting and skirmishing about judicial nominations and much more... working together, solving problems, salving old wounds...not with the administration, with the minority in the Senate. I thought we ended on a different note and actually had done a good job of ratcheting down the conflicts and ratcheting up cooperation, and it shows in the successes over the period of [these last two] years.

Regardless of whether or not one views the last two years of the Bush administration through the lens of divided government, or where one lies on the continuum of evaluating the most recent nominees, the outcome is essentially the same—Bush was able to fulfill his electoral promises of filling the federal bench with ideologically similar jurists. Curt Levey characterized W. Bush's successes as even more impressive than Reagan's given the context in which Bush labored.

> He may not have equaled the total numbers of a Reagan. But Reagan had, except for his Supreme Court nomination [of Robert Bork], no opposition, whereas Bush had tremendous opposition. So if you are going to factor that in, one could argue that he has been the most effective president on judicial nominations in, certainly, the last fifty years.

When asked if she viewed judicial selection as one of the major accomplishments of the administration, Assistant Attorney General Cook replied,

> Yes, absolutely. Speaking for myself, it's been a privilege to work for this President on this issue. I think his record has been outstanding. I think he came in saying he was looking for folks with a particular judicial philosophy and approach to judging... and I think he's done a remarkable job... I think the President is rightfully proud of his record.

Clearly he is— in a speech to the Federalist Society on the eve of the 2008 election he was quite reflective as he described his judicial legacy.

> The lesson should be clear to every American: Judges matter. And that means the selection of good judges should be a priority for us all....I made a promise to the American people during the campaign that if I was fortunate enough to be elected, my administration would seek out judicial nominees... who would faithfully interpret the Constitution... And with your support, we have kept that pledge. I have appointed more than one-third of all the judges now sitting on the federal bench, and these men and women are jurists of the highest caliber, with an abiding belief in the sanctity of our Constitution.[8]

## Confirmation processes and politics

Perhaps the initial focal point for discussion of the W. Bush administration's confirmation record is the distinction that might be drawn between the overall success enjoyed by Bush, based largely on a record

8. *Supra* n. 5.

developed during his first six years in office, and allegations of diminished success during the 110th Congress. For its part, the administration argued forcefully that its diminished confirmation success was primarily a consequence of the imposition of the so-called Thurmond Rule by the majority Democrats. According to Beth Cook, "We're proud of the work that has been done. I think the President is rightfully proud of the quality of the nominees that he has continued to send up. Do we believe that each one of them should have gotten a hearing, should have gotten an up or down vote? Absolutely."

In Cook's view, much as had been argued during the final year in the Clinton Administration before it, nominees were not being moved even in instances where the constellation of confirmation considerations were aligned in their favor.

> In the beginning of 2007, if you looked at the criteria that were set forth for nominees that should move, nominees with strong state support, ABA well qualified ratings, people who met all of the criteria for what Senator Leahy said would move, Bob Conrad comes immediately to mind, I don't think it's surprising to anyone that we're disappointed that extremely well qualified folks like that didn't even get a hearing.

A similar view was held by Nicholas Rossi, Chief Counsel to ranking Judiciary Committee minority member Arlen Specter.

> Though the vacancy rates are relatively low, and when folks look back at this in terms of historical perspective, the difference of four or five seats may not be the kind of thing that folks view with as much ire as we do in the moment—particularly when we know of specific candidates who have been passed over, it's tough not to personalize the argument. When you have someone like Peter Keisler, the candidate for a seat on the DC Circuit, someone like Glen Conrad, a consensus pick of Senators Warner and Webb, and he couldn't get a hearing, it's hard for us to say we're not disappointed.

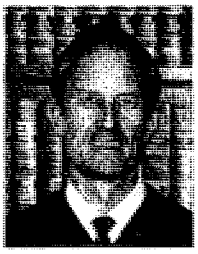
In Rossi's view, Judiciary Committee Chairman Patrick Leahy's interpretation of the Thurmond Rule, one with which he took issue, added to the dif-

# Notable Bush appointees

Among the 68 federal judges confirmed by the Senate of the 110th Congress were a number of individuals with outstanding credentials, of which a sampling is presented here. All of those profiled unanimously received the "Well Qualified" rating by the Standing Committee on the Federal Judiciary of the American Bar Association.

**G. Steven Agee,** born in Roanoke, Virginia, received his undergraduate education at Bridgewater College in Virginia and his legal training at the University of Virginia. From 1977 to 2000 he was in private practice and from 1982-1994 he served in the Virginia House of Delegates. He was very active in Republican politics. In 1993 he was unsuccessful in his bid for the Republican nomination for state attorney general. From 2001-2003 he served on the Virginia state court of appeals and in 2003 he was elected to the Supreme Court of Virginia for a 12-year term. He was nominated on March 13, 2008, for a seat on the U. S. Court of Appeals for the Fourth Circuit, and was confirmed unanimously May 20.

**Sharlon Aycock** has the distinction of being the first woman named to a federal district court judgeship in Mississippi. Judge Aycock was born in Tupelo, Mississippi, graduated from Mississippi State University (undergraduate) and Mississippi College School of Law where she was co-editor-in-chief of the law review. From 1984-1992 she served as prosecuting attorney for Itawamba County. She was active in the Mississippi bar, serving as Mississippi Bar Foundation President during 2000-2001. In 2003, she began service as a state judge, the post she held when nominated on March 19, 2007, for a federal district judgeship for the Northern District of Mississippi. She was confirmed unanimously October 4. Judge Aycock had not been active politically and has been a political independent.



**Philip A. Brimmer,** born in Rawlins, Wyoming, received his undergraduate education at Harvard and his legal training at Yale. Upon graduation, he clerked for federal district judge Zita L. Weinshienk for 18 months. He practiced law in the private sector until he began work in 1994 in the Denver District Attorney's office where he rose through the ranks to become Chief Deputy District Attorney. In 2001, he joined the U.S. Attorney's office and served as an assistant U.S. Attorney until his confirmation as a federal district court judge for the District of Colorado. Although a Republican, Judge Brimmer was not active in politics. His father is Wyoming federal district court judge Clarence A. Brimmer, now on senior status.

**Timothy D. DeGiusti,** born in Oklahoma City, was educated at the University of Oklahoma (both undergraduate and law school). After graduating from law school in 1988, he entered private practice, from which he took three years off to serve as an Army prosecutor in the Judge Advocate General's Corps. At the time of his nomination to the federal district bench for the Western District of Oklahoma, Judge DeGiusti was a partner in a small law firm he helped found seven years earlier. He was nominated and confirmed in 2007, the same year he was listed in Best Lawyers in America. Although a Republican, he was not politically active.

**Philip S. Gutierrez** was born in Los Angeles, did his undergraduate work at Notre Dame, and then received his legal education at UCLA. He was in private practice for 11 years before joining the Los Angeles Superior Court in 1997. He was first nominated to a position on the U.S. District Court for the Central District of California on April 24, 2006, but his nomination was delayed in the partisan wrangling over judgeships that year, although he did have a hearing the following August and was favorably reported out of committee in September. He was renominated on January 9, 2007, favorably reported out of committee on January 25, and unanimously confirmed on January 30. Although a Republican, Judge Gutierrez was not actively involved in politics.

**Thomas Michael Hardiman** was born in Winchester, Massachusetts. He received his undergraduate education at Notre Dame and his law school education at Georgetown. He was in private practice and also active in Pennsylvania Republican politics when tapped in 2003 by George W. Bush for the United States District Court for the Western District of Pennsylvania. He was elevated to the United States Court of Appeals for the Third Circuit in 2007 following his unanimous confirmation by the Senate.

**Richard A. Jones,** born in Seattle, received his undergraduate education at Seattle University and his legal education at the University of Washington School of Law. He served as a King County prosecuting attorney for three years. He later served as an assistant U.S. Attorney for about six years before joining the King County Superior Court bench in 1994. On March 19, 2007, he was nominated for the federal district bench for the Western District of Washington. He was confirmed unanimously the following October. A political independent, Judge Jones had not been active in politics.

ficulties in moving circuit nominees in the 110th Congress.

Rossi continued,

> Our position was that the Thurmond Rule was more myth than reality..... And as far as it went, it should not have limited some of the consensus nominees that were teed up towards the latter half of this session.... Certainly Senator Leahy maintained that he was being faithful to the rule in insisting upon consensus not only by the home state senators and the ranking member and Chair of the Judiciary Committee, but also by the minority leader and the majority leader.... At the end of the day, I suspect that Senator Leahy may suggest that the reason more circuit nominees were not moved has to do with the Thurmond Rule and the fact that winning the approval of the majority leader in a tight election year was not likely to happen.

Rossi also anticipated and disputed the notion that the reason for the President's diminished success could be traced to the amount of time and resources spent seeking confirmation of difficult, sometimes unconfirmable nominees instead of seeking to augment its sheer numbers. "They will point to our efforts on Southwick and others as things that slowed the process. They'll say, 'well, had you not spent so much time on him, we maybe could have gotten three or four more done.' We don't accept that argument, but it's one that they will likely make."

True to Rossi's prediction, senior staff members of Democratic senators on the Judiciary Committee indicated their satisfaction with what had been accomplished in the 110th Congress while also noting that those accomplishments could have been greater if the administration had taken a different approach.

According to one such staffer, "It was weird because they knew what time of the year it was. They know how we work... Even if we wanted to send everybody over, they were getting them to us after the August recess. They were trying to run up the numbers on those we hadn't confirmed as opposed to a real effort to work together and get them through." Another aide added that, "there was a time very early in the

year when the Chairman even said publicly, 'Look, this is the time. Let's get together....' So while we made significant progress, did we accomplish everything we could have working together? No. We all could have done a better job."

### The long view

Importantly, the broader the lens focused on assessing the administration's appointment record across its eight years in office, the more impressive the characterization of its accomplishments. According to Nan Aron, W. Bush, "cemented the modern day revolution started by Reagan to pack the courts with judges who seek less government intervention in the lives of ordinary people.... To some extent he helped fulfill a dream of Ronald Reagan's which was to leave behind a federal bench packed with like-minded judges."

Also taking the long view, Jay Sekulow was effusive in his assessment.

> Concerning the overall...eight year period, from my philosophical position it's hard to be anything but enthusiastic about Roberts and Alito.... I think he [President Bush] has had a lasting mark on the Supreme Court.... The same is true for some of the appellate courts.... Knowing who the nominees are, most of them are young. They'll be around for a long time....You take a look at people like Janice Rogers Brown, Bill Pryor, Priscilla Owen, these are very bright intellects. They're very good judges and they are going to be leaders. So I think it is going to be a long-term legacy. When the President is eighty five, judges like Bill Pryor will be in their sixties. So they're going to be around a long time.

Nicholas Rossi offered a very similar assessment.

> He'll actually be viewed as relatively successful over the eight years... You can't underestimate the importance of being able to place two Supreme Court nominees on the Court and, too, whether you're supportive of them or not, two very qualified nominees... I think beyond the numbers, when you look at his imprint on the judiciary, I think he'll be seen as successful in appointing the kind of judges he wanted to appoint, and reasonably successful in having them processed, even with the opposition party controlling the Senate the last two years.

**C. Darnell Jones II** was born in Claremore, Oklahoma, received his undergraduate education at Southwestern College, and his legal training at American University. He settled in Philadelphia following graduation from law school and worked as a public defender for 12 years before becoming a judge on the Philadelphia Court of Common Pleas. In 2007, he was an unsuccessful candidate for the Democratic Party nomination for Justice on the Pennsylvania Supreme Court. On July 24, 2008, he was nominated for a seat on the federal district court bench for the Eastern District of Pennsylvania. The following September 26 he was confirmed unanimously.

KIRK SHEPHERD PHOTOGRAPHY, CHICAGO, IL

**Frederick J. Kapala** was born in Rockford, Illinois. He went to Marquette University and then received his legal education at the University of Illinois. For about one year he served as an assistant state's attorney before entering private practice for about five years. In 1982, he embarked upon a judicial career, serving on various state courts. He was an Illinois appellate court judge when he was nominated to the federal district bench for the Northern District of Illinois on December 5, 2006. He was renominated in 2007, and confirmed unanimously on May 8, 2007. Prior to his judicial career, he was involved in Republican politics.

**Stephen N. Limbaugh, Jr.,** son of now retired federal district judge Stephen N. Limbaugh Sr. and cousin to Rush Limbaugh, was born in Cape Girardeau, Missouri, which is still his home. He earned both his undergraduate and law school degrees at Southern Methodist University. Upon graduation, he did a four-year stint as a prosecutor. His career as a judge began in 1987 with service as a state circuit judge and placement on the Supreme Court of Missouri in 1992, the post he occupied when named to the federal district court for the Eastern District of Missouri on December 6, 2007. He was confirmed unanimously the following June 10. Prior to his judicial career he was active in Republican politics, including serving as an alternate delegate to the Republican National Convention in 1984.

**Debra Ann Livingston** was named to the U.S. Court of Appeals for the Second Circuit, coming to the bench from serving as a law professor at the Columbia University School of Law. Judge Livingston was born in Waycross, Georgia, did her undergraduate work at Princeton University, and her law school training at Harvard where she was an editor of the law review. After completing law school she clerked for federal appeals court judge J. Edward Lumbard in 1984-1985. She had prosecutorial experience as an assistant U.S. Attorney for the Southern District of New York from 1987-1994 before joining the faculty at Columbia. Although a registered Republican, she was not active in politics. On June 28, 2006, she was nominated for a seat on the Second Circuit. She was renominated in 2007, and confirmed unanimously on May 9.

**Kiyo A. Matsumoto** was born in Raleigh, North Carolina. She earned her undergraduate degree from Georgetown and her law degree from the University of California at Berkeley. From 1983 to 2000 she was an assistant U.S. Attorney. In 2004, she was appointed a U.S. Magistrate Judge, the position she held when nominated to the federal district bench for the Eastern District of New York on March 11, 2008. She was confirmed unanimously on July 16. Although a registered Democrat and Democratic Senator Schumer's candidate, Judge Matsumoto had no history of political activity.

**John A. Mendez** was born in Oakland, California, and graduated from Stanford University and Harvard Law School. His wide-ranging legal experience included a two- year stint as an assistant U.S. Attorney from 1984-1986 and serving as U.S. Attorney from August 1992 until July 1993. In June of 2001 his judicial career began with his placement as a Superior Court judge in Sacramento County, the post he held when named to the federal district court bench for the Eastern District of California on September 6, 2007. He was confirmed unanimously the following April 10. Judge Mendez is not affiliated with any political party and has no history of party activity.

**Reed Charles O'Connor** comes from Texas (he was born in Houston). He received his undergraduate education at the University of Houston and his legal training at South Texas College of Law. Before his nomination to the federal district court for the Northern District of Texas in 2007, he was a career prosecutor. He served as an assistant district attorney for Tarrant County from 1994-1998 and then became an assistant U.S. Attorney, the position he held when nominated to the federal bench. At the time of his nomination he was on assignment to the Subcommittee on Immigration, Border Security, and Citizenship, working closely with Republican Texas Senator John Cornyn for the previous almost two and one-half years. A Republican, Judge O'Connor had not been active in politics.

**Mary Stenson Scriven** was born in Atlanta, Georgia, received her undergraduate education at Duke, and her legal training at Florida State. After graduation she was in private practice for 10 years before becoming a U.S. Magistrate in 1997, the post she held when named to the Middle District of Florida. She was nominated on July 10, 2008, and was confirmed unanimously on September 26. Active in the Federal Magistrate Judges Association, she was slated to become President-Elect for 2008-2009. A Democrat, she did not have a history of prominent partisan activism, although she served as a legislative assistant to the House Majority Office in the Florida House of Representatives in 1985-1986.

**Cathy Seibel** was born in West Islip, New York. She did her undergraduate work at Princeton and received her legal education at Fordham University where she was editor-in-chief of the law review. Upon graduating law school, she was a law clerk for federal district judge Joseph M. Laughlin. In 1987, she became an Assistant U.S. Attorney, and held the post of First Assistant United States Attorney when nominated for the Southern District of New York on March 11, 2008. She was

## Successes and failures

Indeed, one might even argue that the administration had its fair share of unanticipated successes, even during its weakest confirmation context, the last two years corresponding to the 110th Congress. Specifically, three interesting events during this period warrant exploration in greater detail. These are the late term confirmations of 10 district court judges on September 26, 2008, well after the Thurmond Rule would have been invoked, regardless of whose definition of the day for its implementation was utilized; the seating of an extremely controversial nominee, Leslie Southwick, on the U.S. Court of Appeals for the 5th Circuit, while strong allegations of racism swirled around him; and the successful ending of the struggle over the filling of circuit court judgeships on the U.S. Court of Appeals for the 6th Circuit, a controversy that spanned the better part of the two term presidencies of Bill Clinton and George W. Bush.

Regarding the seating of 10 district court nominees in late September, on the cusp of a presidential election that the Democrats were favored to win, a senior aide to a senior Democrat on the Judiciary Committee voluntered that, "There was flak from our own party to move anybody at that time when the thinking is, 'shut this down, you've already done...more than the Republicans did.' We had done at that point 158; the Republicans had done 159 for Bush so we ended up doing ten more."

Not happy with what could be perceived as the Democrats giving more to the Republicans than was necessary under the circumstances, a spokesperson for a liberal interest group with a long history of activity in judicial selection politics was critical of Senator Leahy for what was characterized as somewhat self-serving behavior.

> This is a man who sees himself as ... a great hero to both sides of an issue.... He talks about how many judges he had confirmed.... 'Now be nice to me, Republicans, because I have been nice to you.' I think he probably saw a real chance for Obama to win the election, and, therefore, he'd be owed thanks

from the Republicans. Fat chance.

On the other side of the political spectrum, considerably less surprise was expressed about the 10 late term confirmations and, as well, they were afforded considerably less significance. Jay Sekulow simply commented, "I think it was the right thing to do to get them through.... No one pays, or very few people pay attention [to the district courts], certainly nowhere near the level of appellate [courts] or the Supreme Court." The Committee for Justice's Curt Levey elaborated further.

> Leahy, I think, only wanted to let a few through, and I think McConnell played a bit of hardball. But Leahy never put up a big fight.... The Democrats didn't put up a big fight against the district court judges. That was basically their strategy. Run up the numbers with the district court judges and then fight on the more conservative circuit court nominees. So I certainly don't remember being surprised; if anything, I thought maybe we'd get a couple of more after that.

A similar view was held by the administration. Assistant Attorney General Cook noted, "I think they went five or six months without having a circuit court hearing, the last circuit hearing was in June....I wouldn't call it a surprise. There were, at that point, forty-some nominees who were waiting for a hearing.... So the fact that they were still working in September I don't think was a surprise." Associate White House Counsel Kate Todd agreed. "I don't think it's a surprise. It's a disappointment that there weren't more." Finally, as an aide to a senior Republican member of the Judiciary Committee noted of the ten, "Some of them were ones that had Senator Hatch's strong support...and in some cases there were agreements between home-state senators. So in that respect, it wasn't that surprising."

### The Southwick confirmation

Perhaps in need of greater explanation was the successful confirmation of Leslie Southwick to the 5th Circuit approximately one year prior to the presidential election, despite substantial opposition. Explaining confirmed unanimously on July 22. A political independent with no history of party activity, Judge Seibel was recommended to the Bush Administration by Democratic New York Senator Charles Schumer.

**G. Murray Snow** was born in Boulder, Nevada. His undergraduate and legal education was at Brigham Young University, where he was editor-in-chief of the law review. After graduating law school he clerked for U.S. Court of Appeals Judge Stephen Anderson. He was in private practice in Phoenix, Arizona, until 2002 when he joined the Arizona Court of Appeals. He was nominated to the federal district court in Arizona on December 11, 2007, and was confirmed unanimously the following June 26. Although a Republican, he did not have a record of prominent partisan activism.

**Richard Joseph Sullivan** was raised in Glen Head, New York, attended the College of William and Mary, and received his law degree from Yale. He served as a law clerk to the Honorable David M. Ebel of the Tenth Circuit before becoming an associate at Wachtell Lipton Rosen & Katz in New York. In 1994, he assumed the post of assistant U. S. Attorney for the Southern District of New York, where he served until 2005. In 2005, he became Deputy General Counsel for Marsh & McLennan Companies, Inc, and in 2006, General Counsel for Marsh, Inc. He was nominated for the Southern District of New York bench on February 15, 2007, and was unanimously confirmed on June 28, 2007. Although a registered Republican, he did not have a record of previous party activity.

**Amul R. Thapar,** the son of immigrants from India, was born in Detroit, Michigan, did his undergraduate work at Boston College, and received his legal education at the University of California at Berkeley. He clerked on a federal district court for Judge S. Arthur Spiegel and on the U.S. Court of Appeals for Judge Nathaniel R. Jones. He served as an Assistant U.S. Attorney, first in the District of Columbia, and then in the Southern District of Ohio. He was appointed U.S. Attorney for the Eastern District of Kentucky in March 2006, the position he held when nominated to the federal district court for the Eastern District of Kentucky on May 24, 2007. He was confirmed unanimously on December 13. At 38, he was the youngest judicial appointee of the Bush Administration confirmed by the 110th Congress and the fifth youngest of all Bush's judicial appointees. When he was younger, he worked on campaigns for Republican candidates.

**Anthony John Trenga** comes from Wilkinsburg, Pennsylvania. He was an undergraduate at Princeton and earned his law degree at the University of Virginia. He was a law clerk for federal district judge Ted Dalton and then entered private practice in Virginia. In the 1980s he was active in Democratic party politics. In 1998, he joined the prestigious Washington, D.C. law firm of Miller & Chevalier, where he remained until nominated for a seat on the Eastern District of Virginia on July 16, 2008. On September 26 he was confirmed unanimously by the Senate. He is a fellow of the American College of Trial Lawyers.

**Lisa Godbey Wood** was born in Lexington, Kentucky. She completed both her undergraduate and legal education at the University of Georgia, where she was managing editor of the law review. Upon graduation she clerked for federal district judge Anthony Alaimo in the Southern District of Georgia, the court she would join in 2007. She was in private practice in Georgia and became U.S. Attorney in 2004, the position she held when named to the federal district court bench on June 12, 2006. She was renominated early in 2007, and unanimously confirmed on January 30. Before becoming U.S. Attorney, Judge Wood was active in Republican politics, including both Bush presidential campaigns. She also worked with Democrats and received bipartisan support when she was nominated.

**George H. Wu** was born in New York City, educated at Pomona College and the University of Chicago School of Law, and was a law clerk for U.S. Court of Appeals Judge Stanley Barnes. Judge Wu had a varied career before joining the federal bench. He was in private practice, was an assistant professor of law at the University of Tennessee College of Law for three academic years beginning in 1979, was an assistant U.S. Attorney for a total of 11 years, a Los Angeles Municipal Court judge, and then a Los Angeles Superior Court judge starting in 1996. This last position was the one he held when nominated to the federal district court for the Central District of California on September 5, 2006. He was renominated in 2007, and unanimously confirmed on March 27. Judge Wu was not politically active and was not affiliated with any political party.

Southwick's confirmation, one that "surprised" Nan Aron who characterized it as "the big nomination of the past few years" where it was "just stunning to see, for the Democrats, for that to occur," is a story somewhat more complex than Jay Sekulow's observation that, "You get a pass every once in a while." Rather, as is often the case in unraveling judicial selection politics, one must focus on group activity both in support of, and in opposition to, the nomination, as well as on the role of the Senate Judiciary Committee to better understand the nomination's eventual outcome.

For his part, the Committee for Justice's Curt Levey was taken somewhat by surprise when the Southwick nomination ran into difficulty, in effect, the mirror image of Nan Aron's shock at it going forward. According to Levey, "A lot of ...times, it is reactive.... I don't want to trumpet...'isn't it great that the President just nominated this strong conservative?'" The Southwick case was a situation where Levey called this "reactive" strategy into question.

> The only case in which I...regretted that...was with Southwick, where we probably could have done more early on. But I just thought that the charges there were just so...trumped up that they're not going to get all of the Democrats to buy in.... So, there, I probably should have been a little more proactive. But, generally, we would wait to see what People for the American Way did, what happened in the hearing. You can definitely tell from the questions in the hearing.... You know after the hearing if it's going to be a difficult nomination.

From the perspective of a group leader on the other side of the political spectrum there was a similar concern that, organizationally, they had not done enough. In this instance, however, the failure was not one of being insufficiently reactive to the nomination, as alluded to by Levey, but, rather, failing to pay close enough attention to the playing out of confirmation politics in the Judiciary Committee.

> It occurred, I think...because of a failure on our part to work more closely with Dianne Feinstein. She was the one. She was the key. Leahy doesn't talk to her...and so the Republicans play her like a fiddle. They throw out Leslie Southwick, they pay attention to Dianne Feinstein....and when one side is playing you and the other side is ignoring you, and you're a senator who likes attention? It's unacceptable what she did, it's an excuse for what she did, but...we just didn't work hard enough.... And that was a huge loss, because he was so clearly unqualified.

What Democratic Senator Feinstein of California "did" in this instance was vote "yes" on Southwick in Committee, assuring that the nomination would be sent to the Senate floor and sending a signal to the Democratic rank and file that this was a nominee on whom their fellow partisans disagreed and one, therefore, who engendered fewer constraints on

their confirmation vote. A senior Senate Republican Committee aide expressed some surprise at Southwick's confirmation, underscoring Feinstein's role in the outcome.

> It was surprising...in the sense that...a circuit court nominee who was opposed by a large number of the majority party [was] confirmed, but not surprising in the sense that he was a qualified candidate. And the arguments against him seemed very thin; the suggestion that... his concurrence on two opinions during his long tenure on the state appellate court should disqualify him or allow him to be labeled as a racist. I think, when scrutinized, those arguments didn't stand up. And they didn't stand up, thankfully, with Senator Feinstein.... In our view it was a brave move and a great decision on her part to favor Southwick....I think credit goes to Senator Feinstein for actually looking at the merits of the case and the individual, rather than just listening to rhetoric.

The aide's sense that the case against Southwick was "thin" resonated with Curt Levey who asserted that there was always a need for "something more" than simply ideology to derail a candidacy.

> I always thought he would be confirmed.... The real motivation for the Democrats opposing the person is ideology, but they always need one extra thing....With Boyle it could be ethics...Myers, what he did in the Interior Department. But they would never, when the Republicans were willing to fight, and the nominee was willing to fight...stop someone unless they had one extra thing. And that was lacking in Southwick.

For his part, an aide to a Democratic senator on the Judiciary Committee saw in the Southwick scenario a situation where a good process had simply reached a bad result.

> The civil rights community is still very upset about Southwick, with good reason. Senator Leahy was against this nomination, voted against the nomination.... Now he did something that he has gotten beaten up on. On different occasions, nominees have moved that he has personally voted against. That he has given more process instead of just burying it.... This was just one of those situations where there was a Democratic member of the Committee that voted a different way than, I think, earlier, we had expected to vote. I think it was one that could have easily been voted down. Not buried, not never brought up, but voted down.... Groups on the left, very upset about it, groups on the right were upset that they even had to sweat for it. You're not going to win them all. The process, though, of having someone come up and be voted on was a good process.

The sense that Southwick was, ultimately, "one that got away" did, indeed, not sit well with left leaning interest groups, one of whose spokespersons not only blamed themselves for not doing a better job of courting Senator Feinstein but, in addition, held the Judiciary Chair, Patrick Leahy, responsible for not scheduling a vote at the most propitious time. "When he could have scheduled, he held him; and then when he knew he didn't have the votes, he brought it up for a vote.... What was the thinking behind the scheduling of those votes?"

## A failure

While Leslie Southwick's nomination ended in confirmation it was the case, of course, that several of President Bush's appellate court nominees were stalled in their quest for confirmation during the last two years of the administration. And, at times, the failure to confirm a nominee might be as counterintuitive as was Southwick's success. Such was the case in the failed nomination of Gene Pratter, a sitting district court judge and a candidate favored by ranking Judiciary Committee minority member Arlen Specter for a Pennsylvania vacancy on the Third Circuit. Pratter was nominated on November 15, 2007, a full year before the presidential election. By the time her nomination was eventually withdrawn and a substitute candidate, Paul Diamond, was named, it was late July, 2008 and the calendar, not the candidate per se, left the vacancy unfilled.

Interestingly, the Pratter nomination initially appeared to be a noncontentious one as characterized by a senior aide to a high ranking Judiciary Committee Democrat.

> Here's a funny story. When this year began I thought the first circuit hearing would have been Pratter, because I'm an idiot. I thought, well, she's from Pennsylvania; the ranking member is from Pennsylvania. Specter's guys were saying 'Casey supports her, Casey supports her. Casey supports the nomination.' And, I thought, if this is what Arlen really wants, and Casey is going to support, and it's supported by a Democrat and a Republican, why wouldn't we do that one?

Discussion on the Committee as it mapped out timelines for nominees focused on whether the ranking minority member wanted Pratter to be the first, second, or third circuit nominee confirmed in the session. "And the reaction was, well, 'Arlen doesn't want her to go first because he doesn't want to appear too piggy.' Well, it turned out Arlen didn't want her to go first because he didn't have the clearance yet."

Such are the vagaries of Senate advice and consent processes and the difficulties that can be encountered within a state's Senate delegation, particularly when, as in this instance, the senators involved come from different parties. As explained by Nicholas Rossi,

> There was a lot of discussion about that seat....We have the benefit of hindsight now but, at the time she was tapped for that, she was a district court judge who had been confirmed by the Senate unanimously....She wasn't viewed as a particularly controversial pick. Maybe there should have been a little more conversation with Casey, but I think that's one where we hoped to be able to secure Casey's support all along. It was only after groups in the state began to raise more concerns that it gave him pause. And relatively quickly, Senator Specter met with the outside groups that raised concerns about her. He brought them into his office, he sat down with the groups... asked for the specifics about the cases they were concerned with, had staff going through and evaluating the merits of the arguments, forwarded information to Senator Casey. So there was a real effort to try to reach consensus there and to move forward on her nomination. It wasn't until it became very clear that that wasn't going to happen that they started focusing on other options.

The administration's change in direction in this instance, as in others, simply came too late for a lame

duck president facing his final months in office. As noted by a senior aide to a Judiciary Committee Democrat, the seat could have been filled "had the White House heeded the realities and not waited to the summer to nominate Paul Diamond, who Casey could sign off on and work with. They insisted on this pick that Casey wasn't going to sign off on. They wasted a year and a half and then held our feet to the fire like it was 2002-2003. It was unproductive."

Obviously, Pratter was a nominee who had blue slip problems underscoring the lack of support by a home state senator, in this instance Democratic Senator Robert Casey of Pennsylvania. What frustrated the minority Republicans during the 110th Congress was a situation in which, in their view, the majority was sensitive to home state opposition and respected the blue slip yet, at the same time, did not necessarily move those circuit nominees who lacked home state opposition. As portrayed by an aide to a senior Republican Judiciary Committee senator,

> Generally speaking, Senator Leahy has clearly respected the blue slip in the sense that he has not granted hearings to candidates who do not have the blue slip but, by the same token, he has not given hearings even to some nominees whose blue slips were returned....Glen Conrad and Paul Diamond are examples, and in the case of Peter Keisler, he'd already had a hearing and blue slips weren't really an issue. Robert Conrad is another example of another 4th circuit nominee who had the support of both home state senators. It does create sort of a bad feeling for us. It does create some questions about whether or not blue slips tendered, particularly tendered by the minority, are given as much weight, and whether or not it is a break with traditional practices not to grant hearings in those cases.... Looking at the numbers, one can debate whether the President got fair treatment for his nominees in these last two years. We really did have an extraordinarily small number of circuit court hearings in the past year. And one of those was for the package on the 6th circuit which included Helene White, who was a Clinton nominee and was nominated by President Bush.

## The 6th Circuit solution

The 6th Circuit solution, reached during the 110th Congress, represents another facet of confirmation politics during the final two years of the W. Bush presidency warranting a closer look. The saga of the multiple Michigan based vacancies on the 6th Circuit Court of Appeals and the failed attempt to fill them for the better part of the Clinton years and for much of the W. Bush presidency is a familiar one.

At bottom, four 6th Circuit vacancies from Michigan were inherited by the W. Bush administration because the Republican controlled Senate failed to confirm a slate of Clinton nominees whose confirmation was obstructed for years. The Republicans argued that their actions were warranted because of the failure of the Clinton administration and Senator Levin to consult appropriately with then Republican Michigan Senator Spencer Abraham about the vacancies. W. Bush subsequently nominated four people of his own, with none confirmed during his first term in office as Senators Carl Levin and Debbie Stabenow, Michigan Democrats, united in their resolve to not allow the Bush administration to benefit from the sins of the Republican controlled Senate during the Clinton years. Interestingly, while hearings were held on all four nominees, despite the Levin/Stabenow blue slip holds, floor action on the nominations was successfully obstructed.

The 6th Circuit logjam began to ease when Henry Saad, the most controversial of the Bush nominees, was not explicitly protected by the Gang of Fourteen's agreement to oppose judicial filibusters (unless there were "extraordinary circumstances") and his nomination was ultimately withdrawn. Three 6th Circuit nominees (Richard Griffin, David McKeague, and Susan Neilson) were allowed to go through, a district court nominee (Dan Ryan) was withdrawn, and the Democrats would be given a large say in designating a replacement nominee for Ryan. This turned out to be Janet Neff, a candidate supported by both Senators Levin and Stabenow.

Ironically, Republican Senator Sam Brownback of Kansas placed a hold on the Neff confirmation processes because of the nominee's attendance at a civil commitment ceremony. Eventually, Brownback withdrew his hold, partly responding to pressure from his own party colleagues because he had become the proverbial fly in the 6th Circuit's agreement ointment. While Neff would eventually be confirmed to the district court seat in the following congressional session, it took a little over a year from her initial nomination to her confirmation vote, seemingly with an agreement in hand. The damage had been done and, during this period, the Michigan senators proceeded to turn their attention to stalling two subsequent Michigan 6th Circuit nominees, Raymond Kethledge and Stephen Murphy III. It would take virtually two more years, the term of the 110th Congress, to finally reach an accord and unravel the 6th Circuit mess.

As is often the case in instances of confirmation gridlock, a solution requires delicate negotiation and bargaining among the principals, with an 11th hour agreement that, arguably, could have been struck years before. In this instance, as in others, it took the winding down of a presidency and a willingness to bargain to serve as an important catalyst for getting a deal done. Indeed, as Assistant Attorney General Cook noted, "We're somewhat disappointed that the 6th Circuit hearing was the last circuit court hearing that was held... We did the 6th Circuit hearing and that was it."

Despite their frustration that the 6th Circuit deal was the administration's appellate court swan song, the President's team, nevertheless, was highly supportive of the deal itself. Beth Cook noted that, "the real beneficiaries are the people of Michigan and the people of the 6th Circuit who, for the first time in...years have a full complement of judges on the circuit." In characterizing the mechanics of the deal, Nicholas Rossi indicated that, "the credit should really go to the White House and to the Michigan senators for working out some arrangement. I don't know to what extent

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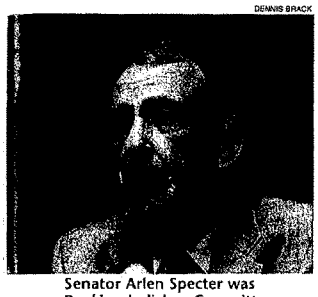

**Senator Arlen Specter was Ranking Judiciary Committee minority member during the 110th Congress.**

Senator Leahy's office was involved in brokering that deal, but we were not involved in brokering the deal." Indeed Senator Specter voted against Judge White's confirmation.

The deal, which withdrew Bush 6th Circuit nominee, Stephen Murphy III, and placed him in nomination for a district court judgeship, while retaining Raymond Kethledge's circuit nomination, also included substituting Helene White, a former Clinton nominee who was first nominated to the Sixth Circuit in 1997.

In a scenario that could not have more resembled a political quid pro quo, the administration continued, nevertheless, to stay on its prime judicial selection message. Beth Cook asserted that, "The President sent up two circuit nominees who we thought were both well qualified and would be assets to the 6th Circuit... What we can tell you from our perspective is that both Ray and Helene White should absolutely get a hearing, get a vote, and be confirmed." Associate White House Counsel Kate Todd added, "Our job is to be supportive of all the President's nominees and nominations are not sent up there for show. They were genuinely put up there and we work hard to support our nominees through the confirmation process."

On one level, the 6th Circuit outcome underscores the power of individual senators in confirmation politics over the long haul. As Nan Aron commented, "that deal might have been a result of ... two years [of] politics, Bush feeling in a less powerful role. But the fact of the matter is Carl Levin dug in his heels and was not going to relent, so he got his nominee on the bench."

While Levin emerged a "winner" in the outcome, this does not necessarily mean that the deal was a Democratic victory writ large. As a spokesperson for a prominent liberal interest group active in judicial politics commented, "It's heartbreaking.... We were opposed to that deal because Helene White isn't half as strong as this guy. We thought it was a terrible deal." Curt Levey confirmed the thrust of this assessment from the opposite side of the political spectrum. "Some people in the base were unhappy, but I thought it was the right move, because you were either going to have a Democratic president or a Republican president who wasn't very conservative with increased Democratic margins in the Senate... Even people who were involved in holding up Helene White thought it was a good deal."

## Major issues and controversies

A thorough assessment of confirmation processes and politics in the 110th Congress necessitates moving beyond these case studies of specific administration successes and failures to include a look at some of the major issues and controversies that dominated selection politics earlier in the Bush presidency with an eye towards how they fared as the presidency wound down. Specifically, what can we say about the role, if any, of the Gang of Fourteen in the 110th Congress as compared with their centrality in earlier advice and consent outcomes? Similarly, what became of the so-called "nuclear option" that threatened to paralyze the Senate, but not for the maneuvers of the Gang of Fourteen?

Even more broadly, what can we say about the seemingly diminished importance of the judicial selection issue, especially for the Republicans in the 110th Congress and, indeed, the role the issue played (or failed to play) in the 2008 presidential election?

The agreement fashioned among the bipartisan and moderate Gang of Fourteen that saved the filibuster while avoiding the Republican detonation of the so-called nuclear option was explicitly fashioned for and limited to breaking judicial confirmation gridlock during the remainder of the 109th Congress, in the Spring of 2005, soon after the start of W. Bush's second term. Nevertheless, the agreement of the Gang has reverberated ever since and, inevitably, remained a valid reference point for the playing out of judicial confirmation politics through the 110th Congress.

Reflecting on the importance of the Gang of Fourteen and its legacy, Nan Aron opined that its real significance

> was its ability to work with the Bush administration and confirm their appointees... The day that they announced that deal it was a bright day for the Senate and a dark day for the judiciary. Because, in essence, it took power away from the Senate Judiciary Committee and granted it to a group of senators who had really no knowledge or interest in the judiciary, and no experience....That Gang is a large part of the story of the last eight years, because for several years they wrested control from the Committee to themselves.

Fast forwarding to today, Aron explained that, in her view, the legacy of the Gang of Fourteen helps to explain the forgiving treatment that the Obama administration and the Senate Democrats have afforded Senator Joe Lieberman, a prominent member of the Gang.

> The Senate dynamic is very interesting going forward, particularly given the fact that the Democrats went out of their way to keep Lieberman in the party. He was a key broker during the Bush administration in bringing Democrats and Republicans together, not just to avoid the filibuster, but to help the Bush administration confirm their judges.... Certainly it would behoove the Democratic leadership to look to Senator Lieberman to bring some Republicans together to help confirm Obama judicial picks, and I suspect that may have been a factor in keeping

Senator Lieberman in the caucus.

Clearly, the work of the Gang of Fourteen had, as Curt Levey noted, "ratcheted things down a bit. And it certainly took the filibuster off the table." The legacy of that reality for Republicans today in the "post-Gang" environment, according to Levey, is that, "If we were going to support a filibuster, it would be under the bipartisan conditions agreed to by the Gang of Fourteen. I realize that's not necessarily binding anymore, but it's instructive, which is for 'extraordinary circumstances.'"

As noted by a senior aide to a Republican member of the Judiciary Committee, the "legs" of the Gang of Fourteen might have been evident in the Southwick confirmation discussed earlier. "You might see it a little bit.... There's Southwick, and you certainly could look to the members of that group and, I think, all of them voted for Southwick. They certainly all voted for cloture.... I think they left that group with a certain understanding of how nominations should be treated, particularly in getting people to a vote."

It is impossible to talk about the Gang of Fourteen and its impact without, of course, referencing the phenomenon the Gang's action was meant to prevent, specifically, the imposition of the nuclear option to alter Senate rules in an effort to break filibusters and seat controversial judges. Today, in the altered political map of the 111th Congress, with a comfortable Democratic Senate majority, and a Democratic president, the dynamic that created the "nuclear threat" in years past may simply no longer be present. To the question of whether the bolstered Democratic strength would lead to a confirmation role reversal with Democrats threatening to end filibustering of judicial nominees through resort to the nuclear option Jay Sekulow underscored,

> I don't think they have to. They've got...fifty-nine Senate seats. Then you've got some Republicans who would go with the Democrats on it, like Collins and Snowe. So I don't see the nuclear option as an option this go-round.... The Democratic leadership is not going to be facing the same obstacles that others have. They've got an overwhelming majority in the Senate, almost filibuster proof.

For others, such as Specter aide Nicholas Rossi, it is not simply a matter of numbers but, as well, a sense that partisan positions on the nuclear tactic will hold even under changed circumstances.

> I tend to agree with those who think the parties have somewhat locked themselves into their positions on this issue. I've seen some comments from the Republican leadership suggesting that if President Obama really sends up people they think aren't qualified they are not willing to take the option of the filibuster off the table. But do I think that Democrats now would consider a rule change if it came to the nuclear option? I don't think so.

Nan Aron, too, was of the view that the Democrats wouldn't and shouldn't resort to nuclear tactics to break filibusters.

> I don't think the Democrats should follow what the Republicans did. It was unwarranted, it was illegitimate, it was phony in every way. It was a tactic to put the Democrats on the defensive, grab some power in the Senate, and help Bush confirm his judges.... Filibusters have been around since the beginning of the Republic. And it's... fascinating to me that as soon as this showdown was averted... as soon as the Democrats took control of the Senate, the Republicans resorted to the use of filibusters on a regular basis.

## A decrease of interest

Completing our account of confirmation processes in the 110th Congress requires some consideration of the apparent decrease of interest by actors other than the White House in judicial selection politics during this period and, as well, the role of this issue, or relative lack thereof, in the electoral processes of 2008, particularly in the presidential election.

We have already alluded to the difficulties all presidents face seating judges during the winding down of their administrations and, as well, to some of the specific factors that took a special toll on W. Bush's undiminished efforts in this regard. In such an environment, which included Democratic takeover of the Senate, Nicholas Rossi concluded that, "With the Chairman's gavel, Senator Leahy was able to process just enough nominees to quiet critics and not too many to upset his caucus." Jay Sekulow admitted that,

> We had these meetings. We would discuss how do you get your base energized? When it's a Supreme Court vacancy, it's easy. When it's an appellate nominee it was easy too, until you had Supreme Court vacancies.... Although the base understood the significance of it, it was hard to get the attention drawn to the appellate courts. And it really did come to pretty much a screeching halt in the last eighteen months.

For his part, Curt Levey attributed the waning enthusiasm for the judicial selection issue to "just the events on the ground. The filibusters were dramatic, that was off the table after the spring of 2005. Obviously, Supreme Court battles, the showdown with the nuclear option.... I think we all felt exhausted...and burned out for a few months, but that lasted way too long."

While one cannot know with certainty, it is at least possible that the diminution of interest in and attention paid to judicial selection by the media, the public, and perhaps Republicans in Congress during W. Bush's final two years in office played some role in limiting the issue's importance in the electoral politics of 2008, particularly in the presidential contest. Two years ago our interviews revealed considerable consensus about the prospects for judicial selection being a major campaign battleground for the candidates. Yet with the ongoing war on terror, continued war in Iraq, and a failing economy, that prediction failed to materialize. In the opinion of both Jay Sekulow and Curt Levey, this was a failure of the Republican campaign strategy. Indeed, in Sekulow's view,

> it was a strategic mistake for the Republicans to not make it an issue. I don't recall, other than one or two passing comments, John McCain ever mentioning it. And I think that's unfortunate. I can't underscore that enough. It was a

> galvanizing issue for our base and the base, as you could tell by the elections, did not get enthusiastic. I do not know if it would have been a game changer because I'm not sure if any one issue would have beaten President-elect Obama.... But it did not become the issue it should have been. I think that was unfortunate.

To some extent, the keeping of the issue under election year wraps may be credited not to Republican failures to energize their base but, rather, the success of Obama's efforts to not engage the opposition squarely and continuously on the matter of courts. Nan Aron pointed out that Obama

> referred to the war on courts, referred to judges with empathy, judges who bring diverse, different experiences and viewpoints, and...that was very helpful. But there was no engagement by him on this issue and many other hot-button issues.... Every hot-button social issue presented to him he pivoted and defused it as quickly as he could: death penalty, abortion, guns, gay marriage.... He deflected any criticism and avoided making the Court an issue.

In the end, in the eyes of most analysts, there was really not much to explain about the issue's lack of electoral prominence. As Nan Aron underscored, "There was no other issue in the election except the economy.... No other issue came to the fore, including the Iraq War, healthcare, the environment, and education." For its part, even the Supreme Court's own decision-making behavior ended up highlighting some similarities between the presidential candidates and not their differences. According to Nicholas Rossi,

> Some of the credit or blame... may...rest with the Supreme Court itself, and some of the recent decisions it has handed down. If you had seen the *Heller* case decided differently, for example, that could have changed the dynamic dramatically. But the fact that it was decided as it was, that you had both Obama and McCain coming out and saying that they thought the decision was right, and both coming out and saying that they thought the Court's decision about the death penalty for child rape was suspect. They were in somewhat of an agreement. And had some of those cases been decided differently, I think that might have changed the degree to which the Court played a role in the elections.

**When the dust settled on the 110th Congress, that Congress confirmed 58 to the district courts and 10 to the appeals courts.**

Before leaving the electoral connection issue, two more perspectives should be brought into play. For one, an argument can be made, as it was by a high ranking Democratic staff aide serving a Judiciary Committee member, "When there are huge issues out there, judges fall to the back, and that's really where they should be." Thus, in an ideal world, "the president consults, picks really, really smart well qualified people, and they are by and large confirmed." And, finally, another senior Democratic staff aide offered a contrarian note and query for pondering. "When Senator McCain chose Sarah Palin, were some of the things that led women voters not flocking to Sarah Palin the issues that we talk about with judges? So I think it did play a role in a way."

When the dust settled on the 110th Congress, that Congress confirmed 58 to the district courts and 10 to the appeals courts. We turn now to an examination of those who made it to the lower federal courts during W. Bush's final two years.

## District court appointees

During the 110th Congress, the President submitted 79 nominations to lifetime judgeships on the federal district courts, of which 58 were confirmed. (For brief biographies of some of those confirmed, see "Some notable Bush appointees," page 263).

Table 1 compares the demographic portrait of those confirmed by the 110th Congress to the Bush appointees confirmed by the previous three congresses. The differences are small but hint that the changed political environment may have to a limited extent affected the profile of Bush's last two years' worth of appointees. Among the findings of special interest are:

- A clear majority of the most recent group of appointees came to the bench with previous prosecutorial experience and that proportion was noticeably larger than the proportion for the earlier group of appointees. Interestingly, as we will see in Table 3, the overall figures still show a higher proportion of the Bush cohort with judicial than prosecutorial experience.
- Along the same lines of the appointees' credentials, the most recent group of Bush appointees had the fewest with neither judicial nor prosecutorial experience.
- Educational differences were not pronounced. However, 40 percent of the most recent cohort had a prestigious legal education compared to 28 percent of the district court appointees from the previous six years.[9]
- There were proportionately more women, African Americans, and Asian Americans appointed in the last two years than during the first six years. This meant that the corresponding proportion of white male appointees was the lowest for the Bush presidency, and the overall proportion was second lowest only to the Clinton proportion (as seen in Table 3).
- The ABA ratings of the appointees confirmed by the 110th Congress were higher than for

9. The non-Ivy League law schools attended by the appointees considered prestigious are: Berkeley, Chicago, Duke, Fordham, Georgetown, Illinois, Indiana, Michigan, NYU, North Carolina, Ohio State, Stanford, Texas, Vanderbilt, and Virginia.

appointees confirmed by the previous three congresses. During the last two years, no appointee rated "not qualified" by the ABA was confirmed. In the previous six years, four rated "not qualified" were confirmed. In general, it is unclear whether Bush's eliminating the ABA from the pre-nomination stage (which he did at the start of his first term) tended to elevate such ratings across his administration. Some have argued that this is the case because of the likely reticence of the ABA's interview subjects to criticize nominations that have already been submitted and made public.

- Perhaps the findings for the party variable best suggest the change in the appointment climate. The proportion of Democrats named during the last two years almost doubled from the previous six years, The proportion of Republicans, while still an overwhelming majority, dipped below 80 percent. But, interestingly, the proportion with a record of previous party activism increased, in part because some of the Democrats named had previously been active Democrats.
- The cohort from the last two years was also wealthier than the cohort from the previous six years. Some 62 percent had a net worth in excess of $1 million compared to some 53 percent of those from the previous six years.
- Finally, and surprisingly, the average age of those appointed by George W. Bush during the last two years was noticeably older than those appointed in the first six years, almost two years older on average.[10]

Twenty-two nontraditional appointees to the district courts were confirmed during the 110th Congress. Added to the 63 from Bush's first six years, there were a total of 85 nontraditional district court appointees. Thirty-six traditional appointees (white males) were confirmed by the

**Table 1. How the Bush appointees to the federal district courts confirmed during the 110th Congress compare to those confirmed during his first six years**

| | 110th Congress | | 107th-109th Congresses | |
|---|---|---|---|---|
| | % | (N) | % | (N) |
| **Occupation** | | | | |
| Politics/government | 17.2% | (10) | 12.3% | (25) |
| Judiciary | 53.4% | (31) | 46.8% | (95) |
| Large law firm | | | | |
| 100+ members | 6.9% | (4) | 9.9% | (20) |
| 50-99 | 5.2% | (3) | 4.9% | (10) |
| 25-49 | — | — | 5.9% | (12) |
| Medium size firm | | | | |
| 10-24 members | 3.4% | (2) | 5.4% | (11) |
| 5-9 | 5.2% | (3) | 4.9% | (10) |
| Small firm | | | | |
| 2-4 | 3.4% | (2) | 4.4% | (9) |
| solo | 1.7% | (1) | 2.0% | (4) |
| Professor of law | — | — | 1.5% | (3) |
| Other | 3.4% | (2) | 2.0% | (4) |
| **Experience** | | | | |
| Judicial | 53.4% | (31) | 51.7% | (105) |
| Prosecutorial | 58.6% | (34) | 43.8% | (89) |
| Neither | 20.7% | (12) | 26.1% | (53) |
| **Undergraduate education** | | | | |
| Public | 43.1% | (25) | 48.3% | (98) |
| Private | 44.8% | (26) | 45.3% | (92) |
| Ivy League | 12.1% | (7) | 6.4% | (13) |
| **Law school education** | | | | |
| Public | 50.0% | (29) | 48.8% | (99) |
| Private | 39.7% | (23) | 38.9% | (79) |
| Ivy League | 10.3% | (6) | 12.3% | (25) |
| **Gender** | | | | |
| Male | 75.9% | (44) | 80.3% | (163) |
| Female | 24.1% | (14) | 19.7% | (40) |
| **Ethnicity/race** | | | | |
| White | 77.6% | (45) | 82.8% | (168) |
| African American | 10.3% | (6) | 5.9% | (12) |
| Hispanic | 6.9% | (4) | 10.8% | (22) |
| Asian | 5.2% | (3) | 0.5% | (1) |
| **Percentage white male** | 62.1% | (36) | 69.0% | (140) |
| **ABA rating** | | | | |
| Well Qualified | 74.1% | (43) | 69.0% | (140) |
| Qualified | 25.9% | (15) | 29.1% | (59) |
| Not Qualified | — | — | 2.0% | (4) |
| **Political identification** | | | | |
| Democrat | 12.1% | (7) | 6.9% | (14) |
| Republican | 77.6% | (45) | 84.7% | (172) |
| None | 10.3% | (6) | 8.4% | (17) |
| **Past party activism** | 58.6% | (34) | 50.7% | (103) |
| **Net worth** | | | | |
| Under $200,000 | 1.7% | (1) | 5.9% | (12) |
| $200-499,999 | 17.2% | (10) | 18.2% | (37) |
| $500-999,999 | 19.0% | (11) | 22.7% | (46) |
| $1+ million | 62.1% | (36) | 53.2% | (108) |
| **Average age at nomination** | 50.6 | | 48.7 | |
| **Total number of appointees** | 58 | | 203 | |

10. Note that Table 2 of our 2007 article mistakingly put the average age of the first six years of appointees at 50. The average age should have been recorded as 48.7. This error was only discovered when preparing for this article.

Senate during the 110th Congress and their numbers were added to those of traditional appointees from the first six years for a total of 176 traditional appointees during Bush's two terms in office.

A comparison of nontraditional to traditional appointments is found in Table 2 and the differences between the two groups suggest that in some important respects nontraditional candidates tended to follow a different path to a career on the federal bench.

- Almost 7 in 10 nontraditional appointees came from a judicial position, typically on the state bench. But only 4 in 10 traditional appointees came from such a judgeship.
- Over 40 percent of traditional appointees came from private law practice compared to slightly over 15 percent of nontraditional appointees.
- Over 7 in 10 nontraditional appointees had judicial experience before ascending the federal district court bench, compared to only about 4 in 10 traditional appointees.
- Nontraditional appointees had more prosecutorial experience than traditional appointees. The nontraditional cohort had markedly fewer appointees lacking both prosecutorial and judicial experience.
- White women were the largest proportion of nontraditional appointees.
- The ABA ratings of both groups of appointees were similar.
- The party variable showed the most dramatic differences between the nontraditional and traditional appointees. About 9 in 10 traditional appointees were Republicans compared to under 7 in 10 nontraditional appointees. There were almost four times the proportion of nontraditional appointees with no party identification than there were traditional appointees and almost three times the proportion of nontraditional appointees who were Democrats than were traditional appointees.
- The traditional appointees had close to double the proportion of nontraditional appointees with a record of previous party activity.
- A majority of both groups had a

**Table 2. How the Bush non-traditional appointees compared to his traditional appointees to the federal district courts**

| | Nontraditional appointees | | Traditional appointees | |
|---|---|---|---|---|
| | % | (N) | % | (N) |
| **Occupation** | | | | |
| Politics/government | 11.8% | (10) | 14.2% | (25) |
| Judiciary | 67.0% | (57) | 39.2% | (69) |
| Large law firm | | | | |
| 100+ members | 5.9% | (5) | 10.8% | (19) |
| 50-99 | 1.2% | (1) | 6.8% | (12) |
| 25-49 | 1.2% | (1) | 6.2% | (11) |
| Medium size firm | | | | |
| 10-24 members | 3.5% | (3) | 5.7% | (10) |
| 5-9 | 1.2% | (1) | 6.8% | (12) |
| Small firm | | | | |
| 2-4 | 3.5% | (3) | 4.5% | (8) |
| solo | — | — | 2.8% | (5) |
| Professor of law | 1.2% | (1) | 1.1% | (2) |
| Other | 3.5% | (3) | 1.7% | (3) |
| **Experience** | | | | |
| Judicial | 72.9% | (62) | 42.0% | (74) |
| Prosecutorial | 52.9% | (45) | 44.3% | (78) |
| Neither | 11.8% | (10) | 31.2% | (55) |
| **Undergraduate education** | | | | |
| Public | 48.2% | (41) | 46.6% | (82) |
| Private | 42.4% | (36) | 46.6% | (82) |
| Ivy League | 9.4% | (8) | 6.8% | (12) |
| **Law school education** | | | | |
| Public | 45.9% | (39) | 50.6% | (89) |
| Private | 42.4% | (36) | 37.5% | (66) |
| Ivy League | 11.8% | (10) | 11.9% | (21) |
| **Gender** | | | | |
| Male | 36.5% | (31) | 100.0% | (176) |
| Female | 63.5% | (54) | — | — |
| **Ethnicity/race** | | | | |
| White | 43.5% | (37) | 100.0% | (176) |
| African American | 21.2% | (18) | — | — |
| Hispanic | 30.6% | (26) | — | — |
| Asian | 4.7% | (4) | — | — |
| **ABA rating** | | | | |
| Well Qualified | 70.6% | (60) | 69.9% | (123) |
| Qualified | 27.1% | (23) | 29.0% | (51) |
| Not Qualified | 2.4% | (2) | 1.1% | (2) |
| **Political identification** | | | | |
| Democrat | 14.1% | (12) | 5.1% | (9) |
| Republican | 68.2% | (58) | 90.3% | (159) |
| None | 17.6% | (15) | 4.5% | (8) |
| **Past party activism** | 34.1% | (29) | 61.4% | (108) |
| **Net worth** | | | | |
| Under $200,000 | 8.2% | (7) | 3.4% | (6) |
| $200-499,999 | 21.2% | (18) | 16.5% | (29) |
| $500-999,999 | 18.8% | (16) | 23.3% | (41) |
| $1+ million | 51.8% | (44) | 56.8% | (100) |
| **Average age at nomination** | 47.4 | | 49.9 | |
| **Total number of appointees** | 85 | | 176 | |

# Diversity on the bench

From the outset, the Bush administration set a goal of adding to the diversification of the federal bench. In fact, Assistant Attorney General Beth Cook commented that,

> this President... came in saying he was looking for folks from all walks of life. If you look at his first set of nominees, the diversity of the set of nominees was, I think striking. And if you look at what he has continued to do throughout his administration in terms of an even playing field, looking at the number of courts where he's had the privilege of appointing the first woman or appointing the first African-American woman, or appointing the first Turkish American or Southeast Asian American, I think he should be proud of it and I'm certainly proud to be a part of it.[1]

The attention to diversity is clear as the percentage of nontraditional judges in active service totaled 38.8 percent at the end of the 110th Congress, an increase of 5.2 percent.[2] (See Table 1) This is a change from the previous two years where bench diversification decreased (-.96 percent), but similar to Bush's first term (6.7 percent and 8.7 percent during the 107th and 108th congresses, respectively). Notably, four of the five nontraditional groups made gains;[3] when considering all three court levels, women increased their presence by 6.5 percent (13 seats), African Americans by 2.2 percent (2 seats), Hispanics by 5.3 percent (3 seats) and Asian Americans by 60 percent (3 seats).[4]

During Bush's two terms in office, Hispanics achieved unprecedented success as their representation increased by almost 45 percent—they began 2001 with 42 judgeships and ended 2008 with 60. Women, too, made great strides, adding 45 seats to the 167 occupied at the start of Bush's tenure, an increase of over 25 percent. African Americans and Asian Americans did not enjoy as much success during the last 8 years, adding only 7 and 2 seats, respectively.

Examining the district courts specifically, when not double counting women who also belong to a racial minority group, the proportion of nontraditional judges is 39.3 percent, an increase of 4.8 percent (12 seats) from the previous two years. Even though diversity increased on the district courts, 9 states remain without any women judges, 20 without any African-American judges, and 35 without any Hispanic judges, compared to 10, 21 and 36, respectively, at the end of the 109th Congress. These data suggest that although the nontraditional groups increased their presence, the majority were added to courts in states already represented by the relevant group. Asian Americans are present only on district courts in New York, California, Hawaii, and Kentucky (with the confirmation of Judge Amul Thapar). In addition, the eight states that had never seated a nontraditional judge remain undiversified at the close of this Congress (Alaska, Idaho, Maine, Montana, New Hampshire, North Dakota, Vermont, and Wyoming). As we discussed previously, this result is unremarkable since appointments are contingent upon vacancies and due to the small size of these states, fewer appointment opportunities arise. In fact, during the past two years, only one vacancy occurred on a district court within these states.[5]

**Table 1: Proportion of nontraditional lifetime judges in active service on courts of general jurisdiction on January 1, 2007, and on January 1, 2009**

| | 2007 | | 2009 | | |
|---|---|---|---|---|---|
| | % | (N) | % | (N) | % Increase |
| **U.S. district courts*** | | | | | |
| Women | 23.6 | 157 | 25.0 | 166 | 5.7 |
| African American | 11.1 | 74 | 11.4 | 76 | 2.7 |
| Hispanic | 6.9 | 45 | 7.2 | 48 | 6.7 |
| Asian American | 0.6 | 5 | 1.2 | 8 | 60.0 |
| Native American | 0.0 | 0 | 0.0 | 0 | – |
| **U.S. courts of appeals**** | | | | | |
| Women | 24.5 | 41 | 26.9 | 45 | 9.8 |
| African American | 8.3 | 14 | 8.3 | 14 | 0.0 |
| Hispanic | 7.2 | 12 | 7.2 | 12 | 0.0 |
| Asian American | 0.0 | 0 | 0.0 | 0 | – |
| **U.S. Supreme Court***** | | | | | |
| Women | 11.1 | 1 | 11.1 | 1 | 0.0 |
| African American | 11.1 | 1 | 11.1 | 1 | 0.0 |
| **All three court levels** | | | | | |
| Women | 23.7 | 199 | 25.2 | 212 | 6.5 |
| African American | 10.6 | 89 | 10.8 | 91 | 2.2 |
| Hispanic | 6.8 | 57 | 7.1 | 60 | 5.3 |
| Asian American | 0.6 | 5 | 1.0 | 8 | 60.0 |
| Native American | 0.0 | 0 | 0.0 | 0 | |
| Total nontraditional****** | 37.0 | 310 | 38.8 | 326 | 5.2 |

* Out of 664 authorized lifetime positions on the U.S. district courts. Some double counting is inevitable. In 2009, 37 women also were either African American, Hispanic, or Asian American.

** Out of 167 authorized lifetime positions on the numbered circuits and the U.S. Court of Appeals for the District of Columbia Circuit, all courts of general jurisdiction. Some double counting is inevitable. In 2009, 8 women also were either African American or Hispanic

*** Out of 9 authorized positions on the U.S. Supreme Court.

**** This percentage and total does not double count those who were classified in more than one category.

1. Interview with Beth Cook, Assistant Attorney General, December 15, 2008

2. Note that Table 1 of the sidebar on diversity in our 2007 article mistakenly calculated the number of women who were also either African American, Hispanic, or Asian American as 31 on the district courts and 8 on the courts of appeals. The number on the district courts should have been 32, which changes the total nontraditional judges, when not double counting, from 311 to 310. Thus, the calculation of the percent decrease in nontraditional judges in 2007 should have been -.96.

3. Historically, Native Americans have been represented only in district courts in Oklahoma. There have been no Native American judges in active service since 2003 when Frank Howell Seay took senior status.

4 Data are from the *History of the Federal Judiciary*. http://www.fjc.gov, web site of the Federal Judicial Center, Washington, DC. This database contains biographical information on all Article III judges confirmed by the Senate since 1789, but lists only five classifications for race —African American, Asian American, Hispanic, Native American, and White.

5. Joseph Laplante was nominated and confirmed to the District of New Hampshire. He is a white, male. Additionally, a vacancy from September 7, 2006 remains unfilled in Wyoming

**Table 2: Diversity on the district courts, January 1, 2009: Active judges aggregated by circuit**

| Circuit | % Female district courts | % African American general population | % African American district courts | % Hispanic general population | % Hispanic district courts |
|---|---|---|---|---|---|
| First.1 | 21.4 | 6.1 | 3.6 | 30.3 | 25.0 |
| First.2* | 19.1 | 5.4 | 4.8 | 6.9 | 0.0 |
| Second | 35.0 | 15.9 | 11.7 | 15.3 | 3.3 |
| Third | 28.1 | 12.6 | 14.0 | 9.1 | 5.3 |
| Fourth | 16.0 | 22.7 | 16.0 | 5.9 | 0.0 |
| Fifth | 24.1 | 17.1 | 7.6 | 28.3 | 15.2 |
| Sixth | 23.0 | 13.1 | 11.5 | 3.1 | 0.0 |
| Seventh | 24.4 | 11.4 | 11.1 | 10.1 | 4.4 |
| Eighth | 26.3 | 7.6 | 15.8 | 4.1 | 0.0 |
| Ninth | 25.5 | 5.5 | 11.3 | 28.4 | 9.4 |
| Tenth | 31.0 | 4.6 | 8.3 | 16.4 | 13.9 |
| Eleventh | 30.8 | 21.5 | 13.8 | 14.3 | 9.2 |
| D.C. | 25.0 | 55.2 | 33.3 | 8.3 | 8.3 |

Data on general population compiled from the Statistical Abstract found at: http://www.census.gov/compendia/statab * Excluding Puerto Rico

When not double counting women who also belong to a racial minority group, the proportion of nontraditional judges on the courts of appeals is 37.7 percent, an increase of 6.7 percent (4 seats) over the last two years. However, this is somewhat misleading since the courts remained largely the same in terms of diversity—only women increased their representation. Presently, all of the geographic circuits have a sitting female judge, and all but the First and Eighth Circuits have more than one woman, with the Ninth Circuit having the most at nine.[6] The racial balance on the geographic circuit courts remained the same, with no increase in the number of Hispanic or African-American jurists. Notably, the First Circuit remains the only court yet to seat an African American. Hispanic judges, both currently and historically, have yet to serve on 6 of the 12 circuit courts of general jurisdiction (Fourth, Sixth, Seventh, Eighth, Eleventh, and DC). While Asian Americans have served on courts of appeals in the past, none does now. No Native American has ever served at this court level.

Given the number of vacancies left at the end of Bush's term, in addition to those created by judges leaving active service since January 1, 2009 (57 district court, 15 courts of appeals, 1 Supreme Court) Obama will have ample opportunity to increase the number of nontraditional judges represented on the federal bench. Certainly, if his initial nominations to both the Supreme Court and courts of appeals are indicative of his commitment to diversity, underrepresented groups will realize substantial gains.[7]

Table 2 aggregates district courts by circuit and lists the percentage of women in each district. It also compares the percentage of African Americans and Hispanics to the percentage of each group in the circuit's general population, since we may expect states with more diverse populations to also have more diverse courts.[8] Women have the greatest presence on district courts within the Second and Tenth circuits, and the lowest within the First and Fourth. The Second Circuit saw the largest increase as 4 of the 14 new female judges appointed to district courts are within that jurisdiction. As in years past, the highest concentration of African-American district judges is in the Fourth Circuit; and, not surprisingly, it is the circuit with the largest population of African Americans. However, in comparing overall representation on the federal bench to the general population, African American representation on the courts exceeding population concentration occurs in only four circuits (Third, Eighth, Ninth, Tenth). The converse is true in the most Southern circuits (Fifth and Eleventh), and the disparity is much greater, nearly 10 percent. Despite the proportion and number of Hispanic appointees over Bush's eight years in office, surpassing that of any previous president, under-representation is even more acute for this group; the states of the First, Fourth, Sixth, and Eighth Circuits have no Hispanic district judges and relative to the population concentration, the Second, Fifth and Ninth Circuits have very few. The highest congruence between population and judicial representation is on the Third and Seventh Circuits.

— *Sara Schiavoni*

6. In relative terms, with the confirmations of Jennifer Elrod and Catharina Haynes, the Fifth Circuit has a slightly higher concentration of women, 6 of 17 (35.3 percent) than the Ninth Circuit, 9 of 27 (33.3 percent).

7. Of his five nominations to the courts of appeals, as of mid-June, two are African American and one is a woman. If confirmed, Judge Sonia Sotomayor would be the first Hispanic woman to serve on the U.S. Supreme Court.

8. Asian Americans and Native Americans are omitted given the small (or nonexistent) cohorts of judges. Calculations for the First Circuit are performed with and without Puerto Rico to get a more reliable view of the congruence between the Hispanic population in that jurisdiction and its representation on the district bench.

net worth of $1 million or more but the proportion for traditional appointees was somewhat higher. Conversely the proportion of nontraditional appointees with a net worth under $500,000 was about 3 in 10 compared to about 2 in 10 for the traditional appointees.

• Nontraditional appointees were on the whole younger than traditional appointees—on average two and one-half years younger.

Table 3 offers a portrait of all of W. Bush's district court appointees during his presidency compared to those appointed to the district bench by his four immediate predecessors in office. Among the noteworthy findings:

• The W. Bush appointees' profile was consistent with the trend of the continued professionalization of the federal judiciary. The majority of Bush appointees had judicial experience, a proportion similar to that for the Clinton appointees. In a previous article in this series, we noted that during his first term, W. Bush had continued the trend of promoting within the federal judiciary, that is, promoting U.S. magistrates or bankruptcy judges to the district court bench.[11] This trend began with the Ford administration (8 percent came from these ranks), and continued with subsequent presidents, with proportions ranging from 5 percent for Carter and Reagan to Bush Sr.'s 11 percent and Clinton's 12 percent.

Promotion from within the federal judiciary rose to 17 percent during W. Bush's first term when he named 26 who were serving as U.S. magistrates and 3 who were U.S. bankruptcy judges. During the second term, an additional 14 U.S. magistrates were named, thus maintaining the historic W. Bush proportion at close to 17 percent. Half of the promotions from within the federal judiciary were nontraditional appointees, which compares to the 45 percent of the first term appointees.

• Bush's appointees had the largest proportion of all five administrations with prosecutorial experience. Overall, continuing the trend that began with Carter, there was a larger proportion with judicial than prosecutorial experience.

• W. Bush's appointees had the lowest proportion of all five administrations with neither judicial nor prosecutorial experience, thus, arguably, characterizing the W. Bush appointees on the whole as having the strongest professional credentials since and including the Roosevelt appointees. This is reinforced by the findings of the ABA ratings, which show that 7 in 10 received the highest rating, the best record since ratings began.

• The proportion of Bush appointees with an Ivy League law school education was the lowest since the Reagan appointees. Taking into account the non-Ivy prestige law schools, about 31 percent of the Bush appointees had a prestige legal education compared to 38 percent of the Clinton appointees.

• In terms of gender diversity, Bush's record was second only to Bill Clinton's. Prior to Jimmy Carter's administration there were only token numbers of women appointed. The first George Bush set a historic record for a Republican president, exceeded only by his son. But it was Democrat Bill Clinton who set the bar at its highest point with women constituting close to 30 percent of his district court appointments. Although W. Bush did not match Clinton's record, it should be noted that he nominated a woman, his White House Counsel Harriet Miers, to replace Sandra Day O'Connor in 2005, but the nomination was withdrawn after heavy conservative opposition.[12]

• In terms of race, although Jimmy Carter's administration was the breakthrough presidency for the appointment of African Americans to the district court bench, Bill Clinton once again raised the bar (17 percent). George W. Bush's record of African-American appointments was far from Clinton's and in terms of proportions, matched the record of his father with just under 7 percent of his total appointments.

• With the appointment of Hispanics, however, W. Bush set a new record with an overall proportion of 10 percent, pointedly better than the Clinton and Carter record. The Hispanic vote was important to Bush's victories in 2000 and 2004 and the selection of highly qualified jurists with Hispanic heritage was one way of acknowledging a vital component of Bush's electoral coalition. The same could be said for Bush's Democratic predecessors in terms of their appointments of women and African Americans. (In general, see "Diversity on the bench," page 276).

• As for Asian Americans, as seen in Table 3, only token appointments have been made and W. Bush's proportion was about the same as Clinton's.

• Overall, the percentage of Bush's traditional (white male) appointments was 67 percent, second lowest only to Clinton's 52 percent.

• The findings for political identification in Table 3 show that of all five administrations, W. Bush appointed the lowest proportion from his political party and the highest proportion from the opposing party. He also appointed the highest proportion of those not affiliated with any party. To be sure, more than 8 out of 10 appointed by W. Bush were Republicans. And, of course, the changed political environment of Bush's last two years likely was largely responsible for the numbers and proportions of Democrats and nonaffiliateds appointed. (In general, see "Partisan makeup of the bench," page 282).

• The proportion of appointees with prominent prior party activism was slightly larger than the proportion of Clinton appointees, but noticeably smaller than the proportions of the other three presidents, and, indeed, markedly lower than all other administrations since and including the Roosevelt administration.[13] As we observed

11. Goldman, et. al., *W. Bush's judiciary*, *supra* n. 3, at 268.

12. See the account in Jan Crawford Greenburg, SUPREME CONFLICT; THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 247-285 (New York: Penguin Books, 2008).

13. Sheldon Goldman, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 349 (New Haven: Yale University Press, 1997).

## Table 3. U.S. district court appointees compared by administration

| | W. Bush | | Clinton | | Bush | | Reagan | | Carter | |
|---|---|---|---|---|---|---|---|---|---|---|
| | % | (N) | % | (N) | % | (N) | % | (N) | % | (N) |
| **Occupation** | | | | | | | | | | |
| Politics/government | 13.4% | (35) | 11.5% | (35) | 10.8% | (16) | 13.4% | (39) | 5.0% | (10) |
| Judiciary | 48.3% | (126) | 48.2% | (147) | 41.9% | (62) | 36.9% | (107) | 44.6% | (90) |
| Large law firm | | | | | | | | | | |
| 100+ members | 9.2% | (24) | 6.6% | (20) | 10.8% | (16) | 6.2% | (18) | 2.0% | (4) |
| 50-99 | 5.0% | (13) | 5.2% | (16) | 7.4% | (11) | 4.8% | (14) | 5.9% | (12) |
| 25-49 | 4.6% | (12) | 4.3% | (13) | 7.4% | (11) | 6.9% | (20) | 5.9% | (12) |
| Medium size firm | | | | | | | | | | |
| 10-24 members | 5.0% | (13) | 7.2% | (22) | 8.8% | (13) | 10.0% | (29) | 9.4% | (19) |
| 5-9 | 5.0% | (13) | 6.2% | (19) | 6.1% | (9) | 9.0% | (26) | 9.9% | (20) |
| Small firm | | | | | | | | | | |
| 2-4 | 4.2% | (11) | 4.6% | (14) | 3.4% | (5) | 7.2% | (21) | 11.4% | (23) |
| solo | 1.9% | (5) | 3.8% | (11) | 1.4% | (2) | 2.8% | (8) | 2.5% | (5) |
| Professor of law | 1.1% | (3) | 1.6% | (5) | 0.7% | (1) | 2.1% | (6) | 3.0% | (6) |
| Other | 2.3% | (6) | 1.0% | (3) | 1.4% | (2) | 0.7% | (2) | 0.5% | (1) |
| **Experience** | | | | | | | | | | |
| Judicial | 52.1% | (136) | 52.1% | (159) | 46.6% | (69) | 46.2% | (134) | 54.0% | (109) |
| Prosecutorial | 47.1% | (123) | 41.3% | (126) | 39.2% | (58) | 44.1% | (128) | 38.1% | (77) |
| Neither | 24.9% | (65) | 28.9% | (88) | 31.8% | (47) | 28.6% | (83) | 31.2% | (63) |
| **Undergraduate education** | | | | | | | | | | |
| Public | 47.1% | (123) | 44.3% | (135) | 46.0% | (68) | 37.9% | (110) | 55.9% | (113) |
| Private | 45.2% | (118) | 42.0% | (128) | 39.9% | (59) | 48.6% | (141) | 34.2% | (69) |
| Ivy League | 7.7% | (20) | 13.8% | (42) | 14.2% | (21) | 13.4% | (39) | 9.9% | (20) |
| **Law school education** | | | | | | | | | | |
| Public | 49.0% | (128) | 39.7% | (121) | 52.7% | (78) | 44.8% | (130) | 52.0% | (105) |
| Private | 39.1% | (102) | 40.7% | (124) | 33.1% | (49) | 43.4% | (126) | 31.2% | (63) |
| Ivy League | 11.9% | (31) | 19.7% | (60) | 14.2% | (21) | 11.7% | (34) | 16.6% | (34) |
| **Gender** | | | | | | | | | | |
| Male | 79.3% | (207) | 71.5% | (218) | 80.4% | (119) | 91.7% | (266) | 85.6% | (173) |
| Female | 20.7% | (54) | 28.5% | (87) | 19.6% | (29) | 8.3% | (24) | 14.4% | (29) |
| **Ethnicity/race** | | | | | | | | | | |
| White | 81.6% | (213) | 75.1% | (229) | 89.2% | (132) | 92.4% | (268) | 78.2% | (158) |
| African Amer. | 6.9% | (18) | 17.4% | (53) | 6.8% | (10) | 2.1% | (6) | 13.9% | (28) |
| Hispanic | 10.0% | (26) | 5.9% | (18) | 4.0% | (6) | 4.8% | (14) | 6.9% | (14) |
| Asian | 1.5% | (4) | 1.3% | (4) | — | — | 0.7% | (2) | 0.5% | (1) |
| Native American | — | — | 0.3% | (1) | — | — | — | — | 0.5% | (1) |
| **Percentage white male** | 67.4% | (176) | 52.4% | (160) | 73.0% | (108) | 84.8% | (246) | 67.8% | (137) |
| **ABA rating** | | | | | | | | | | |
| EWQ/WQ | 70.1% | (183) | 59.0% | (180) | 57.4% | (85) | 53.5% | (155) | 51.0% | (103) |
| Qualified | 28.4% | (74) | 40.0% | (122) | 42.6% | (63) | 46.6% | (135) | 47.5% | (96) |
| Not Qualified | 1.5% | (4) | 1.0% | (3) | — | — | — | — | 1.5% | (3) |
| **Political identification** | | | | | | | | | | |
| Democrat | 8.0% | (21) | 67.5% | (267) | 6.1% | (9) | 4.8% | (14) | 91.1% | (184) |
| Republican | 83.1% | (217) | 6.2% | (19) | 88.5% | (131) | 91.7% | (266) | 4.5% | (9) |
| Other | — | — | 0.3% | (1) | — | — | — | — | — | — |
| None | 8.8% | (23) | 5.9% | (18) | 5.4% | (8) | 3.4% | (10) | 4.5% | (9) |
| **Past party activism** | 52.5% | (137) | 50.2% | (153) | 84.2% | (95) | 60.3% | (175) | 61.4% | (124) |
| **Net worth** | | | | | | | | | | |
| Under $200,000 | 5.0% | (13) | 13.4% | (41) | 10.1% | (15) | 17.9% | (52) | 35.8%* | (53) |
| $200-499,999 | 18.0% | (47) | 21.6% | (66) | 31.1% | (46) | 37.6% | (109) | 41.2% | (61) |
| $500-999,999 | 21.8% | (57) | 26.9% | (82) | 26.4% | (39) | 21.7% | (63) | 18.9% | (26) |
| $1+ million | 55.2% | (144) | 38.0% | (116) | 32.4% | (48) | 22.8% | (66) | 4.0% | (6) |
| **Average age at nomination** | 49.1 | | 49.5 | | 48.2 | | 48.6 | | 49.6 | |
| **Total number of appointees** | 261 | | 305 | | 148 | | 290 | | 202 | |

* These figures are for appointees confirmed by the 98th Congress for all but six Carter district court appointees (for whom no data were available).

two years ago: "This reflects in large part the impact of the relatively nonpolitical nontraditional appointees but also the relatively nonpolitical backgrounds of the traditional appointees whose professional careers were on the state bench or federal magistrate/bankruptcy positions. It would appear that party affiliation rather than past party activism was of greater importance."[14]

• Findings for net worth reveal that for the first time, a clear majority of appointees were millionaires. There has been a steady increase of the proportion of millionaires from 4 percent of Carter appointees to 23 percent of Reagan appointees to 32 percent of Bush 1 appointees, to 38 percent of Clinton appointees to W. Bush's 55 percent. Inflation may account for some of the increase, but the conclusion is inescapable that relatively stagnant judicial salaries have made it more affordable for the well-to-do to go on the bench than for the less well-to-do. If Congress does not substantially raise the salaries of federal judges, it is likely that the profile of the federal judiciary increasingly will be skewed to the wealthy.

• Of the three Republican administrations represented in Table 3, George W. Bush's appointed on average the oldest cohort. But his cohort was still on average younger than the appointees of the two Democrats, Carter and Clinton.

## Appeals court appointees

During the 110th Congress, President George W. Bush nominated 22 individuals to lifetime judgeships on the federal circuit courts of general jurisdiction, of which 10 were confirmed. (Three are profiled in "Some notable Bush appointees," page 263). Table 4 compares the demographic portrait of those 10 to the Bush appointees confirmed by the previous three congresses. Table 5 compares all the nontraditional appointees during W. Bush's two terms in office (a total of 21) to the traditional appointees (a total of 38). Table 6 aggregates all of Bush's appeals court appointees and compares them to the appointees of his four predecessors in office. With Tables 4 and 5 we are dealing with relatively small numbers, thus percentage differences must be treated cautiously.

**Table 4. How the Bush appointees to the appeals courts confirmed during the 110th Congress compare to those confirmed during his first six years**

| | 110th Congress | | 107th-109th Congresses | |
|---|---|---|---|---|
| | % | (N) | % | (N) |
| **Occupation** | | | | |
| Politics/government | — | — | 22.4% | (11) |
| Judiciary | 60.0% | (6) | 46.9% | (23) |
| Large law firm | | | | |
| 100+ members | 10.0% | (1) | 4.1% | (2) |
| 50-99 | — | — | 8.2% | (4) |
| Medium size firm | | | | |
| 10-24 members | 10.0% | (1) | 6.1% | (3) |
| Small firm | | | | |
| 2-4 | — | — | 2.0% | (1) |
| solo | — | — | 2.0% | (1) |
| Professor | 20.0% | (2) | 4.1% | (2) |
| Other | — | — | 4.1% | (2) |
| **Experience** | | | | |
| Judicial | 80.0% | (8) | 57.1% | (28) |
| Prosecutorial | 30.0% | (3) | 34.7% | (17) |
| Neither | 10.0% | (1) | 28.6% | (14) |
| **Undergraduate education** | | | | |
| Public | 30.0% | (3) | 36.7% | (18) |
| Private | 50.0% | (5) | 46.9% | (23) |
| Ivy League | 20.0% | (2) | 16.3% | (8) |
| **Law school education** | | | | |
| Public | 30.0% | (3) | 40.8% | (20) |
| Private | 40.0% | (4) | 34.7% | (17) |
| Ivy League | 30.0% | (3) | 24.5% | (12) |
| **Gender** | | | | |
| Male | 60.0% | (6) | 77.6% | (38) |
| Female | 40.0% | (4) | 22.4% | (11) |
| **Ethnicity/race** | | | | |
| White | 100.0% | (10) | 81.6% | (40) |
| African American | — | — | 12.2% | (6) |
| Hispanic | — | — | 6.1% | (3) |
| **Percentage white male** | 60.0% | (6) | 65.3% | (32) |
| **ABA rating** | | | | |
| Well qualified | 90.0% | (9) | 67.3% | (33) |
| Qualified | 10.0% | (1) | 32.7% | (16) |
| **Political identification** | | | | |
| Democrat | 10.0% | (1) | 6.1% | (3) |
| Republican | 90.0% | (9) | 91.8% | (45) |
| None | — | — | 2.0% | (1) |
| **Past party activism** | 80.0% | (8) | 65.3% | (32) |
| **Net worth** | | | | |
| Under $200,000 | — | — | 6.1% | (3) |
| $200-499,999 | — | — | 20.4% | (10) |
| $500-999,999 | 30.0% | (3) | 26.5% | (13) |
| $1+ million | 70.0% | (7) | 46.9% | (23) |
| **Total number of appointees** | 10 | | 49 | |
| **Average age at nomination** | 49.2 | | 49.7 | |

In examining Table 4, there are several findings worth highlighting:

14. Goldman, et. al., *Picking judges in a time of turmoil*, *supra* n. 9 at 276.

**Table 5. How the Bush non-traditional appointees compared to his traditional appointees to the U.S. appeals courts**

| | Nontraditional appointees | | Traditional appointees | |
|---|---|---|---|---|
| | % | (N) | % | (N) |
| **Occupation** | | | | |
| Politics/government | 9.5% | (2) | 23.7% | (9) |
| Judiciary | 71.4% | (15) | 36.8% | (14) |
| Large law firm | | | | |
| 100+ members | 9.5% | (2) | 2.6% | (1) |
| 50-99 | 4.8% | (1) | 7.9% | (3) |
| Medium size firm | | | | |
| 10-24 members | — | — | 10.5% | (4) |
| Small firm | | | | |
| 2-4 | — | — | 2.6% | (1) |
| solo | — | — | 2.6% | (1) |
| Professor of law | 4.8% | (1) | 7.9% | (3) |
| Other | — | — | 5.3% | (2) |
| **Experience** | | | | |
| Judicial | 85.7% | (18) | 47.4% | (18) |
| Prosecutorial | 33.3% | (7) | 34.2% | (13) |
| Neither | 4.8% | (1) | 36.8% | (14) |
| **Undergraduate education** | | | | |
| Public | 42.9% | (9) | 31.6% | (12) |
| Private | 42.9% | (9) | 50.0% | (19) |
| Ivy League | 14.3% | (3) | 18.4% | (7) |
| **Law school education** | | | | |
| Public | 38.1% | (8) | 42.1% | (16) |
| Private | 38.1% | (8) | 31.6% | (12) |
| Ivy League | 23.8% | (5) | 26.3% | (10) |
| **Gender** | | | | |
| Male | 28.6% | (6) | 100.0% | (38) |
| Female | 71.4% | (15) | — | — |
| **Ethnicity/race** | | | | |
| White | 57.1% | (12) | 100.0% | (38) |
| African American | 28.6% | (6) | — | — |
| Hispanic | 14.3% | (3) | — | — |
| **ABA rating** | | | | |
| Well Qualified | 66.7% | (14) | 73.7% | (28) |
| Qualified | 33.3% | (7) | 26.3% | (10) |
| **Political identification** | | | | |
| Democrat | 14.3% | (3) | 2.6% | (1) |
| Republican | 81.0% | (14) | 97.4% | (37) |
| None | 4.8% | (1) | — | — |
| **Past party activism** | 38.1% | (8) | 84.2% | (32) |
| **Net worth** | | | | |
| Under $200,000 | 9.5% | (2) | 2.6% | (1) |
| $200-499,999 | 14.3% | (3) | 18.4% | (7) |
| $500-999,999 | 23.8% | (5) | 28.9% | (11) |
| $1+ million | 52.4% | (11) | 50.0% | (19) |
| **Average age at nomination** | 49.7 | | 49.7 | |
| **Total number of appointees** | 21 | | 38 | |

• Those confirmed during the 110th Congress were more likely to come from the judicial ranks or have judicial experience than the appointees confirmed during the previous three congresses.

• A larger proportion of appointees confirmed during the 110th Congress were women but none were of an ethnic or racial minority.

• Nine out of 10 of the most recent appointees received the highest ABA rating compared to under 7 in 10 confirmed during the previous three congresses.

• Seven in 10 of the most recent appointees had a net worth over $1 million compared to under 5 in 10 confirmed during the previous three congresses.

Over his two terms in office George W. Bush appointed 38 white males (traditional appointees) and 21 who did not fit this profile—racial or ethnic minority males and women, some of whom also were from a racial or ethnic minority (nontraditional appointees). Table 5 compares the two groups:

• About twice the proportion of nontraditional appointees were already judges when appointed to the circuit courts. The proportion of nontraditional appointees with judicial experience was close to twice that for traditional appointees.

• Whereas about one third of the traditional appointees had neither judicial nor prosecutorial experience, the proportion for the nontraditional appointees was under 5 percent.

• Both groups had close to the same proportions given the highest ABA rating with the edge leaning towards the traditional appointees.

• Democrats and Independents, although few in number, were more likely to be found among the nontraditional appointees.

• Traditional appointees were much more likely to have a record of past partisan activism than nontraditional appointees.

• The net worth for the nontraditional and traditional groups of appointees was approximately the same.

• The average age at time of nomination was the same for both groups of appointees.

Table 6 presents the composite portrait of all W. Bush's appeals court appointees during his two terms in office compared to the composite portraits of the appointees of Presidents Carter, Reagan, Bush Sr., and Clinton. The findings reveal:

• Almost 1 in 5 Bush appointees

# Partisan makeup of the bench

From the beginning of 2001 to the end of 2006, we saw little impact of the Bush appointments to the federal bench. When he took office in 2001, 51 percent of the judges sitting on lower federal courts were appointed by Republican presidents; at the end of the 109th Congress (2007) that percentage had increased marginally to 52.6. Despite the Democrats gaining a majority in the Senate and the associated claims by Republicans that there was a slowdown in acting on Bush nominees, this trend strengthened during the 110th Congress.[1] When it ended in December of 2008, 56.1 percent of active judges on the lower federal courts were appointed by Republican presidents.[2] In effect, from 2007 to 2008, Bush increased the percentage of Republican-appointed judges by 3.5 percent, compared to just 1.6 percent for the previous 6 years.

This change in partisan makeup of the bench can be explained by two factors. First, a greater number of vacancies—especially on the district courts—came from Democratic appointees.[3] From 2001 to 2006, 169 judges left active service and only 41 (24 percent) were appointed by Democratic presidents. By contrast, from 2007 to 2008, this percentage increased to 39 percent overall, with 42 percent coming from district courts. While still remarkably strong, this is the first sign the Clinton cohort is starting to age as 33 percent of all vacancies came from Clinton appointees.

Second, during his last two years in office, Bush made more federal judicial appointments. Even with the partisan change in the Senate and his lame duck status, Bush nominated and obtained confirmation for 68 judges (58 district court and 10 circuit court)—18 more than the previous two years. This is partially because he had more judicial positions to fill; nonetheless, the impact is the same.

Regarding these last two years of Bush's judicial appointments, there was a marked shift in judicial openings in terms of the party of the appointing president. Historically, the bulk of appointment opportunities come from judges taking senior status or retiring. One explanation is that they do so under a partisan-compatible president and Congress since their replacement is more likely to be ideologically similar. In addition, the "generational effect" dictates that the overall complement of departing judges in any given administration is dominated by the appointees of a specific predecessor of the same party as the sitting president. Combining these two phenomena resulted in Reagan and H. W. Bush judges being replaced by George W. Bush appointees during the first six years of his tenure.

However, from 2007 to 2008, we saw a substantial increase in the retirements of Clinton appointees, particularly at the district court level. Forty Clinton district court judges left while W. Bush was president and half of them left active service from 2007 to 2008. Although they did not leave with a partisan-compatible president, the Democrats controlled the majority in the Senate, thus those judges left knowing it would be more difficult for the president to nominate someone too ideologically conservative. The data support this conclusion, as the proportion of Democrats nominated to district court positions during the last two years almost doubled from the previous six.[4]

Despite the increase in retirements from the district courts, Table 1 illustrates that the Clinton cohort remains strong on both the district courts and the courts of appeals, where it accounts for 38 percent and 32.3 percent of judges respectively. This is just shy of the 38.1 percent and 32.9 percent of Bush appointees, a difference of one judge at both levels. However, this may change in the near future, as the historical pattern suggests that accelerated departures from the bench (especially retirements) follow changes in partisan control of the White House.[5] In fact, since January 1, 2009, 22 judges have left active service, of which 45 percent were Clinton appointees.

Given this pattern, unless there is an omnibus judges bill similar to Senate Bill 2774, which would have created 48 new judgeships (38 district court, 10 courts of appeals), it will be difficult for Obama to shift the partisan composition of the bench in any considerable way for a number of years. In fact, assuming no additional Clinton or Carter judges retire, which is very unlikely, it would require nearly 45 percent of the judges appointed by Reagan and H. W. Bush to leave active service to bring partisan equity back to the courts

The data in Table 1 also underscore the impact of judges opting to take senior status, since the number of senior judges is more than half the number of active judges on each court level. Republican appointees make up a clear majority of senior judges—64 percent and 71 percent on the district courts and courts of appeals, respectively. While senior judges have reduced caseloads, they nonetheless are a critical component of the judiciary and certainly the strong Republican majority has an impact on judicial decision making. Even with the increase in Clinton judges taking senior status, absent a dramatic rise in the number of full retirements by senior judges, Republicans will have the numerical advantage for many years to come.

Looking at the courts separately, the trend of partisan disagreement over district court nominees continued

1. Politico, March 5, 2008 "Nominations staredown in the Senate."
2. This calculation is for authorized judgeships, and thus includes vacancies.
3. Vacancy data include judges who left the bench due to retirement, resignation, elevation, and death—the overwhelming majority, of course, took senior status.
4. *See* Table 3 in text.
5. *See* Deborah Barrow, Gary Zuk and Gerard Gryski, THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE (Ann Arbor: University of Michigan Press, 1996).

**Table 1. Make-up of federal bench by appointing president, January 1, 2009 (lifetime positions on lower courts of general jurisdiction).**

| | District courts | | | | Courts of appeals | | | |
|---|---|---|---|---|---|---|---|---|
| | Active | | Senior | | Active | | Senior | |
| | % | (N) | % | (N) | % | (N) | % | (N) |
| Bush, G.W. | 38.1 | 253 | 0.0 | 0 | 32.9 | 55 | 1.0 | 1 |
| Clinton | 38.0 | 252 | 8.1 | 30 | 32.3 | 54 | 3.0 | 3 |
| **Bush** | 10.5 | 70 | 12.7 | 47 | 10.8 | 18 | 14.1 | 14 |
| **Reagan** | 7.2 | 48 | 35.2 | 130 | 11.4 | 19 | 42.4 | 42 |
| Carter | 1.7 | 11 | 23.8 | 88 | 4.2 | 7 | 20.2 | 20 |
| **Ford** | 0.2 | 1 | 4.3 | 16 | 0.6 | 1 | 3.0 | 3 |
| **Nixon** | 0.2 | 1 | 11.4 | 42 | 0.0 | 0 | 10.1 | 10 |
| Johnson | 0.2 | 1 | 3.3 | 12 | — | — | 5.1 | 5 |
| Kennedy | — | — | 0.8 | 3 | — | — | 1.0 | 1 |
| Eisenhower | — | — | 0.3 | 1 | — | — | — | — |
| Vacancies | 4.1 | 27 | — | — | 7.8 | 13 | — | — |
| **Total** | 100.2% | 664* | 99.9% | 369 | 100% | 167 | 99.9% | 99 |

*Does not include the 11 temporary district court judgeships.

during the 110th Congress.[6] Even though Republicans claimed that Democrats' invocation of the Thurmond Rule impeded progress on Bush's judicial nominees,[7] Bush obtained confirmation of 58 district court judges out of 85 appointment opportunities (but only 79 submitted nominations).[8] This is a vast improvement over the 35 confirmations from the 109th Congress, but Bush still left 27 vacancies as his term expired.

Owing primarily to the decrease in appointment opportunities during the last four years[9] and an increase in contention over district court nominees, by the end of the 110th Congress, Bush appointed 261 judges—significantly fewer than Clinton's record of 305. However, the impact of Bush's appointments is clear. Overall, Republican appointees now constitute 56.2 percent of the total authorized positions, and 58.6 percent of active judges. This is considerably more than the 52.4 percent of authorized positions and 55 percent of active judges from just two years ago.

During his first six years in office Bush had a difficult time getting his appointees to the courts of appeals confirmed and this trend continued during the 110th Congress. At the start of the congressional term there were 16 appellate court vacancies, with 7 additional positions left by 5 judges taking senior status, 1 retirement, and 1 death. In total, Bush had 23 appointment opportunities to the courts of appeals for which he submitted 22 nominations. He succeeded in getting 10 nominees confirmed.

Despite the strength of the Clinton cohort (only one Clinton appointee took senior status) Republican appointees now comprise 55.7 percent (93) of the 167 seats authorized for the courts of appeals, which is 2.4 percent more than two years ago. However, taking into account only active judges, the Republican majority swells to 60.4 percent, illustrating that it is firmly in the Republican column for the foreseeable future.

The Republican advantage widens upon factoring senior status judges into the mix. Combining both court levels, 61.3 percent of all judges currently hearing cases were appointed by Republican presidents.[10] The Republican edge is more pronounced at the appellate level where 64.4 percent were appointed by Republicans, as compared to 60.5 percent on the district courts. Reagan appointees dominate the group of senior judges—they comprise more than one third of the district and appellate courts.

*— Sara Schiavoni*

6. Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?* 86 JUDICATURE 282 (2003) and Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244 (2005). Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *Picking judges in a time of turmoil: W. Bush's judiciary during the 109th Congress*, 90 JUDICATURE 252 (2007).

7. See page 263 for a discussion of the rule.

8. Of the 85 opportunities, 43 (50%) came from judges taking senior status, 28 from inherited vacancies, 6 from resignations, 2 from elevations to the courts of appeals, 2 from retirements, and 4 from death.

9. Bush did not benefit from any judgeship legislation during the 108th, 109th or 110th Congresses.

10. Adding senior judges to those in active service totals 1259 judges, which increases to 1299 when including vacancies.

**Table 6. U.S. appeals court appointees compared by administration, Carter through W. Bush**

| | W. Bush | | Clinton | | Bush | | Reagan | | Carter | |
|---|---|---|---|---|---|---|---|---|---|---|
| | % | (N) | % | (N) | % | (N) | % | (N) | % | (N) |
| **Occupation** | | | | | | | | | | |
| Politics/government | 18.6% | (11) | 6.6% | (4) | 10.8% | (4) | 6.4% | (5) | 5.4% | (3) |
| Judiciary | 49.1% | (29) | 52.5% | (32) | 59.5% | (22) | 55.1% | (43) | 46.4% | (26) |
| Large law firm | | | | | | | | | | |
| 100+ members | 5.1% | (3) | 11.5% | (7) | 8.1% | (3) | 5.1% | (4) | 1.8% | (1) |
| 50-99 | 6.8% | (4) | 3.3% | (2) | 8.1% | (3) | 2.6% | (2) | 5.4% | (3) |
| 25-49 | — | — | 3.3% | (2) | — | — | 6.4% | (5) | 3.6% | (2) |
| Medium size firm | | | | | | | | | | |
| 10-24 members | 6.8% | (4) | 9.8% | (6) | 8.1% | (3) | 3.9% | (3) | 14.3% | (8) |
| 5-9 | — | — | 3.3% | (2) | 2.7% | (1) | 5.1% | (4) | 1.8% | (1) |
| Small firm | | | | | | | | | | |
| 2-4 | 1.7% | (1) | 1.6% | (1) | — | — | 1.3% | (1) | 3.6% | (2) |
| solo | 1.7% | (1) | — | — | — | — | — | — | 1.8% | (1) |
| Professor | 6.8% | (4) | 8.2% | (5) | 2.7% | (1) | 12.8% | (10) | 14.3% | (8) |
| Other | 3.4% | (2) | — | — | — | — | 1.3% | (1) | 1.8% | (1) |
| **Experience** | | | | | | | | | | |
| Judicial | 61.0% | (36) | 59.0% | (36) | 62.2% | (23) | 60.3% | (47) | 53.6% | (30) |
| Prosecutorial | 33.9% | (20) | 37.7% | (23) | 29.7% | (11) | 28.2% | (22) | 30.4% | (17) |
| Neither | 25.4% | (15) | 29.5% | (18) | 32.4% | (12) | 34.6% | (27) | 39.3% | (22) |
| **Undergraduate education** | | | | | | | | | | |
| Public | 35.6% | (21) | 44.3% | (27) | 29.7% | (11) | 24.4% | (19) | 30.4% | (17) |
| Private | 47.4% | (28) | 34.4% | (21) | 59.5% | (22) | 51.3% | (40) | 51.8% | (29) |
| Ivy League | 17.0% | (10) | 21.3% | (13) | 10.8% | (4) | 24.4% | (19) | 17.9% | (10) |
| **Law school education** | | | | | | | | | | |
| Public | 39.0% | (23) | 39.3% | (24) | 32.4% | (12) | 41.0% | (32) | 39.3% | (22) |
| Private | 35.6% | (21) | 31.1% | (19) | 37.8% | (14) | 35.9% | (28) | 19.6% | (11) |
| Ivy League | 25.4% | (15) | 29.5% | (18) | 29.7% | (11) | 23.1% | (18) | 41.1% | (23) |
| **Gender** | | | | | | | | | | |
| Male | 74.6% | (44) | 67.2% | (41) | 81.1% | (30) | 94.9% | (74) | 80.4% | (45) |
| Female | 25.4% | (15) | 32.8% | (20) | 18.9% | (7) | 5.1% | (4) | 19.6% | (11) |
| **Ethnicity/race** | | | | | | | | | | |
| White | 84.7% | (50) | 73.8% | (45) | 89.2% | (33) | 97.4% | (76) | 78.6% | (44) |
| African American | 10.2% | (6) | 13.1% | (8) | 5.4% | (2) | 1.3% | (1) | 16.1% | (9) |
| Hispanic | 5.1% | (3) | 11.5% | (7) | 5.4% | (2) | 1.3% | (1) | 3.6% | (2) |
| Asian | — | — | 1.6% | (1) | — | — | — | — | 1.8% | (1) |
| **Percentage white male** | 64.4% | (38) | 49.2% | (30) | 70.3% | (26) | 92.3% | (72) | 60.7% | (34) |
| **ABA rating** | | | | | | | | | | |
| EWQ/WQ | 71.2% | (42) | 78.7% | (48) | 64.9% | (24) | 59.0% | (46) | 75.0% | (42) |
| Qualified | 28.8% | (17) | 21.3% | (13) | 35.1% | (13) | 41.0% | (32) | 25.0% | (14) |
| **Political identification** | | | | | | | | | | |
| Democrat | 6.8 % | (4) | 85.2% | (52) | 2.7% | (1) | — | — | 82.1% | (46) |
| Republican | 91.5% | (54) | 6.6% | (4) | 89.2% | (33) | 96.2% | (75) | 7.1% | (4) |
| Other | — | — | — | — | — | — | 1.3% | (1) | — | — |
| None | 1.7% | (1) | 8.2% | (5) | 8.1% | (3) | 2.6% | (2) | 10.7% | (6) |
| **Past party activism** | 67.8% | (40) | 54.1% | (33) | 70.3% | (26) | 66.7% | (52) | 73.2% | (41) |
| **Net worth** | | | | | | | | | | |
| Under $200,000 | 5.1% | (3) | 4.9% | (3) | 5.4% | (2) | 15.6%* | (12) | 33.3%** | (13) |
| $200-499,999 | 16.9% | (10) | 14.8% | (9) | 29.7% | (11) | 32.5% | (25) | 38.5% | (15) |
| $500-999,999 | 27.1% | (16) | 29.5% | (18) | 21.6% | (8) | 35.1% | (27) | 17.9% | (7) |
| $1+ million | 50.8 % | (30) | 50.8% | (31) | 43.2% | (16) | 16.9% | (13) | 10.3% | (4) |
| **Total number of appointees** | 59 | | 61 | | 37 | | 78 | | 58 | |
| **Average age at nomination** | 49.8 | | 51.2 | | 48.7 | | 50.0 | | 51.8 | |

*Net worth was unavailable for one appointee.
**Net worth only for Carter appointees confirmed by the 96th Congress with the exception of five appointees for whom net worth was unavailable.
Note that the two recess appointments by President Bush and the one by President Clinton are not included in the statistics.

came to the courts of appeals from positions in government, typically the U.S. Attorney's office. This was the largest proportion by far for all five administrations.

- Slightly under half the Bush appointees were elevated from a lower court judgeship. Only the proportion for the Carter appointees

was lower. On the other hand, the proportion with judicial experience was the second highest for all five administrations. And, significantly, the Bush appeals court appointees had the lowest proportion of all five administrations with neither judicial nor prosecutorial experience. Clearly, the Bush Administration was concerned with naming people with a track record that aligned with the judicial philosophy of the President.

• About one in four had an Ivy League law school education. However, when we add those who attended such prestigious non-Ivy league law schools as Chicago, Duke, Georgetown, Indiana, Michigan, Stanford, Texas, and Virginia, the proportion attending the most prestigious law schools came to over 50 percent, close to the same proportion as that of the Clinton appointees and larger than the 45 percent of Reagan and Bush Sr. appointees.

• The proportion of women appointed by W. Bush to the appeals courts was exceeded only by Clinton. The proportion of African Americans was higher than that of Bush's Republican predecessors but lower than the proportions for Carter and Clinton. Similarly, the proportion of traditional appointees was higher than the proportions for Carter and Clinton but lower than that of Bush's Republican predecessors.

• About 7 in 10 Bush appointees received the highest ABA rating. This was better than his Republican predecessors but lower, although close, to the Carter and Clinton proportions.

• Bush, Clinton, and Carter named approximately the same proportion of appointees affiliated with the opposition party, but Bush appointed the lowest proportion of those unaffiliated with a political party.

• About two-thirds of the Bush appointees had some record of previous party activism. The Clinton cohort had the smallest proportion but even for the Clinton judges, over half had a documented history of party activity.

• The Bush and Clinton cohorts were on the whole the wealthiest group of appointees of all five presidents. The same proportion (51 percent) of both presidents' appointees had a net worth of $1 million or more.

• Bush's appointees were the second youngest of all five presidents. Only Bush's father appointed younger appeals court judges in terms of average age at the time of nomination.

## W. Bush's judicial legacy

From the outset of the Bush presidency, judicial selection was targeted as a high priority and administration officials were quite candid about this. Viet Dinh, when he was Assistant Attorney General for Legal Policy during the early years of the presidency told us: "The legal legacy that the President leaves [is as] important as anything else we do in terms of legislative policy . . . .[W]e want to ensure that the President's mandate to us that the men and women who are nominated by him to be on the bench have his vision of the proper role of the judiciary." He also noted that judicial nominations should not be thought of "as something apart from and secondary to [the] policy agenda but as an integral part of it."[15]

The then Associate White House Counsel Brett Kavanaugh, later named and confirmed to the U.S. Court of Appeals for the District of Columbia Circuit, also told us that the President "is very interested in this [selecting judges] and thinks it is one of his most important responsibilities...."[16] Two years later Kavanaugh's successor, Associate White Counsel Dabney Friedrich, told us that the President "has given a great deal of attention to judgeships over the past four years, and he will continue to do so."[17] Two years subsequently Friedrich's succes-


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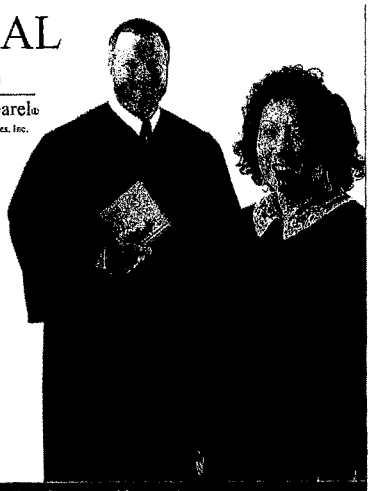

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15. Interview with Viet Dinh on January 6, 2003.
16. Interview with Brett Kavanaugh on January 7, 2003.
17. Interview with Dabney Friedrich on December 8, 2004.

sor, Jennifer Brosnahan, assured us that "the President will continue to nominate the same kind of people that he has nominated in the past—people with extraordinary credentials and integrity, and who share his judicial philosophy."[18]

In recent decades, starting with the Reagan Administration, ideological/philosophical screening has been de rigueur for Republican administrations. As a result, the lower court appointees of Reagan and both presidents Bush have generally been more conservative in the exercise of their discretion than have the appointees of Democratic presidents. The Carp et. al. study of the voting behavior of W. Bush's district court judges in this issue of *Judicature* (see page 312) provides empirical support for this statement. After eight years of Bush appointments to the appeals courts, the ideological mix on those courts is thought to have sharply tipped to the conservative end of the ideological spectrum.[19]

The impact of Bush appointments on judicial policy is most dramatically illustrated by the sharp divisions on the Supreme Court where Bush appointees Associate Justice Samuel Alito and Chief Justice John Roberts have helped push the Court even further to the right and whose support of civil liberties claims is relatively low. Barbara Perry in her article in this issue (see page 302) fleshes out the policy impact of the Roberts and Alito appointments.

Furthermore, in simple quantitative terms, the proportion of votes supporting civil liberties claims in non-unanimously decided decisions from 2005-2008 was 17 percent for Justice Alito (only Justice Thomas had a lower support level, 10 percent) and 23 percent for Chief Justice Roberts (virtually the same as Justice Scalia's support level). In contrast, Justice Kennedy's civil liberties support level was 40 percent, and the four more liberal justices' support levels ranged from Justice Breyer's 74 percent to Justice Ginsburg's 81 percent.[20]

***Thus, George W. Bush's legacy includes the appointment of like-minded Supreme Court justices and lower court judges selected by a process structured to achieve that result.***

Over the past two decades, the judicial confirmation process has become heavily politicized with active lobbying of senators by conservative and liberal groups. Senators have placed holds on nominations, conducted filibusters, and employed various delaying tactics. This has most notably been the case with appeals court nominees, but district court nominees were also affected. The Democrats were furious with Republican obstruction and delay of Clinton judicial nominees. Particularly during Clinton's second term, dozens of judicial nominations were delayed or killed. Democrats exacted payback during W. Bush's presidency, especially when the nominees were seen as excessively ideological and/or partisan. Rather than lower the partisan temperature, the President raised it. The article by Binder and Maltzman in this issue (see page 320) provides systematic analyses of confirmation battles and what variables are associated with greater or lesser contentiousness.

The level of distrust between Senate Democrats and the Bush White House escalated to the point that during the 110th Congress, the Senate refused to recess lest the President make recess appointments. Thus the Senate was in continuous pro forma session over the major holidays and the customary August recess.

***W. Bush's judicial legacy then must be seen as including a highly politicized and confrontational selection and confirmation process.***

In terms of the demographics and characteristics of those placed on the bench by George W. Bush, as discussed earlier in this article, the record is one of highly professionally qualified appointees and the most diverse cohort (race, ethnicity, gender) of any Republican president and of every Democratic president with the exception of Clinton and rivaling Carter. Indeed, Bush's proportion of Hispanics to the federal district courts was a historic record. A full discussion of diversity is found in the article in this issue by Jennifer Segal Diascro and Rorie Spill Solberg (see page 289).

While Democrat Barack Obama can be expected to set new historic records for diversity, George W. Bush set the benchmark for Republican presidents and it is unlikely that any future Republican president would fail to take account of his performance in this regard.

**Bush's judicial legacy is also that of a highly professionally qualified diverse judiciary.**

***W. Bush's judicial legacy, then, is also that of a highly professionally qualified diverse judiciary.***

In sum, George W. Bush and his administration set out with a vision for the judiciary and firm ideas of what the President wanted his judicial legacy to be. In that respect, unlike the ill-fated war in Iraq that was once touted as "mission accomplished," his successful placing on the bench two Supreme Court justices, 59 appeals courts judges, and 261 district court judges, all lifetime appointees to courts of general jurisdiction, truly constituted "mission accomplished."

18. Interview with Jennifer Brosnahan on December 6, 2006.

19. Charlie Savage, *Appeals Courts Pushed to Right By Bush Choices*, New York Times, October 29, 2008, at A-1, A-14.

20. See Table 2 in Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations but Will He Have a Dickens of a Time Living up to Them?*, 7 THE FORUM, Issue 1, Article 9, p. 8. Online journal at www.bepress.com/forum/vol7/iss1/art9

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# Terror-probe rules to change

By Lara Jakes Jordan
*The Associated Press*

Posted: 09/24/2008 12:30:00 AM MDT

WASHINGTON — The Justice Department, in a nod to concerns that Americans could be investigated in terrorism cases without evidence of wrongdoing, said Tuesday that it will tweak still-tentative rules governing FBI national security cases before they are issued.

The changes represent a small but first victory for skeptical lawmakers and civil liberties groups that want the department to delay the rules until a new president is elected.

Not all of the planned changes were outlined during a Senate Intelligence Committee hearing, but Assistant Attorney General Elisebeth Cook said they would include limits on the length and kinds of investigative activities used in monitoring demonstrations and civil disorders.

"We do anticipate making changes in response to the comments we have received," Cook said. Justice Department and FBI lawyers have been briefing lawmakers and interest groups on the rules for the past six weeks.

The short hearing came as three Democrats on the Senate Judiciary Committee demanded " bare-minimum" civil rights protections for U.S. citizens and residents as the FBI expands its power to seek out potential terrorists.

"The Justice Department's actions over the last eight years have alienated many Americans, especially Arab- and Muslim-Americans," Democratic Sens. Dick Durbin, Russ Feingold and Edward Kennedy wrote Tuesday to Attorney General Michael Mukasey.

The rules, known as attorney general guidelines, will update how agents conduct interviews as the FBI shifts from a traditional crime-fighting agency to one whose top priority is protecting the United States from terrorist attacks.

The Justice Department says the guidelines will merely streamline existing authorities used in criminal and national security investigations. But critics call them a broad expansion of FBI powers that could result in racial, ethnic or religious profiling without any evidence of a crime.

The government initially wanted to issue the guidelines by Oct. 1, but Cook indicated Tuesday that was unlikely. She said, however, that the Justice Department expected to finalize the new rules in the near future.

A growing group of House and Senate lawmakers — both Democratic and Republican — has urged Mukasey to release the policy to the public before it takes effect, allowing scrutiny and easing concerns about rule-making done in

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secret.

Senate Intelligence Committee chairman Jay Rockefeller, D-W.Va., said after the hearing that he remains "skeptical" about how well the guidelines will work, but maintained they "could represent an improvement" over current policy.

The panel's top Republican, Sen. Christopher Bond of Missouri, called the guidelines "a remarkable improvement" and said they should be issued immediately.

If Mukasey finalizes the guidelines in the waning days of the Bush administration, Durbin, Feingold and Kennedy demanded that they at least include what they called "bare minimum" safeguards.

Those protections include:

• Explicitly banning surveillance or other investigative activity based on a suspect's race, ethnicity, national origin or religion.

• Requiring some factual proof, allegations or other grounds for opening inquires that fall short of an investigation.

• Requiring specific plans to protect information that the FBI collects about U.S. citizens and residents, particularly in gathering foreign intelligence data.

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# Feds Plan to Take DNA Samples of Anyone Arrested for Immigration Violations

**Thursday , January 15, 2009**

**By Lindsay Stewart**

**FOX NEWS**

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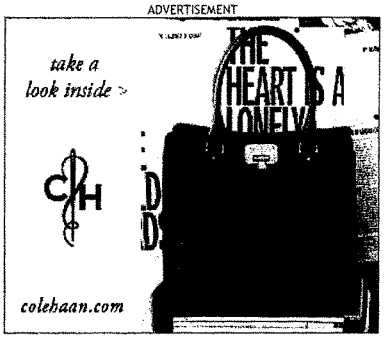


A Mexican national arraigned last month in San Diego on 11 charges in a rape case is now a poster boy for a new Department of Justice policy requiring federal officials to take DNA samples from those arrested on immigration violations.

Before being charged with rape, suspect Carlos Ceron Salazar was deported nine times from the United States. Had the new DOJ policy been in place, federal officials say many victims could heve been spared.

"In the past, we have had a limited authority to take DNA samples," said Elisebeth Cook, an attorney in the Office of Legal Policy at the Justice Department. "It's critical while we have the opportunity to take the sample."

But civil libertarians are concerned about the policy, pointing to backlog of DNA samples already existing in criminal laboratories across the country. Samples will be taken from those who are merely detained, they say, not just from those who arrested or charged with any crime.

"We're now treating people who have yet to be taken to court of law, proven to have violated either the civil or criminal law and engaging in probably the most invasive kind of information gathering we have," said Larry Frankel, an attorney for the American Civil Liberties Union.

Frankel says the new policy will likely lead to increased racial profiling from law enforcement.

"We're going to find people who someone suspects they're not citizens because of their skin color or their accent, when in fact they are naturalized citizens," he told FOX News.

Yet federal officials insist that cheek swab data taken from those detained — whether it be for coming into the country illegally or overstaying a visa — will be a valuable crime-fighting tool. The DOJ says nearly 60,000 cases have been solved using DNA evidence, either aiding in the conviction or the exoneration of suspects.

In cases where a person is wrongly detained, that individual will have a right to petition the Federal Bureau of Investigations to have their DNA sample removed from their databases, a remedy which the ACLU argues is too arduous for a person who never committed a crime in the first place.

The ACLU is looking for ways to fight the policy. While the organization has not filed any legal action, they will not rule out a future lawsuit.

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INTERNATIONAL
Herald Tribune

## FBI given new rules for investigations

**The Associated Press**
Saturday, October 4, 2008

**WASHINGTON:**
The Bush administration issued new rules Friday designed to allow the FBI to pursue potential national security threats with the same vigor and techniques used against common criminals. Civil libertarians said the guidelines will come at a cost to constitutional protections.

The rules, to take effect Dec. 1, are a road map to the FBI's transformation. The Federal Bureau of Investigation made its reputation many decades ago by successfully pursuing bank robbers. The Justice Department says it wants to ensure that the FBI can now meet the biggest threats of the 21st century: national security and terrorism.

The road map consolidates once-separate rules for assessing threats and investigating traditional crimes and terror. They tell FBI agents what they can and cannot do, including when to conduct surveillance, use informants and consider race or ethnicity in determining whether someone is a suspect.

While some changes were made from preliminary rules shown to lawmakers, public interest organizations and reporters, the alterations were not enough to silence critics who say the FBI will be able to begin investigating people with no indication they have committed a crime.

Anticipating the criticism, Attorney General Michael Mukasey and FBI Director Robert Mueller issued a joint statement saying: "We are confident these guidelines will assist the FBI in carrying out its critical national security and foreign intelligence missions while also protecting privacy and civil liberties."

Democratic Sen. Patrick Leahy, chairman of the Senate Judiciary Committee, was not reassured.

"I am concerned that the guidelines continue the pattern of this administration of expanding authority to gather and use Americans' private information without protections for privacy or checks to prevent abuse and misuse," Leahy said.

Three Democrats on the House Judiciary Committee asked the department to postpone the effective date until a new president takes office in January and has an opportunity to review the procedures.

"Questions still remain about why there seems to be a rush to change these procedures in the last days of this administration," Reps. John Conyers, Robert "Bobby" Scott and Jerrold Nadler said in a joint statement.

The three said it was unclear whether the guidelines will result in FBI agents "monitoring the religious and political activities of innocent people."

Michael German, policy counsel for the American Civil Liberties Union, said the Justice Department recently revised the rules to make it appear that limits have been imposed on what techniques the FBI can use to investigate demonstrations and civil disorders. He cited language elsewhere in the guidelines that appear to contradict the restrictions, saying there are no limits on the FBI's authority to investigate federal crimes or threats to national security during civil disorders or demonstrations.

Elisebeth Cook, chief of the Justice Department's Office of Legal Policy, said in an interview that several changes were made to accommodate critics' worries and protect civil rights and liberties.

"To say we're in a brave new world, and the FBI has new ability to investigate without evidence of wrongdoing is misunderstood," she said.

Dealing with concerns about racial profiling, Cook said race is used only as one factor in an investigation when it is relevant, such as describing a suspect. The guidelines cannot undercut any

constitutional protections, state laws, executive orders or federal policies, Cook said.

Among the changes between a preliminary draft and the final rules:

_Investigations related to civil disorders now have a time limit of 30 days. The investigations are to determine only whether the president needs to use the military.

_The guidelines "cut way back," Cook said, in the types of information that can be collected in cases of civil disorders. Only four techniques will be allowed: checking public records, FBI records, other government records and online sources.

Any other methods would have to be approved by the attorney general or one of several top deputies confirmed by the U.S. Senate.

_Language was added to say the FBI "shall" protect speech and practice of religion rights, instead of "should."

*Correction:*

Notes:

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**STATEMENT OF RACHEL L. BRAND, NOMINEE TO BE A MEMBER OF THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD**

Ms. BRAND. I am not sure how much I can add there, but it is clearly important both that agencies continue to develop the culture of sharing information, which was a challenge after 9/11, but also put into place the safeguards that will make sure that the information that they appropriately have and are sharing is safeguarded as well.

Chairman LEAHY. But you understand the real concern Americans have for——

Ms. BRAND. Absolutely.

Chairman LEAHY. And, Judge Wald, did you want to add anything to that?

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**
**QUESTIONNAIRE FOR NOMINEES**
**TO PRIVACY AND CIVIL LIBERTIES BOARD**

**PUBLIC**

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

*Rachel Lee Brand*

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

*Member, Privacy and Civil Liberties Oversight Board*

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

*Office address: 1615 H Street, NW, Washington, DC 20062*
*Residence: McLean, VA*

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

*May 1, 1973; Muskegon, MI*

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

*Law School: Harvard Law School, JD 1998 (attended 1995 - 1998)*

*Undergraduate: University of Minnesota-Morris, BA 1995 (attended 1991 - 1995)*
*(I studied at Universidad de Las Andes, Merida, Venezuela on a study abroad program for one term in 1993.)*

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

*National Chamber Litigation Center. Chief Counsel for Regulatory Litigation (2011-present). 1615 H Street, NW, Washington, DC 20062.*

*George Washington University Law School. Adjunct Professor (2010-2011). 2000 H Street, NW, Washington, DC 20052.*

*Wilmer Cutler Pickering Hale & Dorr. Counsel (2008-2011). 1875 Pennsylvania Ave., NW, Washington, DC 20006.*

*U.S. Department of Justice. Assistant Attorney General for Legal Policy (2005-2007); Principal*

*Deputy Assistant Attorney General (2003-2005). 950 Pennsylvania Ave., NW, Washington, DC 20530.*

*Supreme Court of the United States, Associate Justice Anthony Kennedy. Law clerk (2002-2003). One First Street, NE, Washington, DC 20543.*

*White House. Associate Counsel to the President (2001-2002); Assistant Counsel to the President (2001). 1600 Pennsylvania Ave., NW, Washington, DC 20500.*

*Bush-Cheney Transition. Associate Counsel (2001). 1800 G Street, NW, Washington, DC 20270.*

*Cooper, Carvin & Rosenthal. Associate (1999-2001). 1500 K Street, NW, Washington, DC 20005.*

*Elizabeth Dole for President Exploratory Committee. General Counsel (1999). Arlington, VA.*

*Supreme Judicial Court of Massachusetts, Associate Justice Charles Fried. Law clerk (1998-1999). New Courthouse, One Pemberton Square, Boston, MA 02108.*

*Simpson, Thacher & Bartlett. Summer Associate (1998). 425 Lexington Avenue. New York, NY 10017.*

*Cooper & Carvin. Summer Associate (1997). Washington, DC.*

*Covington & Burling. Summer Associate (1997). 1201 Pennsylvania Ave., NW, Washington, DC.*

*Harvard Law School. Research Assistant (1997). 1563 Massachusetts Ave., Cambridge, MA 02138.*

*Federal Bureau of Investigation. Honors Intern (1996). 935 Pennsylvania Ave., NW, Washington, DC 20535.*

*Mervenne Beverage., Inc. Receptionist (1995). 4209 Lincoln Rd., Holland, MI 49423.*

*Brann's Steakhouse. Waitress (1995). 12234 James St., Holland, MI 49424.*

*Bos Landen Country Club. Waitress (1995). 2411 Bos Landen Drive, Pella, IA 50219.*

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

*N/A*

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

*In 2007, I received the Department of Justice Edmund J. Randolph Award.*

*In 2004, I received the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security.*

*I graduated* cum laude *from Harvard Law School.*

*I received a full tuition scholarship from the University of Minnesota-Morris. I graduated from UMM with High Distinction and Honors.*

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

*American Bar Association, 1999-2000*

10. **Bar and Court Admission**:

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

*I am a member of the bars of New York (1999-present) and the District of Columbia (2000-present).*

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

*I am a member of the bars of the following federal courts:*
*Supreme Court of the United States (2003-present)*
*U.S. Court of Appeals for the Fourth Circuit (2007-present)*
*U.S. Court of Appeals for the District of Columbia Circuit (2011-present)*
*U.S. Court of Appeals for the Federal Circuit (1999-present)*
*U.S. District Court for the District of Columbia (2000-2003; 2007-2010; 2011-present. Admission to the bar of this court is for a three-year period. I renewed when necessary.)*
*U.S. Court of Federal Claims (2000-present)*

11. **Memberships**:
a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

*Little Falls Presbyterian Church, member 2007-present*
*-Member of the Board of Trustees of Little Falls Presbyterian Church (2010-present)*
*-Member of the Board of Trustees of the Little Falls Presbyterian Church Foundation (2011-present)*

*National Presbyterian Church, member 2001 - 2007*

*Federalist Society, member intermittently 1995 - present*
*-Member, Executive Committee of the Practice Group on International Law and National Security Law, approximately 2008 - 2011*
*-Member, Executive Committee of the Practice Group on Administrative Law, 2011- present*

*Alexander Hamilton Society, member of informal advisory board, 2011-present*

*Republican National Lawyers Committee, member approximately 2008-present*
*-Member, Board of Governors, 2010-2011*

*University of Minnesota Institute for Law and Politics, member of advisory board, approximately 2009-2010*

*Harvard Federalist Society Alumni Chapter, member of informal steering committee, approximately 2008*

b. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

*Not to my knowledge.*

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

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

*Publications in my official capacity with the U.S. Department of Justice:*

*Web Q and A published on "Ask the White House" (on the official White House website) on March 9, 2006, concerning reauthorization of the USA PATRIOT Act. A copy of the Q and A can be found at:* http://georgewbush-whitehouse.archives.gov/ask/print/20051216-2.html.

*Letter to the editor (with co-author Brian Roehrkasse of the Justice Department) entitled "Alito's Opinions Mischaracterized," published in the Boston Globe on Nov. 21, 2005. A copy is attached.*

*Letter to the Editor published in the National Law Journal on October 31, 2005, concerning federal sentencing policy. A copy is attached.*

*Op-Ed (with co-author John Pistole of the FBI) concerning national security letters, published in USA Today on Nov. 9, 2005. A copy is attached.*

*Letter to the Editor entitled, "DNA databases will not invade people's privacy," published in the Roanoke Times, October 12, 2005. A copy is attached.*

*Publications in my personal capacity:*

*Article entitled, "Reauthorization of the USA PATRIOT Act," published on the Federalist Society's website first published in September 2009 and updated in January 2010. A copy is attached.*

*Article based on my presentation at the 2009 Federalist Society Student Symposium at Yale Law School, entitled, "Judicial Appointments: Checks and Balances in Practice," published in the*

*Harvard Journal of Law and Public Policy, Winter 2010 edition. A copy of the article is attached.*

*Article entitled, "Making It a Federal Case: An Inside View of the Pressures to Federalize Crime," published on the Heritage Foundation's website on Aug. 29, 2008. A copy is attached.*

*Article entitled, "A Practical Look at Federal Judicial Selection," published in The Advocate (the journal of the Litigation Section of the Texas State Bar Association), Winter 2010 edition. A copy is attached.*

*"Case Comment, Civil Forfeiture as Jeopardy: United States v. Ursery," 20 Harv. J.L. & Pub. Pol'y 292 (1996). A copy is attached.*

*Editorial on behalf of Bob Dole for President, published in the Harvard Law Record in 1996. I do not have a copy.*

*I served in various editorial capacities, including Deputy Editor-in-Chief, with the Harvard Journal of Law and Public Policy while in law school. I edited numerous articles in that publication during that time.*

*Various columns in the University Record (student newspaper at the University of Minnesota-Morris) written in my editorial capacity with that newspaper between1991 and 1995. I have no record of specific columns or dates. I also edited other students' work in that newspaper.*

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

*None.*

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

*Testimony delivered in my official capacity with the U.S. Department of Justice:*

*Testimony before the U.S. Senate Judiciary Committee, Subcommittee on Terrorism, Technology and Homeland Security, at a hearing entitled, "Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention of Terrorists." June 22, 2004. A copy of my written statement is attached.*

*Testimony Before the U.S. Senate Judiciary Committee at a hearing entitled, "Examining the Proposal to Restructure the Ninth Circuit," September 20, 2006. A copy of my written statement is attached.*

*Testimony before the U.S. Senate Judiciary Committee Subcommittee on Immigration, Border Security, and Citizenship, for an oversight hearing entitled, "U.S. Refugee Admissions and Policy." I submitted written testimony only. A copy of my statement is attached.*

*Testimony before the U.S. House of Representatives Committee on the Judiciary concerning H.R. 2102, the Free Flow of Information Act of 2007. June 14, 2007. A copy of my written statement is attached.*

*Testimony before the U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on Domestic Policy, at a hearing entitled, "Lethal Loopholes: Deficiencies in State and Federal Gun Purchase Laws." May 10, 2007. A copy of my written statement is attached.*

*Testimony before the U.S. House of Representatives Committee on International Relations, Subcommittee on Africa, Global Human Rights, and International Operations, at a hearing entitled, "Current Issues in U.S. Refugee Protection and Resettlement." May 10, 2006. A copy of my written statement is attached.*

*Confirmation hearing testimony:*

*Testimony at my confirmation hearing to be Assistant Attorney General for Legal Policy. May 12, 2005. I did not submit a written statement. A webcast of the hearing can be found at: http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da105d724.*

*Testimony in my personal capacity:*

*Testimony delivered before a Nov. 3, 2009, meeting of the Republican members of the House Judiciary Committee concerning an extension of USA PATRIOT Act provisions. A copy of my prepared statement is attached. The meeting was aired on C-SPAN. A video can be found at: http://www.c-spanvideo.org/program/TRIO*

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

*Speaking engagements while employed by the U.S. Department of Justice:*

*Panel discussion on terrorism co-hosted by the Oklahoma City University chapters of the National Women's Law Student Association and of the Federalist Society. Oklahoma City, OK, March 2004. A copy of my speech notes is attached.*

*Informal discussion with a group of Harvard Law School students as part of the Harvard Law School Traphagen Distinguished Speakers Series, sponsored by the Dean of the law school in March 2004. I have no notes from this event.*

*Keynote address to the Computers, Freedom, and Privacy Conference on the subject of counter-terrorism policy. Berkeley, CA, April 2004. A copy of my prepared remarks is attached.*

*Participant in the 2004 Holmes Debates at the Library of Congress, on the subject of the USA PATRIOT Act. Washington, DC, June 2004. A copy of my notes is attached.*

*Panel discussion on the USA PATRIOT Act hosted by the Wyoming Bar Ass'n. Gillette, WY, September 2004. I have no notes from this event.*

*Panel discussion on the USA PATRIOT Act hosted by the Long Island chapter of the Federalist Society. Mineola, NY, September 2004. A copy of my speech notes is attached.*

*Debate on the USA PATRIOT Act hosted by the Western Michigan chapter of the Federalist Society. Grand Rapids, MI, October 2004. A copy of my speech notes is attached.*

*Panelist in two panel discussions at the U.S. Attorneys' National Conference on April 22, 2005 (the audience consisted entirely of Justice Department personnel). One panel was on the subject of terrorism; the other was on the subject of crime victims' rights. My notes from the victims' rights panel are attached. I do not have any notes from the other panel.*

*Presentation about Justice Department policy priorities to the Department of Justice's PIO Conference on September 20, 2005. A copy of my notes is attached.*

*Panel discussion about the USA PATRIOT Act sponsored by George Washington University on February 2, 2006. A copy of my notes is attached.*

*Informal remarks at a Recent Graduates Reception of the Harvard Law School Association of the District of Columbia. February 9, 2006. A copy of my notes is attached.*

*Panel discussion about the Department of Justice before the U.S. Senate Youth Program delegates. March 7, 2006. I have no notes from this event.*

*Speech to the Federalist Society Houston chapter on the subject of Supreme Court confirmations. March 23, 2006. A copy of my notes is attached.*

*Panel discussion on the subject of Supreme Court confirmations, hosted by Harvard University's Shorenstein Center on the Press, Politics and Public Policy. Mar. 24, 2006. The event was aired on C-SPAN. Video can be found at: http://www.c-spanvideo.org/program/Synt.*

*Speech to the Harvard Law School Republicans about Supreme Court confirmations. April 6, 2006. A copy of my notes is attached.*

*Speech to the Notre Dame Law School Federalist Society chapter about terrorism policy. April 20, 2006. A copy of my notes is attached.*

*Remarks about Department of Justice priorities to the delegates at the American Bar Association's "ABA Day." May 4, 2006. I did not deliver prepared remarks and have no notes from this event.*

*Speech to the Federalist Society New Orleans chapter about Supreme Court confirmations. May 11, 2006. A copy of my notes is attached.*

*Speech to the Federalist Society Pittsburgh chapter about Supreme Court confirmations. May 25, 2006. A copy of my notes is attached.*

*Press conference at the U.S. Department of Justice on June 1, 2006, concerning the Department's release of its Synthetic Drug Control Strategy. A video of the press conference can be found at: http://www.c-spanvideo.org/program/Synt.*

*Keynote address at the dedication of the Tucson, AZ law enforcement memorial, August 1, 2006. A copy of my prepared remarks is attached.*

*Speech to the Cleveland, OH, Federalist Society chapter on the subject of Supreme Court confirmations. August 10, 2006. A copy of my speech notes is attached.*

*Speech about methamphetamine and drug enforcement at the National Conference of State Legislatures annual meeting. August 17, 2006. A copy of my notes is attached.*

*Speech about methamphetamine and drug enforcement at the Law Enforcement and Youth Partnerships for Crime Prevention Conference. October 3, 2006. A copy of my notes is attached.*

*Remarks to the West/Southwest Methamphetamine Conference in Salt Lake City, UT. October 5, 2006. A copy of my speech notes is attached.*

*Remarks about judicial selection at the White House's "Women's Leadership Briefing." October 11, 2006. A copy of my notes is attached.*

*Speech about Justice Department priorities to the Business Software Alliance Forum. October 17, 2006. A copy of my speech is attached.*

*Panel discussion entitled "Amnesty v. Enforcement -- The House and Senate Proposals," hosted by the George Mason School of Law Civil Rights Law Journal on October 18, 2006. A transcript of the panel is attached.*

*Speech to the Heritage Foundation's Legal Strategy Forum on the subject of Supreme Court confirmations, Oct. 19, 2006. A copy of my speech is attached.*

*Speech to the Georgetown Law School Federalist Society chapter about Supreme Court confirmations. October 31, 2006. A copy of my speech notes is attached.*

*Speech about crime victims' rights at the NOVA Crisis Response Conference in Little Rock, AR. November 13, 2006. A copy of my speech is attached.*

*Panel discussion about attorney-client privilege waivers in criminal investigations hosted by the Kansas City Metropolitan Bar Association. November 15, 2006. A copy of my notes is attached.*

*Presentation about Department of Justice priorities to the Women in Government Relations Homeland Security Task Force. November 27, 2006. A copy of my notes is attached.*

*Press conference in Des Moines, IA, along with the U.S. Attorney for the Southern District of Iowa and the Iowa Drug Policy Coordinator, concerning National Methamphetamine Awareness Day. Nov. 30, 2006. A copy of my notes is attached.*

*Speech to the Iowa Drug Task Force Conference, Altoona, IA, in connection with National Methamphetamine Awareness Day. Nov. 30, 2006. A copy of my speech is attached.*

*Remarks about the Adam Walsh Child Protection and Safety Act of 2006 at the Project Safe Childhood National Conference. December 5, 2006. A copy of my speech is attached.*

*Panel discussion at the Harvard Law School Women's Law Association conference on February 16, 2007. A copy of my notes is attached.*

*Speech to the Thomas Cooley School of Law Federalist Society chapter on the subject of border security and immigration reform, March 22, 2007. A copy is attached.*

*Guest speaker at the April 27, 2007 monthly luncheon of the Federalist Society Washington, DC chapter. A copy of my speech is attached.*

*Speaking engagements in my personal capacity:*

*Panel discussion at the Close-Up Foundation's Reagan Youth Conference, June 20, 2011. The event was aired on C-SPAN. I do not have any notes from this event. A video can be found at: http://www.c-spanvideo.org/program/ReaganYo.*

*Panel discussion entitled "Federal Courts, Inc.?," hosted by the American Constitution Society at New York University Law School on March 8, 2011. I have no notes from this event.*

*Panel discussion about Supreme Court appointments at the Peter Jennings Project for Journalists and the Constitution on March 6, 2011, in Philadelphia, PA. I have no notes from this event.*

*Informal introductory remarks at the January 18, 2011, meeting of the Federalist Society's Washington, DC Young Lawyers Chapter. I have no notes from this event.*

*Panel discussion entitled, "The Path to the Bench: A Conversation on Federal Judicial Selection," sponsored by the American Constitution Society on November 18, 2010. A copy of my notes is attached.*

*Moderator of a panel discussion entitled, "Supreme Court Preview: What Is in Store for October Term 2010?," hosted by the Federalist Society at the National Press Club on September 29, 2010. A video of the event can be found at: http://www.fed-soc.org/publications/pubID.1971/pub_detail.asp*

*Debate participant in an event entitled, "Debating our Judiciary," sponsored by the Center for American Progress, the American Action Forum, and Politico at George Washington University on June 22, 2010. A video of the event can be found at:* http://www.americanprogress.org/events/2010/06/capaafpol.html.

*Speech to the Milwaukee Federalist Society chapter entitled, "What to expect during the Kagan hearings," June 21, 2010. A copy of my speech notes is attached.*

*Roundtable discussion about Supreme Court confirmations hosted by the Aspen Institute on June 15, 2010. A video of the event can be found at: http://www.aspeninstitute.org/video/roundtable-kagan-nomination-look-whats-come.*

*Panel discussion entitled, "A Discussion on the Nomination of Elena Kagan to the Supreme Court," hosted by the American Constitution Society on June 8, 2010. A copy of my speech notes is attached.*

*Speech to the Iowa Federalist Society Chapter in Des Moines, Iowa, in May 2010 on the subject of Supreme Court appointments. A copy of the speech is attached.*

*Moderator of a podcast entitled, "United States Supreme Court: Nomination and Confirmation Process," hosted by the Federalist Society on May 7, 2010. Audio of the podcast can be found at: http://www.fed-soc.org/publications/detail/united-states-supreme-court-nomination-and-confirmation-process-podcast.*

*Panel discussion entitled, "The Supreme Court and Judicial Confirmations," at the Republican National Lawyers Association conference on April 16, 2010. My notes for the event are attached.*

*Panel discussion on the Supreme Court confirmation process hosted by American University Washington College of Law, April 7, 2010. The event was aired on C-SPAN. A video can be found at: http://www.c-spanvideo.org/program/CourtConfirmat.*

*Panel discussion about the Tenth Amendment hosted by the Texas Conservative Coalition in Plano, Texas on February 15, 2010. I have no notes from this event.*

*Participating speaker in a "Briefing call" hosted by the Federalist Society (open to the public) on the subject of USA PATRIOT Act authorization on November 5, 2009. A copy of my notes is attached.*

*Panelist in a "Supreme Court roundup," hosted by the University of Chicago Law School Federalist Society chapter on October 1, 2009. A copy of my notes is attached.*

*Speech about judicial appointments sponsored by the University of Virginia Law School Federalist Society chapter, April 22, 2009. A copy of my speech notes is attached.*

*Moderator of a panel discussion entitled, "Filling the Courts: How the GOP Should Treat President Obama's Judicial Nominees," at the Republican National Lawyers Association conference on April 17, 2009. A copy of my notes is attached.*

*Editor's Roundtable entitled, "The New Administration: A First Look," hosted by the Legal Times, April 14, 2009. A copy of my notes is attached.*

*Speech about judicial appointments sponsored by the University of Michigan Law School Federalist Society chapter, April 6, 2009. A copy of my speech notes is attached.*

*Panel discussion entitled, "Confirmation Battles and Presidential Nominations," part of the 2009 Federalist Society Student Symposium (entitled "Separation of Powers in American Constitutionalism") at Yale Law School, February 28, 2009. This panel presentation was converted into an article for the Harvard Journal of Law & Public Policy. A copy has been provided in response to Question 12.a.*

*Panel discussion on judicial appointments hosted by the Edward Coke Appellate Inn of Court, Nov. 18, 2008. I have no notes from this event.*

*Speech to the Birmingham, Alabama Federalist Society chapter on the subject of Supreme Court appointments, Nov. 10, 2008. A copy of my speech notes is attached.*

*Panel discussion on the 2008 presidential race before the Association of General Counsels conference on October 16, 2008. A copy of my notes is attached.*

*Panel discussion sponsored by the Women's Bar Association on the subject of presidential appointments, October 14, 2008. I do not have any notes from this event.*

*Speech at the University of Minnesota-Morris entitled, "Viewing the Judiciary from All Angles," October 2, 2008. A copy of my speech notes is attached.*

*Panel discussion in 2008 at the University of Minnesota Law School's Minnesota Conservative and Libertarian Legal Colloquium, on the subject of stare decisis. I do not have any notes from this event.*

*Panel discussion on the upcoming presidential election's effect on Supreme Court confirmations, sponsored by the American Constitution Society and the Federalist Society in Philadelphia, PA, September 24, 2008. A copy of my speech notes is attached.*

*Speech at the University of Minnesota Law School, sponsored by the University of Minnesota Institute for Law and Politics, on September 2, 2008, on the subject of Supreme Court appointments. A copy of my speech notes is attached.*

*Panel discussion concerning the 2007-2008 Supreme Court Term, hosted by the Federalist Society at the National Press Club on July 1, 2008. The event was aired on C-SPAN. A video can be found at: http://www.c-spanvideo.org/program/TRIO.*

*Speech to the National Youth Leadership Forum on the subject of legal careers, June 24, 2008. A copy of the speech is attached.*

*Panel discussion on the subject of judicial nominations at Street Law's Supreme Court Summer Institute for Teachers in June 2008. I have no notes from this event.*

*Moderator of a panel discussion on the subject of reporter's shield legislation, hosted by the Federalist Society on April 29, 2008. Video of the event can be found at:* http://www.fed-soc.org/publications/detail/reporters-shield-event-audiovideo

*Panel discussion entitled, "2008 Election Outlook," part of WilmerHale's Financial Institutions Group conference in New York, NY on April 1, 2008. A copy of my notes is attached.*

*Panel discussion entitled, "Public Interest Success Stories," part of a conference at Harvard Law School entitled "A Celebration of Public Interest at Harvard Law School," March 14, 2008. I have no notes from this event.*

*Panel discussion on the subject of judicial appointments hosted by the George Washington University Law School chapters of the American Constitution Society and the Federalist Society in February 2008. A copy of my notes is attached.*

*Speech entitled, "Judicial Confirmations: The Fourth Circuit and Beyond," hosted by the Federalist Society of Greater Charlotte on February 8, 2008. A copy of my speech notes is attached.*

*Panel discussion on Supreme Court confirmations at the annual meeting of the Headmasters Association in Lafayette Hill, Pennsylvania, on February 7, 2008. I have no notes from this event.*

*Speech on the subject of judicial appointments sponsored by the University of Minnesota Institute for Law and Politics, January 24, 2008. A copy of my speech notes is attached.*

*Speech entitled, "An Insider Look at the U.S. Supreme Court Confirmation Process," hosted by the Thomas Cooley School of Law Federalist Society chapter on October 24, 2007. A copy of my speech notes is attached.*

*Panel discussion entitled, "The Future of the Supreme Court" at The New Yorker Festival, hosted by The New Yorker magazine, October 7, 2007. I have no notes from this event.*

*Speech to the Federalist Society's Student Leadership Conference on July 14, 2007. A copy of my speech notes is attached.*

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

*I do not have a record of every interview I have given to a news reporter. Listed below are print articles in which I have been quoted and radio and TV interviews of which I have a record. I have done my best to locate such items, but this may not be an exhaustive list.*

*Press interviews in my official capacity with the Department of Justice:*

*Radio interview regarding the USA PATRIOT Act on KQED - Forum with Michael Krasny. Feb. 12, 2004. I do not have a transcript or recording.*

*Interview with National Journal for a June 18, 2005, article profiling various Justice Department staff. A copy of the article is attached.*

*Interview with the Des Moines Register for a September 16, 2005, article about Chief Justice Roberts's confirmation process. A copy of the article is attached.*

*Interview with the Washington Post for a Nov. 3, 2005, article concerning Justice Alito's confirmation. The article can be found at:* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/02/AR2005110202724.html.

*Press Background Briefing on the subject of Justice Alito's nomination, Nov. 3, 2005. A transcript is attached.*

*Interview with the Wall Street Journal for a Nov. 16, 2005, article concerning Justice Alito's confirmation. A copy of the article is attached.*

*Interview with the San Francisco Chronicle for a Nov. 20, 2005, article concerning Justice Alito's confirmation. The article can be found at:* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/11/20/MNGVDFRH0B1.DTL&ao=all.

*Interview with the Wall Street Journal for a Nov. 21, 2005, article concerning Justice Alito's confirmation. The article can be found at:* http://online.wsj.com/article/SB113252961872202600.html.

*Press briefing concerning Justice Alito's confirmation. Circa Dec. 1, 2005. Attached is an article containing a quote from that briefing.*

*Interview with C-SPAN on Dec. 6, 2005, concerning Justice Alito's confirmation. Video can be found at: http://www.c-spanvideo.org/program/SupremeCourtWatch55.*

*Interview with CNN for a December 13, 2005, article concerning national security letters. A transcript of the segment can be found at:* http://www.cnn.com/2005/EDUCATION/12/14/transcript.thu/index.html?iref=allsearch.

*Interview with WIBA, Madison, WI, December 13, 2005. I do not have a transcript or recording.*

*Interview with WDAY, Fargo, ND, concerning the USA PATRIOT Act, December 15, 2005. I do not have a transcript or recording.*

*Radio interview with a Sacramento station concerning the USA PATRIOT Act, December 15, 2005. I do not have a transcript or recording.*

*Radio interview with WLOB, Portland, ME, concerning the USA PATRIOT Act, December 16, 2005. I do not have a transcript or recording.*

*Interview with the Eagle's Cry (the student newspaper of Pella Christian High School, Pella, IA, my alma mater) about my job at the Department of Justice. 2005. A copy of the article is attached.*

*Interview with* the Wall Street Journal *for a Jan. 5, 2006, article concerning Justice Alito's confirmation. A copy of the article can be found at:* http://online.wsj.com/article/SB113642811283938270-search.html.

*Interview with CNN for a January 10, 2006 segment concerning Justice Alito's confirmation hearing. Transcript attached.*

*Interview with C-SPAN on Jan. 12, 2006, concerning Justice Alito's confirmation. Video can be found at:* http://www.c-spanvideo.org/program/AlitoConfirmationHearin.

*Interview with FOX news concerning Justice Alito's confirmation. January 13, 2006. I do not have a transcript or recording.*

*Interview with Susanna Dokupil for an article posted on American Enterprise Online on Feb. 7, 2006. A copy of the article is attached.*

*TV interviews on March 8, 2006, concerning the USA PATRIOT Act: Hearst-Argyle television; BELO television; Cox Broadcasting TV. I do not have transcripts or recordings of these interviews.*

*Interview with the New York Times for a June 2, 2006, article concerning ISP retention of customer records. A copy of the article is attached.*

*Interview with NPR on August 9, 2006, concerning internet child pornography. The article can be found at:* http://www.npr.org/templates/story/story.php?storyId=5629338.

*Press release on November 30, 2006, concerning National Methamphetamine Awareness Day. A copy of the press release is attached.*

*Radio interviews on November 30, 2006, in connection with National Methamphetamine Awareness Day: WLW/Cincinnati; ABC News Morning; KEX/Portland, OR; KCMO/Kansas City; KTRS/St. Louis; WJR/Detroit. I do not have notes or tape of any of these brief interviews.*

*Interview with the Los Angeles Times for a December 22, 2006, article concerning the intersection of refugee and terrorism policy. The article can be found at:* http://articles.latimes.com/2006/dec/22/nation/na-asylum22.

*Interview with Elliot Slotnick for an article in the May-June 2007 edition of Judicature, entitled, "Picking Judges in a time of turmoil: W. Bush's judiciary during the 109th Congress." A copy of the article is attached.*

*Other press interviews:*

*Interview with NPR concerning Sackett v. EPA for an article aired and published on-line on Nov. 1, 2011. The article can be found at:* http://www.npr.org/templates/story/story.php?storyId=141887844.

*Interview with NPR for a July 20, 2010, story about judicial confirmations. A copy of the print version of the story can be found at:* http://www.npr.org/templates/story/story.php?storyId=128644860.

*Interview with CBS News for a June 29, 2010, story about Justice Kagan's confirmation hearing. The story can be found at:* http://www.cbsnews.com/8301-503544_162-20009227-503544.html?tag=mncol;lst;1.

*Interview with the New York Times for a June 27, 2010, article concerning Supreme Court confirmations. The article can be found at:* http://www.nytimes.com/2010/06/28/us/politics/28questions.html.

*Interview with the LeHigh Valley Morning Call for a June 25, 2010, article about Senator Specter's role in Supreme Court confirmations. The article can be found at:* http://articles.mcall.com/2010-06-25/news/mc-dc-specter-kagan-20100624_1_democrat-specter-supreme-court-confirmation-hearing-high-court-nominee.

*Interview with Voice of America News for a June 23, 2010, article about Supreme Court confirmations. The article can be found at:* http://www.voanews.com/english/news/usa/Kagan-Supreme-Court-Confirmation-Hearings-Begin-Monday-96990134.html.

*Interview with the Associated Press for a June 22, 2010, article concerning Supreme Court confirmation hearings. The article can be found at:* http://www.msnbc.msn.com/id/37854053/ns/politics-supreme_court/t/murder-boards-kagan-preps-hearings/#.T1LZ_Icge3o.

*Interview with Business Week for a June 21, 2010, article about Supreme Court confirmations. A copy of the article is attached.*

*Interview with the Los Angeles Times for a May 29, 2010, article about Supreme Court confirmations. The article can be found at:* http://articles.latimes.com/2010/may/29/nation/la-na-kagan-vetting-20100530.

*Interview with Politico for a May 27, 2010, article about Supreme Court confirmations. The article can be found at:* http://www.politico.com/news/stories/0510/37838.html.

*Interview with NPR for a May 25, 2010, segment about Supreme Court confirmation hearings. The story can be found at:* http://www.npr.org/templates/story/story.php?storyId=127095542.

*Interview with National Journal for a May 12, 2010, article about Supreme Court confirmations. A copy of the article is attached.*

*Interview with Politico for a May 12, 2010, article about Supreme Court confirmations. The article can be found at:* http://www.politico.com/news/stories/0510/37110.html.

*Interview with the Lars Larson radio show for a May 10, 2010, story about Supreme Court appointments. I do not have a transcript or recording.*

*Interview with MSNBC on April 12, 2010, about Supreme Court confirmations. I do not have a transcript or recording.*

*Interview with NBC News on April 9, 2010, about Supreme Court appointments. I do not have a transcript or recording.*

*Interview with CQ Weekly for an April 2010 article about Supreme Court nominations. A copy of the article is attached.*

*Interview with CNN for an April 21, 2010, segment on Supreme Court appointments. Video of the segment can be found at:* http://www.youtube.com/watch?v=6FO_Axbvhkw.

*Interview on CNN for an April 21, 2010, segment about the Supreme Court. I do not have a transcript or recording.*

*Interview with National Journal for an April 16, 2010, article about Supreme Court appointments. A copy of the article is attached.*

*Interview with Congressional Quarterly for an April 16, 2010, article about Supreme Court confirmations. A copy of the article is attached.*

*Interview with ABC News for an April 9, 2010, story concerning Supreme Court appointments. Video is available at: http://www.msnbc.msn.com/id/21134540/vp/36338749#36338749.*

*Interview with NPR in January 2010 concerning Attorney General Holder's confirmation hearing. The story can be found at:* http://www.npr.org/templates/story/story.php?storyId=99361682.

*Interview with the Harvard Law Bulletin for an article entitled, "Executive Counsel" in the Summer 2009 edition. A copy of the article is attached.*

*Interview with National Journal for a July 31, 2009, article about Supreme Court confirmations. A copy of the article is attached.*

*Interview with the New York Times for a July 15, 2009, article about Supreme Court confirmations. The article can be found at:* http://www.nytimes.com/2009/07/16/us/politics/16assess.html.

*Interview with the Washington Post for a July 13, 2009, article about Supreme Court confirmations. The article can be found at:* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/12/AR2009071202338.html.

*Interview with the Associated Press for a July 10, 2009, article about Supreme Court confirmations. The article can be found at:* http://www.azcentral.com/news/articles/2009/07/10/20090710sotomayor-theprep10-ON.html.

*Interview with National Journal for a June 15, 2009, article concerning Supreme Court confirmations. A copy of the article is attached.*

*Interview with National Journal for a June 3, 2009, article about Supreme Court confirmations. A copy of the article is attached.*

*Interview with the National Law Journal for a June 1, 2009, article about Supreme Court confirmations. A copy of the article is attached.*

*Interview with Roll Call TV on the subject of judicial appointments, May 29, 2009. I do not have a recording or transcript.*

*Interview with the National Law Journal for a May 4, 2009, article about Supreme Court appointments. A copy of the article is attached.*

*Interview with CNN for a May 3, 2009, article about Supreme Court confirmations. The article can be found at:* http://politicalticker.blogs.cnn.com/2009/05/03/obama-likely-to-pick-female-nominee/.

*Interview with the Legal Times for an April 6, 2009, article about Supreme Court appointments. A copy is attached.*

*Interview with WAMU's Kojo Namdi show on the subject of judicial appointments, January 29, 2009. The recording can be found at: http://thekojonnamdishow.org/shows/2009-01-29/breaking-judicial-logjam.*

*Interview with ABC News for a January 17, 2009, segment about the Supreme Court's decision in Ledbetter v. Goodyear. A transcript is attached.*

*Interview with Bloomberg News for a July 15, 2008, article about Supreme Court appointments. The article can be found at:* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=analt7SXDKiQ&refer=home.

*Interview with the Legal Times for an April 17, 2008, article about Bush Administration lawyers joining the private sector. A copy of the article is attached.*

*Interview with the Legal Times for a March 17, 2008, article about joining WilmerHale. A copy of the article is attached.*

*Interview with PBS for an October 4, 2007, segment about reporter shield legislation. A transcript can be found at:* http://www.pbs.org/newshour/bb/media/july-dec07/sources_10-04.html.

f. If applicable, list all published judicial opinions that you have written, including concurrences and dissents. Supply the citations for all published judicial opinions to the Committee.

*N/A*

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

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

*Assistant Attorney General for Legal Policy, U.S. Department of Justice; 2005-2007. Appointed by the President upon confirmation by the Senate.*

*Principal Deputy Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice; 2003-2005. Appointed.*

*Law clerk to Justice Anthony Kennedy, Supreme Court of the United States; 2002-2003. Appointed.*

*Associate Counsel to the President, the White House; 2001-2002. Appointed.*

*Assistant Counsel to the President, the White House; 2001. Appointed.*

*Associate Counsel, Bush-Cheney Transition; 2001. Appointed.*

*Law clerk to Justice Charles Fried, Supreme Judicial Court of Massachusetts; 1998-1999. Appointed.*

*Honors Intern, Federal Bureau of Investigation; 1996. Appointed.*

*Legislative Intern, Office of U.S. Senator Charles Grassley; 1995. Appointed.*

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

*Member of the Board of Governors of the Republican National Lawyers Association, 2010-2011 term. Member of the association from approximately 2008-present.*

*Assisted Fred Thompson's presidential campaign by providing volunteer policy advice. 2007.*

*Was listed on lawyers' committees supporting candidates for President during the 2008 presidential race: Fred Thompson, Mitt Romney, John McCain.*

*Volunteered for the Bush campaign during the 2000 presidential race: as a grassroots volunteer in Virginia and Iowa; and in Florida during the recount effort (writing briefs and pleadings).*

*Member of the Arlington County, VA, Republican Central Committee from 2000-2002.*

*Was employed as the General Counsel of the Elizabeth Dole for President Exploratory Committee for a brief period in 1999.*

*Was Vice-President of the Harvard Law Republicans while in law school.*

*During college at the University of Minnesota-Morris, did grassroots volunteering for various Republican campaigns for local office; Was a member of the Stevens County, MN central committee; Was a delegate to the Stevens County, MN nominating convention and the Minnesota Republican state convention; Was Secretary of the campus College Republicans.*

*Have served on the host committees for various fundraisers for candidates for state and federal office.*

14. **Legal Career:** Answer each part separately.

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

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

*I served as a law clerk to Justice Charles Fried on the Supreme Judicial Court of Massachusetts from 1998-1999 and as a law clerk to Justice Anthony Kennedy on the Supreme Court of the United States from 2002-2003.*

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

*No.*

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

*National Chamber Litigation Center. Chief Counsel for Regulatory Litigation (2011-present). 1615 H Street, NW, Washington, DC 20062.*

*George Washington University Law School. Adjunct Professor (2010-2011). 2000 H Street, NW, Washington, DC 20052.*

*Wilmer Cutler Pickering Hale & Dorr. Counsel (2008-2011). 1875 Pennsylvania Ave., NW, Washington, DC 20006.*

*U.S. Department of Justice. Assistant Attorney General for Legal Policy (2005-2007); Principal Deputy Assistant Attorney General (2003-2005). 950 Pennsylvania Ave., NW, Washington, DC 20530.*

*Supreme Court of the United States, Associate Justice Anthony Kennedy. Law clerk (2002-2003). One First Street, NE, Washington, DC 20543.*

*White House. Associate Counsel to the President (2001-2002); Assistant Counsel to the President (2001). 1600 Pennsylvania Ave., NW, Washington, DC 20500.*

*Bush-Cheney Transition. Associate Counsel (2001). 1800 G Street, NW, Washington, DC 20270.*

*Cooper, Carvin & Rosenthal. Associate (1999-2001). 1500 K Street, NW, Washington, DC 20005.*

*Elizabeth Dole for President Exploratory Committee. General Counsel (1999). Arlington, VA.*

*Supreme Judicial Court of Massachusetts, Associate Justice Charles Fried. Law clerk (1998-1999). New Courthouse, One Pemberton Square, Boston, MA 02108.*

*Simpson, Thacher & Bartlett. Summer Associate (1998). 425 Lexington Avenue. New York, NY 10017.*

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

*No.*

v. whether you have held any judicial office, including positions as an administrative law judge, on any U.S. federal, state, tribal, or local court and if so, please provide the name of the court, the jurisdiction of that court, whether the position was appointed or elected, and the dates of your service.

*No.*

b. Describe:

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

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

*Immediately after graduating from Harvard Law School and taking the bar examination, I was a law clerk to Associate Justice Charles Fried of the Supreme Judicial Court of Massachusetts.*

*Upon completing the clerkship, I deferred my start date with a law firm in order to volunteer for Elizabeth Dole's presidential campaign headquarters in Arlington, VA. Most my volunteer work for the campaign consisted of ballot access organization. After a couple of months as a volunteer, I worked as the campaign's general counsel until Mrs. Dole dropped out of the race.*

*I then became an associate at the Washington, D.C., law firm Cooper, Carvin & Rosenthal (now Cooper & Kirk), where I worked on a wide variety of litigation matters, ranging from Winstar-type cases on behalf of large financial institutions, to a constitutional challenge to the FCC's must-carry regulations, to representing a severely disabled girl seeking compensation for injuries sustained as the result of a childhood vaccine, to defending a small company against a Title VII claim. In 2000, I traveled with other lawyers from the firm to Tallahassee, Florida, to write briefs and other pleadings on behalf of the Bush campaign during the recount.*

*In January, 2001, I went to work for the Bush-Cheney transition and, on Inauguration Day, joined the White House Counsel's Office as an Assistant Counsel. I was promoted to Associate Counsel (and Special Assistant to the President) in June 2001. In that capacity, I provided legal and policy advice to White House officers on a wide range of issues and participated in judicial selection. Some of my particular areas of focus included legal issues relating to presidential appointments and the Twenty-Fifth Amendment to the U.S. Constitution. I coordinated the development of the Executive Order creating the Office of Homeland Security (the predecessor*

*to the Department of Homeland Security). I also was responsible for liaising with certain agencies, including the Department of Health and Human Services and the Department of Energy, on any legal issues requiring the White House's attention.*

*I left the White House to spend a year as a law clerk to Associate Justice Anthony Kennedy at the Supreme Court of the United States.*

*In 2003, I joined the U.S. Department of Justice as Principal Deputy Assistant Attorney General in the Office of Legal Policy. During the Bush Administration, the Office of Legal Policy was the Department's focal point for myriad policy issues ranging from terrorism to tort reform to drug policy and managed development of most of the Attorney General's policy priorities. The Office also handled the Justice Department's functions relating to judicial appointments. As Principal Deputy Assistant Attorney General, I served as the chief deputy to the Assistant Attorney General, helping him to manage the office's substantive work as well as personnel and budget. My greatest area of policy focus during that period was counter-terrorism and national security issues, including efforts to reauthorize the expiring provisions of the USA PATRIOT Act, working with Congress on the Intelligence Reauthorization Act of 2004, and revision of a variety of Attorney General guidelines. Among many other things, I also spearheaded the overhaul of the Attorney General's Guidelines for the treatment of crime victims and other efforts to implement the Justice for All Act of 2004.*

*In March 2005, upon the resignation of the previous Assistant Attorney General, I became Acting Assistant Attorney General. I was nominated by President Bush to be Assistant Attorney General for Legal Policy in April 2005 and was confirmed by the Senate and appointed in July 2005.*

*As Assistant Attorney General for Legal Policy, I served as the Attorney General's chief policy advisor, oversaw the development of high-priority policy initiatives for the Department of Justice, and coordinated the Department's big-picture policy agenda. This involved formulating policy proposals in the first instance, negotiating issues in the inter-agency process and with the White House, and promoting the Department's policy agenda to Congress and the public. Among the many policy issues within my office's purview were terrorism, immigration reform, tort reform, intellectual property protection, identity theft, drug enforcement, violent crime, firearms and explosives, and on-line child exploitation. Some of my greatest areas of focus included: terrorism and national security issues, particularly relating to the USA PATRIOT Act; policies and legislation to combat the diversion and abuse of prescription drugs and to combat the use of methamphetamine, including spearheading the first National Methamphetamine Awareness Day declared by the President; policies and legislation to enhance the Department's ability to investigate and prosecute those who sexually exploit children on-line; and comprehensive immigration reform legislation. I also served as the Attorney General's chief advisor on judicial selection and oversaw the Department of Justice's role in assisting judicial nominees with Senate confirmation. This included running the Department's efforts to achieve confirmation of Chief Justice Roberts and Justice Alito. I also served as the Department's Regulatory Policy Officer, meaning that all regulations promulgated by the Department of Justice were reviewed by my office before being transmitted to the Office of Management and Budget for inter-agency clearance.*

*From 2008-2011, I was a Counsel with the law firm Wilmer Cutler Pickering Hale & Dorr (WilmerHale) in Washington, D.C. Most of my work for the firm consisted of crisis management and strategic or pre-litigation counseling on legal and policy issues ranging from homeland security issues to online privacy issues. For the most part, I cannot discuss my representations in detail without breaching the attorney-client privilege.*

*Since May 31, 2011, I have been the Chief Counsel for Regulatory Litigation at the National Chamber Litigation Center, a public policy law firm affiliated with the U.S. Chamber of Commerce. In that capacity, I work with the staff and members of the U.S. Chamber of Commerce to select cases in which the Chamber will be involved as an amicus curiae or a party; and oversee outside counsel representing the Chamber in those matters.*

*I also have served as an adjunct law professor at George Washington University Law School during two semesters, teaching a seminar focusing on comprehensive immigration reform.*

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

*In my roles as an associate at Cooper, Carvin, and Rosenthal and in my current position, I have been entirely or largely focused on litigation. In other positions I have held during my career, such as my positions in the White House and in the Justice Department, I had little involvement with litigation. As such, it is difficult to provide one calculation the covers my entire career. The percentages provided below are rough estimates.*

i. Indicate the percentage of your practice in:

1. federal courts; 45%
2. state courts of record; 10%
3. other courts; 0%
4. administrative agencies 45%

ii. Indicate the percentage of your practice in:

*If this question refers solely to litigation, as opposed to policy-related matters, my practice has been primarily civil. I have given oral argument, filed briefs, or provided other counsel in a few criminal proceedings. A large part of my policy work at the Department of Justice dealt with criminal justice issues.*

1. civil proceedings; 95%
2. criminal proceedings. 5%

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

*I have never tried a case to verdict.*

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

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

*I have been counsel on briefs filed in the Supreme Court of the United States in my positions at Cooper, Carvin & Rosenthal and in my current position. I have attached copies of these briefs.*

15. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

*U.S. v. Nelson. While employed with the U.S. Department of Justice, I presented oral argument in this case in the U.S. Court of Appeals for the Fourth Circuit on the behalf of the United States. This was a criminal appeal involving a matter of first impression in the Fourth Circuit – whether a prior conviction under 18 U.S.C. 924(c)(1) is a "felony drug offense" supporting a sentencing enhancement under 21 U.S.C. 841(b)(1)(B). The United States prevailed. The Fourth Circuit issued its opinion on April 19, 2007. Docket number 06-4333.*

*Tan v. U.S. Attorney General. While employed with the U.S. Department of Justice, I presented oral argument in this case in the U.S. Court of Appeals for the Eleventh Circuit on behalf of the United States. This was an asylum-related immigration appeal. The alien prevailed. The Eleventh Circuit's decision is reported at 446 F.3d 1369 (2006).*

*Chamber of Commerce v. NLRB. The Chamber of Commerce is challenging the National Labor Relations Board's "ambush election rule" in the U.S. District Court for the District of Columbia. Case No. 1:11-cv-02262-JEB. The case is pending.*

*Sackett v. EPA. The Chamber of Commerce filed an amicus brief supporting the petitioner in the Supreme Court of the United States in this case, which addresses the availability of pre-enforcement review of EPA orders issued under the Clean Water Act. Docket No. 10-1062. The case is pending.*

*Credit Suisse v. Simmonds. The Chamber of Commerce filed an amicus brief supporting petitioners in the Supreme Court of the United States in this case, which addresses the time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934. Docket No. 10-1261. The case is pending.*

*Blackstone Medical v. U.S. ex rel Hutcheson. The Chamber of Commerce filed an amicus brief supporting certiorari in the Supreme Court of the United States in this case, which addressed the scope of liability under the False Claims Act. Docket No. 11-269. Certiorari was denied.*

*Defenders of Wildlife v. Bureau of Ocean Energy Management. The Chamber of Commerce filed an amicus brief in the U.S. Court of Appeals for the Eleventh Circuit in this case, which involves a challenge to BOEM's approval of an offshore drilling permit. Docket No. 11-12958. The case is pending.*

*In the Matter of Opening a Private Road for Timothy P. O'Reilly. In 2009, I filed an amicus brief in the Pennsylvania Supreme Court on behalf of the Institute for Justice in this case, which involved a challenge to a Pennsylvania law allowing private parties to effect a taking of another party's property. Docket No. 10 WAP 2009. The court ruled in favor of the position urged by our brief.*

*Satellite Broadcasting Ass'n of America v. FCC. While at Cooper, Carvin, and Rosenthal in 2000 and 2001, I participated in the firm's representation of the Satellite Broadcasting Association in a First Amendment challenge to the FCC's must-carry rule for satellite broadcasters. The challenge to the rule was brought in the U.S. court of Appeals for the Fourth Circuit. The case was pending when I left the firm and was ultimately resolved in favor of the FCC. Docket number 01-1151.*

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

*See Response to Question 15, above.*

*I registered as a lobbyist for the following organizations while employed by WilmerHale: Google; T-Mobile; and PhRMA. In each case, I was registered for only one quarter, and the lobbying activity was incidental to legal work I was performing for the client.*

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

*I have twice taught a seminar class at George Washington University Law School entitled "Public Law Seminar: Immigration Reform." I taught this class during the spring semester of 2010 and the fall semester of 2011. The class covered the myriad legal and policy issues relating to comprehensive immigration reform. A syllabus is attached.*

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

*While employed at WilmerHale, I had a 401(k) account. The account still exists, but neither I nor the firm are making any more contributions to it.*

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

*I intend to continue my current employment with the National Chamber Litigation Center.*

20. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees,

dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

*See attached SF-450.*

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

22. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

*None known.*

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

*I will recuse myself from the matter that poses the conflict. Whether I recuse myself from the PCLOB's work on that matter or from my employer's work on that matter will depend upon the circumstances and the advice I receive from the agency's ethics officials.*

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

*While employed with WilmerHale, I represented several clients on a pro bono basis, including the Institute for Justice and the Alliance for School Choice.*

*I am substantially involved in charitable work through my church, including service on the church's Board of Trustees.*

**FINANCIAL STATEMENT**

NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 85 | 000 | Notes payable to banks-secured | | | 0 |
| U.S. Government securities-add schedule | | | 0 | Notes payable to banks-unsecured | | | 0 |
| Listed securities-add schedule | 1 | 395 | 000 | Notes payable to relatives | | | 0 |
| Unlisted securities--add schedule | | | 0 | Notes payable to others | | | 0 |
| Accounts and notes receivable: | | | | Accounts and bills due | | | 0 |
| Due from relatives and friends | | | 0 | Unpaid income tax | | | 0 |
| Due from others | | | 0 | Other unpaid income and interest | | | 0 |
| Doubtful | | | 0 | Real estate mortgages payable-add schedule | 1 | 492 | 000 |
| Real estate owned-add schedule | 2 | 000 | 000 | Chattel mortgages and other liens payable | | | 0 |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | 0 |
| Autos and other personal property | | 29 | 000 | | | | |
| Cash value-life insurance | | 58 | 000 | | | | |
| Other assets itemize: | | | | | | | |
| | | | | | | | |
| | | | | Total liabilities | 1 | 492 | 000 |
| | | | | Net Worth | 2 | 075 | 000 |
| Total Assets | 3 | 557 | 000 | Total liabilities and net worth | | | |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | | 0 | Are any assets pledged? (Add schedule) | | | 0 |
| On leases or contracts | | | 0 | Are you defendant in any suits or legal actions? | | | 0 |
| Legal Claims | | | 0 | Have you ever taken bankruptcy? *No.* | | | 0 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Provision for Federal Income Tax | | | 0 | | | | |
| Other special debt | | | 0 | | | | |

Schedule of securities (all amounts rounded to nearest $1000; amounts taken from recent statements)
*Alpha Natural Resources Inc. $3000*
*Altera Corp. $23,000*
*Best Buy Inc. $7000*
*CVS Caremark $8000*
*Chevron Corp. $8000*
*Concho Res Inc. $33,000*
*Hewlett Packard Co. $4000*
*JA Solar Holdings Co Ltd $<1000*
*KVH Industries Inc. $7000*
*National Oilwell Varco Inc. $10,000*
*New York Community Bancorp Inc. $5000*
*Nuance Communications Inc. $12,000*
*Pfizer Inc. $5000*
*Ryanair Holdings PLC $5000*
*Trina Solar Ltd $1000Columbia Acorn Fund Class A - $108,000*
*Dodge and Cox Int'l Stock Fund -* $45,000
*Fundamental Investors Fund Class F 1 - American Funds - $114,000*
*Growth Fund of America Class A – American Funds – $36,000*
*Growth Fund of America Class F-1 - American Funds - $53,000*
*Franklin Templeton Mutual Global Discovery - $81,000*
*Vanguard Tax Managed Small Cap Fund Admiral Shares - $91,000*
*Vanguard Tax Managed Capital Appreciation Fund - $81,000*
*Lincoln National - American Legacy Design (variable annuity) - $154,000*
*Capital World Bond Fund Class F1 - American Funds - $25,000*
*Columbia Acorn Fund Int'l Fund Class A - $25,000*
*Vanguard Small Cap ETF - $14,000*
*Vanguard Large Cap ETF - $14,000*
*Marshall Prime Money Market - $3,000*
*Amana Growth - $32,000*
*Touchstone Small Cap Core - $15,000*
*Tweedy Browne Global Value - $8,000*
*Acadian Emerging Markets - $9,000*
*Ivy Global Natural Resources - $12,000*
*T. Rowe Price Real Estate - $10,000*
*SSgA S&P 500 Index Fund - $42,000*
*FPA Perennial Fund - $34,000*
*Rainier Small/Mid Cap Equity - $52,000*
*Harbor Int'l Fund - $37,000*
*Janus Overseas Fund - $7,000*
*Kinetics Small Cap Opportunities Fund - $2000*
*T Rowe Price New Asia Fund - $3000*
*T Rowe Price Emerging Markets Stock Fund - $4000*
*Royce 100 Fund - $5,000*
*UMB Scout Mid Cap Fund - $6,000*
*Appleseed Fund - $5,000*
*Columbia Acorn Int'l Select Class Z - $2000*
*Fidelity Freedom 2040 - $4000*
*Spouse's TSP account - $131,000*

AFFIDAVIT

I, R R, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

3/7/12 (DATE)

Rachel Brand (NAME)

Deanna M. Cox (NOTARY)

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 7th day of March, 2012
Deanna M. Cox, Notary Public, D.C.
My commission expires September 30, 2016.

**STATEMENT OF HON. PATRICIA M. WALD, NOMINEE TO BE A MEMBER OF THE PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD**

Judge WALD. I would only add that I am happy with the prior Congress having put into our mandate 2000(e), the fact that we should provide advice on proposals to retain or enhance a particularly governmental power to ensure that the need for the power is balanced and that it has supervision, et cetera.

I hope that the board will be able, as new technology requires new responses by the government, to pursue that particular power and to be at the initiation of those policies.

I think I would take a note from the Supreme Court's—some of the language in the recent *U.S.* v. *Jones* case which dealt with the GPS and their notion that technology is coming along, we cannot really know in advance how to cope with all the new technologies, but we do have to be alert to all their various propensities, their various capabilities. And I hope that, if confirmed, we can follow through with the mandate in our statute.

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**
**QUESTIONNAIRE FOR NOMINEES**
**TO PRIVACY AND CIVIL LIBERTIES BOARD**

**PUBLIC**

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

Patricia Ann McGowan Wald

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

Member, Privacy and Civil Liberties Oversight Board

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

2101 Connecticut Avenue, NW, Apartment 38
Washington, D.C. 20008

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

September 16, 1928; Torrington, CT

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

1948-1951, Yale Law School; J.D., 1951

1944-1948, Connecticut College for Women; B.A., 1948

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

2010-present
Administrative Conference of the United States
1120 20th Street, N.W.
Washington, D.C. 20036
Council Member (uncompensated)

2009-present
Constitution Accountability Center
1800 Connecticut Avenue, N.W.
Washington, D.C. 20036
Board Member (uncompensated)

2004-2008
American Constitution Society
1333 H Street, N.W., 11th Floor
Washington, D.C. 20005
Board Member (uncompensated)

2003-2010
Mental Disability Rights International
1154 15th Street, N.W.
Washington, D.C. 20009
Board Member (uncompensated)

2008-2009
American Society of International Law
2223 Massachusetts Avenue, N.W.
Washington, D.C. 20008
Co-Chair (with William Taft IV) of Task Force on U.S. Policy Toward International Criminal Court (uncompensated)

2004-2005
President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction
(no current address)
Commission Member (uncompensated)

2005-present
New Perimeter
DLA Piper
500 8th Street, N.W.
Washington, D.C., 20004
Co-Chair Advisory Board (uncompensated)

2003-2007
American Arbitration Association
2200 Century Parkway, Suite 300
Atlanta, GA 30345
Arbitrator, Westinghouse Electric Company v. CBS Corp. Panel Chair
CASE NO. 16x 192 00937702

2003-2004
Yale Law School
120 Wall Street
New Haven, CT 06511
J. Skelly Wright Fellow-Lecturer on International Courts

2002-present
Open Society Institute Justice Initiative
400 West 59th Street
New York, NY 10019
Board Member (2004-present)
Board Chair (2002-2004)

1999-2001
International Criminal Tribunal for the former Yugoslavia
Churchillplein 1
2517 JW The Hague, The Netherlands
Judge Trial Chamber I

1979-1999
United States Court of Appeals for District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001
Judge (1979-1986; 1991-1999)
Chief Judge (1986-1991)

1977-1979
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Assistant Attorney General for Legislative Affairs
1972-1977
Mental Health Law Project (defunct; successor is Bazelon Center for Mental Health)
1102 15th Street, N.W.
Washington, D.C. 20005
Litigation Director (1975-1977)
Attorney (1972-1975)

1971-1972
Center for Law and Social Policy
1015 15th Street, N.W.
Washington, D.C. 20005
Attorney

1970-1972
Ford Foundation Drug Abuse Research Project

1200 M Street, N.W.
Washington, D.C. 20005
Co-Director (with Peter Hutt)

1968-1970
Neighborhood Legal Services Program
401 5th Street, N.W.
Washington, D.C.
Attorney in Test Case Division

1967-1968
United States Department of Justice
Office of Criminal Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Consultant on Implementation of D.C. Crime Commission Report (part-time)

1965-1966
United States Department of Justice
President's Commission on Crime in the District of Columbia
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Member (uncompensated)

1952-1953
Arnold, Fortas & Porter
555 12th Street, N.W.
Washington, D.C. 20004
Associate

1951-1952
Judge Jerome N. Frank
United States Court Appeals for Second Circuit
40 Foley Square
New York, NY 10007
Law Clerk

Other Affiliations (Uncompensated unless Otherwise indicated)

2011
Independent Panel on Judicial Nominations to
the International Criminal Court (Coalition for the ICC)
708 3rd Avenue
New York, NY 10017
Member

2010- present
Coalition for the International Criminal Court
708 3rd Avenue
New York, NY 10017
Member Advisory Committee

2002-2011
JFK Library Foundation
Columbia Point Boston, MA 02125
Profiles in Courage Award Committee

1972-Present
American Law Institute
4025 Chestnut Avenue
Philadelphia, PA 19104
Council Member (1978-2008)
Executive Committee (1984-99)
Second Vice President (1988-1993)
First Vice President (1993-1998)

1989-1992
Carnegie Foundation
437 Madison Avenue
New York, NY 10022
Member, Task Force on Science, Technology and the Government (1990-1993)
Member, Carnegie Council on Children (1973-1977)

1965-1972
Vera Institute of Justice
233 Broadway
New York, NY 10279
Board Member

1976-1977
Meyer Foundation
1400 16th Street N.W.
Washington, D.C. 20036
Board of Trustees

1976-1977
Connecticut College
240 Mohegan Avenue
New London, CT 06320
Board of Trustees

1975-1977

Phillips Exeter Academy
20 Main Street
Exeter, NH 03833
Board of Trustees

1972-1977
Ford Foundation
320 East 43rd Street
New York, NY 10017
Board of Trustees (board fees)

1970-1973
Sloan Foundation
638 Fifth Avenue
New York City, NY 10111
Member Sloan Commission on Cable Communications (board fees)
Note: I have been on uncompensated advisory committees to several law schools, law reviews and foundations including: The Environmental Law Reporter (1984-1986); University of Maryland Law School (1985-1982); Edna McConnell Clark Foundation (1981-1984); University of Chicago Law School (1989-1991); University of California (Davis) International Law Center; Washington University at St. Louis Institute of Global Studies (1999-present).

Note: From 1964-1968, I served as a consultant to several conferences and committees including: Consultant to National Conference on Bail and Criminal Justice (author of Conference publication) U.S. Department of Justice and Vera Institute of Justice; Consultant to National Conference on Law & Poverty (Office of Economic Opportunity and Department of Justice) (author of conference publication) (compensated); Consultant to National Advisory Committee on Civil Disorders (compensated); Consultant to National Commission on Causes and Prevention of Violence (compensated); Consultant to President's Commission on Law Enforcement and Administration of Criminal Justice (compensated).

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

I have not served in the military.

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

Full Scholarship to Connecticut College, 1944-48

Phi Beta Kappa and Winthrop Scholar, Pepsi Cola Fellowship for Yale Law School, 1948-51

Order of the Coif, 1951

Distinguished Alumnae Award, Connecticut College, 1972

August Voelmer Award, American Society of Criminology, 1976

Law School Honorary Fellow, University of Pennsylvania Law School, 1979

Doctor Humanities, Mt. Vernon Junior College, 1980

Doctor Laws, George Washington University Law School, 1983

Woman Lawyer of The Year (Women's Bar Association of D.C.), 1984

Doctor Laws, John Jay School Of Criminal Justice, 1985

Doctor Laws, Mount Holyoke College, 1985

Doctor Laws, Notre Dame University, 1986

Doctor Laws, CUNY-Queens Law School, 1986

Annual Merit Award, National Association of Women Judges (Division 4), 1986

Annual Award, New York Women's Bar Association, 1987

Merit Award, Yale Law School, 1987

Doctor Laws, Georgetown University Law School, 1987

Doctor Laws, Villanova Law School, 1988

Doctor Laws, Amherst College, 1988

Doctor Laws, New York Law School, 1988

Doctor Laws, Colgate University, 1989

Doctor Laws, Washington College of Law, American University, 1989

Doctor Laws, Ohio State University Law School, 1991

Doctor Laws, New England College, 1991

Doctor Laws, Hofstra University School of Law, 1991

Honorary Order of The Coif, University of Maryland Law School, 1991

Doctor Laws, Suffolk University Law School, 1991

Honoree, Women's Bar Association's 75th Anniversary, 1992

Sandra Day O'Connor Medal of Honor, Seton Hall Law School, 1993

Margaret Brent Women Lawyers of Achievement Award (American Bar Association Commission on Women in the Profession), 1994

National Association Of Women Judges Annual Award, 1994

Doctor Laws, Vermont Law School, 1995

Juvenile Law Center Award, 1995

Trial Lawyers Association of Metropolitan Washington Award for Judicial Excellence, 1998

The District of Columbia Bar Thurgood Marshall Award, 1998

Women's Council on Energy and the Environment Woman of the Year Award, 1999

American Civil Liberties Union Henry Edgerton Award, 2000

D.C. Bar Association Heroes in the Law Award, 2000

Environmental Law Institute, Annual Award, 2000

Doctor Laws, Yale University, 2001

Women's Law Center, Annual Award, 2002

International Human Rights Law Group Award, 2002

Doctor Laws, University Of Connecticut Law School, 2002

American Society on International Law, Prominent Women in International Law Award, 2002

Wickersham Award for Excellence in Public Service, Friends of Congressional Law Library, March 2003

Lawyers Committee for Civil Rights and Urban Affairs, Wiley Branton Award for Lifetime Commitment to Equal Justice, June 2003

American Inns of Court Lewis Powell Award for Professionalism and Ethics, October 2003

Charles Richey Award for Judicial Excellence, George Washington University Law School, October 2003

American Lawyer Lifetime Achievement Award, April 2004

Fordham-Stein Award, October 21, 2004

Thomas Jefferson Award, University Of Virginia, April 13, 2005

National Law Journal, "100 Most Influential Lawyers In The United States" List, June 20, 2006

Hynes-Goodman Fellowship Award, University of the District of Columbia, 2007

Charles Richey Award for Judicial Excellence, George Washington University Law School, October 2003

American Lawyer Lifetime Achievement Award, April 2004

Fordham-Stein Award, October 21, 2004

Thomas Jefferson Award, University of Virginia, April 13, 2005

National Law Journal, "100 Most Influential Lawyers in the United States" List, June 20, 2006

Hynes-Goodman Fellowship Award, University of the District of Columbia, 2007

Philosophical Society Humanitarian Award, Henry Allen Moe Prize for Essay on International Courts, 2007

National Law Journal, "50 Most Influential Women Lawyers in America,' May 28, 2008

Alliance For Justice Award, 2008

Doctor Laws, Duke. University, 2008

American Bar Association Medal of Honor, 2008

Legal Times, "90 Greatest D.C. Lawyers in Past 30 Years," 2008

NYU Annual Survey of American Law Award, Vol. 1 Dedicated to Patricia M. Wald, 2010

Francis Shattuck Award for Peace and Security (ABA/Int'l Div.), 2010
Yale Biographical Dictionary of American Law, 2010

Constitutional Champion, Constitution Project Award 2011

Kate Stillman Award, Albany Law School, March 2011

Connecticut Women's Hall Of Fame Inductee, October 2011

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

D.C. Bar, 1972-present
Board of Governors, 1974-1977

District of Columbia Judicial Conference
Committee on Admissions and Grievances Member, 1973-1977
Committee on Administration of Justice under Emergency Condition Member, 1972-73
Committee on the Operation of the Bail Reform Act, Member, 1968-1960
Selection Committee for D.C. Bar Thurgood Marshall Award, 2004-present

United States Judicial Conference
Committee on Codes of Conduct Member, 1987-1992
Committee on Case Management, 1996-1999

U.S, Court of Appeals Related Work, 1991- 2011
Task Force on Gender and Racial Bias Member, 1993-1996
Prettyman-Leventhal Inn of Court, 1991- 96
D.C. Pretrial Services Agency, Executive Committee, 1982-1994
D.C. Circuit Historical Society Board, 2005-2011

American Bar Association, 1966-present
Drug Abuse Committee, Criminal Section, Vice-Chair, 1970-1973
Commission on Juvenile Justice Standards, Member, 1973-1979
Board of Editors, American Bar Journal, 1978-1984
ABA Commission on the Mentally Disabled, 1981-1986
Commission to Reduce Court Costs and Delay, 1978- 1984
Special Committee on ABA Standards of Criminal Justice, 1986-1993
Council of Section on Administrative Law and Business Regulation, 1991-1994
Central and Eastern European Law Initiative, Executive Board, 1994-1999
ABA Task Force on Effective Sanctions (2006-2008)
ABA Task Force on Signing Statements (2006)

Women's Bar Association (D.C.), 1952-present

10. **Bar and Court Admission**:
a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please

explain the reason for any lapse in membership.

I was admitted pro hac vice to the Colorado Court of Appeals and the 10th Circuit for two cases in 2009 and 2011.

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

I was admitted to practice before the 5th Circuit Court of Appeals in 1975 and before the U.S. Supreme Court around the same time. No lapses.

11. **Memberships**:
a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Cosmos Club (social) 4021 Mass Ave. Washington, 1987-present

Open Society Institute-Justice Initiative, Board Member, 2002-present

DLA Piper New Perimeter, Advisory Board Co-Chair, 2005-present

Center for Constitutional Accountability, Board Member, 2009-present

American Constitution Project, Member of National Security and Justice Initiative, 2002-present

American Constitution Society, Board Member, 2004-08

Mental Rights Disability International, Board Member, 2003-2010

Profiles in Courage Award Committee, 2002-2011

Human Rights Watch, Advisory Committee on Eastern Europe, 2002-2011

American Society of International Law, Counselor, 2002-2008

Coalition for the International Criminal Court, 2008-present

American Bar Association, 1966-present

D.C. Bar, 1972-present

American Law Institute, 1974-present

Barristers Club (social), 1988-1996 (approx.)

Advisory Board of Yale Journal of International Law, 2005 – present (approx.)

Advisory Board of University of California (Davis), International Law Center, 2008 – present (approx.)

Advisory Board of Durham University, International Justice Project, 2009 – present (approx.)

Advisory Board, Washington University Law Center (St Louis), Whitney R. Harris Institute of Global Studies, 2001 – present (approx..)

Philosophical Society, 2001-present

American Association of Retired Persons, 1990-present

Yale Law School Association, 1951-present

Institute of Medicine, 1978-1986

Center for Court Excellence, sometime in 1980s-present

National Association of Women Judges, 1980-present

American Academy of Arts and Sciences, 1991-present

b. Indicate whether any of these organizations listed in response to 11 a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None of the above organizations discriminate in membership on the basis of race, religion, gender, national origin or sexual orientation. The Cosmos club formerly did not admit women. However, I was in the original group of women in 1987 that formally desegregated the club.

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

***I have done my best to identify and locate all applicable works for subsections a-e, including through a review of my personal files and searches of publicly available electronic databases. Despite exhaustive searches, there may be other items I have been unable to identify, find or remember.***

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

I. Criminal Justice

BAIL IN THE UNITED STATES (with Daniel J. Freed) (1964).

*Pretrial Release and Ultimate Freedom: A Statistical Study - Foreword*, 39 N.Y.U. L. REV. (1964).

*The Bail Reform Act of 1966*, 52 A.B.A. J. 940 (with Daniel J. Freed) (1966).

THE RIGHT TO BAIL REVISITED: A DECADE OF PROMISE WITHOUT FULFILLMENT, IN RIGHTS OF THE ACCUSED (1972) in *The Rights of the Accused, Sage Criminal Justice System Annuals, Vol. 1* (Stuart S. Nagel, ed.) p 178.

POVERTY AND CRIMINAL JUSTICE, TASK FORCE ON THE COURTS, PRESIDENT'S COMMITTEE ON LAW AND THE ADMINISTRATION OF JUSTICE (1967), *reprinted in* the SOCIOLOGY OF PUNISHMENT AND CORRECTION (Johnson, Savitz, Wolfgang, 2d ed.).

*Alcohol, Drugs and Criminal Responsibility*, 63 GEO. L. J. 69 (1974).

*Corrections: The Unequal Partner (Keynote Address to the American Correctional Association, 1980), reprinted in* CORRECTIONS TODAY (Sept./Oct. 1980).

Book Review, 64 JUDICATURE 292 (reviewing KAMISAR, POLICE INTERROGATION AND CONFESSIONS (Dec./Jan. 1981)).

*Commentary: The Unreasonable Reasonableness Test for Fourth Amendment Searches*, 4 CRIM. JUST. ETHICS 2 90 (1985).

*A Report From the Front in the War on Drugs*, 7 GA. ST. U. L. REV. 1 (Fall 1990) (copy of document filed with 1990 speech file).

VIOLENCE UNDER THE LAW: A JUDGE'S PERSPECTIVE, LAW'S VIOLENCE (Sarat & Kearns ed., Amherst Series, 1992) (copy of document filed with 1991 speech file).

*Guilty Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers*, 1993 U. CHI. LEGAL F. 101 (1993) (copy of document filed with 1993 speech file).

*A Retrospective on the Thirty-Year War Against Crime*, Keynote Address to Symposium on 30th Anniversary of President's Commission on Law Enforcement and Administration of Justice, *reprinted in* U.S. DEPT. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY: LOOKING

BACK LOOKING FORWARD (June 1997), (copy of document filed with 1997 speech file).

II. Juvenile Law

*The Changing World of Juvenile Law New Vistas for the Nondelinquent Child- Alternatives to Formal Juvenile Court Adjudication*, 40 PA B. ASS'N Q. 37 (1968).

*Trying a Juvenile Right to Treatment Case: Pointers and Pitfalls for Plaintiffs*, 12 AM. CRIM. L. REV. 125 (with Lawrence Schwartz) (Summer 1974).

*Making Sense Out of the Rights of the Youth*, HUM. RTS. (Winter 1974), *reprinted in* 40 CHILD WELFARE (June 1976).

*Pretrial Detention for Juveniles*, in PURSUING JUSTICE FOR THE CHILD (Rosenheim ed. 1976).

CARNEGIE COUNCIL ON CHILDREN, ALL OUR CHILDREN (Contributor) (1977).
*A Right to Counsel for School Psychologists?*, 6 SCH. PSYCHOL. REV. 30-39 (1977).

*The Rights of Children and the Rites of Passage*, in CHILD PSYCHIATRY & L. (Schetsky-Benedek ed. Brunner-Nagel 1980).

Book Review, AM. J. PSYCHIATRY (reviewing CHILDREN'S RIGHTS AND THE MENTAL HEALTH PROFESSION (July 1977)).

Book Review, 248 J. AM. MED. A. 1110 (reviewing ZIMRING, A JURISPRUDENCE FOR ADOLESCENTS (1982)).

Book Review, *The Kindness of Strangers*, 97 YALE L. J. 1477 (reviewing GOLDSTEIN, FREUD, SOLNIT, IN THE BEST INTERESTS OF THE CHILD (1988)).

*Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence* (Publication by Division of General Pediatrics and Adolescent Health, University of Minnesota) (1994), *reprinted in* 23 U. BALT. L. REV. 397 (1994) (copy of document filed with 1994 speech file).

*Foreword*, JUVENILE JUSTICE STANDARDS ANNOTATED (ABA) (1996), *available at* www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf.

*Goss v. Lopez: Not the Devil, Nor the Panacea* at the Federalist Society Symposium: The Rights Revolution, 1 MICH. L. & POL'Y REV. 331 (1996).

III. Mental Disability Law

*The Right to Education*, and other articles in LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, Practicing Law Institute (1974).

*Basic Personal and Civil Rights of the Mentally Retarded* in THE MENTALLY RETARDED CITIZEN AND THE LAW, President's Council on Mental Retardation (Free Press (1976)).

*Advocacy for the Mentally Retarded Offender*, Symposium on the Mentally Retarded Citizens and the Criminal Justice System (Working Papers from Charleston, South Carolina) (1975).

*The Politics of Mental Health Advocacy in the United States* (with Paul Friedman), Proceedings of the Second International Symposium, Toronto, Canada, LAW & PSYCHIATRY (1978).

DEALING WITH DRUG ABUSE, Report to the Ford Foundation (with Peter Barton Hutt) (Praeger Press 1972), *available at* http://www.druglibrary.org/schaffer/library/studies/dwda/dwdprfc.htm.

*The Organized Bar and Drug Abuse*, SAN FRANCISCO B. J. (Dec. 1972).

*The Right to Refuse Treatment*, ADDICTIONS (Spring 1974).

IV. Poverty and Public Interest Law

LAW AND POVERTY, Report to the National Conference on Law and Poverty (1965).

*Law and Grievances of the Poor*, in LAW AND ORDER RECONSIDERED, STAFF REPORT #10 OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE Ch. 3 (1968), *available at* http://www.archive.org/stream/laworderreconsid00camprich/laworderreconsid00camprich_djvu.txt.

*Ten Admonitions for Legal Services Advocates Contemplating Federal Litigation*, 27 CLEARINGHOUSE REV. No.1 (May 1993) (copy of document filed with 1993 speech file).

*Legal Services in the '90s*, 1 HYBRID 1 (1993); 7 MAN. INFO. EXCHANGE 3 (1993) (copy of document filed with 1993 speech file).

*Whose Public Interest Is It Anyway?: Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 4 (1995) (copy of document filed with 1994 speech file).

*"For the United States": Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107 (1998) (copy of document filed with 1998 speech file).

V. Administrative Law

*Making "Informed" Decisions in the District of Columbia Circuit*, 50 GEO. W. L. REV. 135 (1982).

*Judicial Review of Complex Administrative Agency Decisions,* in THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Vol. 462 No. 1 72-86 (July 1982).

*Judicial Review of Economic Analyses*, 1 YALE J. REG. 43 (1983).

*The Freedom of Information Act: A Short Case Study of the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649 (1984), *reprinted in* Sargentich, ADMINISTRATIVE LAW ANTHOLOGY (1994).

*ACUS, Colloquium on Regulatory Design & Practice* (Lecture Summary # 12 - "Why We Reverse") (1983) (copy of document filed with 1983 speech file).
*Deregulation in the Courts*, in THE IMPACT OF DEREGULATION AND MARKET FORCES ON PUBLIC UTILITIES: THE FUTURE ROLE OF REGULATION (1985) (copy of document filed with 1985 speech file).

JUDICIAL REVIEW OF TRANSPORTATION DEREGULATION, EASTERN TRANSPORTATION LAW SEMINAR PAPERS & PROCEEDINGS (1984) (copy of document filed with 1984 speech file).

*Environmental Negotiation: A New Role for the Courts*, 10 COLUM. J. ENVTL. L. 1 (1985).

*The Realpolitik of Judicial Review in a Deregulation Era*, 5 J. POL'Y ANALYSIS & MGT. 535 (1986).

*The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507 (1988).

*Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges' Findings and Opinions*, 67 WASH. U. L. Q. 661 (1989) (copy of document filed with 1988 speech file).

*The "New Administrative Law" - With the Same Old Judges In It?,* 1991 DUKE L. J. 647 (copy of document filed with 1991 speech file).

*ABA Symposium on FOIA's 25th Anniversary*, GOV'T INFO. Q. (1991).

*The Role of the Judiciary in Environmental Protection*, 191 B.C. ENVT'L. AFF. L. REV. 519 (1992).

*The Cinematic Supreme Court: 1991-92 Term* (ACUS Conference), 7 ADMIN. L.J. AM. U. 238 (1993) (copy of document filed with 1992 speech file).

*Colloquium, The Fifth Annual Robert C. Byrd Conference on the Administrative Process*, 8 ADMIN. L.J. AM. U. 23 (1994).

*Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?,* 67 S. CAL. L. REV. 621 (1994).

*Environmental Postcards From the Edge: The Year That Was and the Year That Might Be*, 26 ENVTL. L. REP. 10182 (1996) (copy of document filed with 1996 speech file).

*Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On,* 32 TULSA L. J. 221 (1996).

*Thirty Years of Administrative Law in the D.C. Circuit,* 11 ADLAW BULLETIN No. 13 (Pike & Fischer) (July 22, 1997) (copy of document filed with 1997 speech file).

*Judicial Review in the Time of Cholera,* 49 ADMIN. L. REV. 659 (1997).

*ADR and the Courts: An Update,* 46 DUKE L. J. 1445 (1997) (copy of document filed with 1999 speech file).

*Analysts and Policymakers: A Confusion of Roles?,* 17 STAN. L. & POL'Y REV. 241 (2006).

VI. Statutory Interpretation

*Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (Jan. 1983).

*The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990) (copy of document filed with 1989 speech file).

VII. Constitutional Law

*Judicial Review and Constitutional Limitations (Panel Presentation)*, 14 GOLDEN GATE U.L. REV. 645 (1984).

*Life on the D.C. Circuit*, 72 MINN. L. REV. 1 (1987).

*Two Unsolved Constitutional Problems*, U. PITT. L. REV. 753 (1988).

*Governmental Benefits: A New Look at an Old Gift horse*, 65 N.Y.U. L. REV. (1990).

*Constitutional Conundrums*, 61 U. COL. L. REV. 727 (1990).

*"One Nation Indivisible, With Liberty and Justice for All": Lessons From the American*

*Experience for New Democracies*, 39 FORD. L. REV. 283 (1990) (copy of document filed with 1990 speech file).

*Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771 (1993).

*A Tale of Four Clauses: Constitutional Protection Against Excessive Regulation in the United States*, Forum for U.S.-EC Legal-Economic Affairs Publication (1993).

Symposium, *Constitutional "Refolution" in the Ex-Communist World: The Rule of Law*, 12 AM. V.L INT'L L. & POL'Y 116 (1996).

*Looking Forward to the Next Millennium: Social Previews to Legal Change*, 70 TEMP. L. REV. 1085 (1997) (copy of document filed with 1997 speech file).

*A Whitewater Legacy: Running the Rapids of Constitutional Law*, Arps Lecture at the Association of the Bar of the City of New York (Oct. 1999) *available at* http://www.c-spanvideo.org/program/AWh#

*The D. C. Circuit and the Struggle for Control of Presidential Information* (with Jonathan Siegel), 90 GEO. L. J. 737 (2002).

*The Use of International Law in the American Adjudicative Process*, 27 HARV. J. LAW & PUB. POL.'Y 101 (2004).

*The Supreme Court Goes to War*, chapter in TERRORISM, THE LAWS OF WAR AND THE CONSTITUTION, (Berkowitz ed., 2005), *available at* www.policyarchive.org/handle/10207/bitstreams/11854.pdf

*Detention*, chapter in PATRIOT ACT (Baker ed., 2005).

Symposium, *Constitutional Stress: Interpretive and Historical Perspectives*, 59 BULL. OF AM. ACAD. OF ARTS & SCI. (Winter 2006).

VIII. Judicial Process and Administration

*Friends of the Court*, APA MONITOR (Feb. 1982).

*The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge*, 42 U. MD. L. REV. 501 (1983), *reprinted in* TRIAL (ATLA) (June 1984).

*Litigation in America: Introduction*, 31 UCLA L. REV. 1 (1983).

*Inside the D. C. Circuit: Address to Annual Meeting of District of Columbia Bar, reprinted in* DISTRICT LAWYER (July-Aug. 1983).

*Thoughts on Decision Making*, 87 W. VA. L. REV. 1 (1984).

Interview: THE THIRD BRANCH, Vol. 18, No. 7 (July 1986).

*The Court of Appeals: Address to Administrative Law and Agency Practice and Environment, Energy and Natural Resources Division of the District of Columbia Bar, reprinted in* DISTRICT LAWYER (July-Aug. 1986).

*Some Thoughts on Judging,* 100 HARV. L. REV. 887 (Hundredth Anniversary Issue 1987).

*Administering Justice*, St. John's University Third Annual Joseph Belsky Memorial Lecture (February 1987).

*Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477 (1985-86).

*The D.C Circuit: Here and Now*, 55 GEO. WASH. L. REV. (1987).

*Yale Was There,* YALE LAW REPORT Fall 77-79 (1987).

Book Review, 7 J. POL'Y ANALYSIS & MGM'T. 373 (reviewing STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (Winter 1988)).

*Technology and the Courts*, in SCIENCE & TECHNOLOGY ADVICE TO THE PRESIDENT, CONGRESS, AND JUDICIARY (Golden ed. 1988).

*Limits on the Use of Economic Analysis in Judicial Decision Making*, 50 LAW & CONTEMP. PROBS. 225 (1988) (copy of document filed with 1988 speech file).

*"Some Exceptional Condition" - The Anatomy of a Decision Under Federal Rule of Civil Procedure 53(b),* 62 ST. JOHN'S L. REV. 405 (1988) (copy of document filed with 1988 speech file).

Colloquy, *Human Voice in Legal Discourse - Disembodied Voices - An Appellate Judge's Response*, 66 TEX. L. REV. 623 (1988) (copy of document filed with 1987 speech file).

*Three Challenges to the Legal Profession*, 36 FED. B. NEWS & J. 227 (June 1989) (copy of document filed with 1988 speech file).

*Random Thoughts on a Random Process: Selecting Appellate Judges*, 6 J. L. & POL. 15 (1989).

*Calendars, Collegiality, and Other Intangibles on the Court of Appeals*, in THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY (Federal Judicial Center, 1990) (copy of document filed with 1988 speech file).

*Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990).

*The Conscience of a Judge*, 25 SUFFOLK U. L. REV. 619 (1992) (copy of document filed with 1991 speech file).

*Some Real-Life Observations About Judging*, 26 IND. L. REV. 173 (1992) (copy of document filed with 1992 speech file).

*"... Doctor, Lawyer, Merchant, Chief"*, 60 GEO. WASH. L. REV. 173 (1992).

*Communicating With Juries* (Panel Two: Innovations for Improving Communications and Views from Appellate Courts), 68 IND. L. J. 1061 (1993).

*Collegiality on a Court*, 40 FED. B. NEWS & J. 521 (Sept. 1993).

*Law Clerks: The Transformation of the Judiciary, The Long-Term View*, Vol. 3, No. 1 (1995) (Interview).

*The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

*Hans Linde and the Elusive Art of Judging: Intellect and Craft Are Never Enough*, 75 TEX. L. REV. 215 (1996).

*Summary Judgment at Sixty*, 76 TEX. L. REV. 1987 (1998) (copy of document filed with 1999 speech file).

*A Twenty-Year Retrospective on Life and Law in the D. C. Circuit,* Cosmos Club Speech (excerpted in COSMOS CLUB BULLETIN) (1998) (copy of document filed with 1998 speech file).

*19 Tips From 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7 (U. ARK. LITTLE ROCK SCHOOL OF LAW) (1999).

*A Response to Tiller and Cross* (A Modest Proposal for Improving American Justice), 94 COLUM. L. REV. 701 (1999).

*Scholars in the Arena, Perspectives on Politics,* AM. POL. SCI. ASSOC. #2 (June 2003).

*Putting Separation of Powers into Practice: Reflections on Senator Schumer's Essay*, 1 HARV. LAW & POL'Y REV. 41 (2007).

*Judicial Independence*, Panel at Federalist Society, 11 CHAPMAN L. REV. 389 (2008).

*Our Courts, Reason To Pay Attention,* Counterbalance (NAWJ) Vol. 29 #2 (2008).

*Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators*, 15

FORDHAM L. REV. 287 (2004).

IX. WOMEN

*The Role of Morality in Judging: A Woman Judge's Perspective*, in LAW & EQUALITY 3 (May 1986).

*Women in the Law: Stage Two*, 52 UMKC L. REV. 45 (1983).

*Building Bridges Not Walls*, Remarks at 1985 Conference on Women and the Law, 71 WOMEN'S L.J. 25 (1985) (copy of document filed with 1985 speech file).

*Women in the Law*, 16 HUMAN RIGHTS 40 (1989).

*Some Unsolicited Advice to My Women Friends in Eastern Europe*, 46 SMUL. REV. 557 (1993) (copy of document filed with 1992 speech file).

*Civilization's Unfinished Business: Violence Against Women,* Keynote Speaker to International Women Judges Rome Conference on Domestic Violence, excerpted in COUNTERBALANCE INTERNATIONAL (Newsletter of International Association of Women Judges), Vol. 3, No.1 (Summer 1994) (copy of document filed with 1994 speech file).

*"What About the Kids? "*, 8 FED. SENT. REP. #3 (Dec. 1995), Gender and Sentencing Symposium, *reprinted in* HIGHLIGHTS FROM A DECADE OF GUIDELINES SENTENCING, 10 FED. SENT. REP. #1 (1997).

Glass Ceilings and Open Doors: A Reaction, 65 FORDHAM L. REV. 603 (1996)

Why Focus on Women Offenders?, 16 CRIM. JUST. 10 (Spring 2001).

Gender Matters, Women and Yale in its Third Century, "THE ANONYMOUS PAST, WOMEN AND INTERNATIONAL JUSTICE" (2003).

*Six Not So Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOLEDO L. REV. 979 (2005).

X. General

*Justice in the 95th Congress: An Overview*, 64 A.B.A. J. 1854 (Dec. 1978).

Graduation Address, 1979, University of Pennsylvania Law School, *reprinted in* 14 U. PA. ALUMNI J. 13 (Summer 1979).

Commencement Address, 1982, 32 CATH. U. L. REV. (1983).

Commencement Address, 1983, George Washington University Law School, *reprinted in* LEGAL TIMES, Vol. 6, No. 9 (Aug. 1, 1983) (copy of document filed with 1983 speech file).

Senior Day Address, 1984, University of Maryland Law School, *reprinted in* 29 LAW QUADRANGLE NOTES 37 (Fall 1984).

*Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 36 J. LEGAL EDUC. 35 (1986).

*On the Cusp*, Commencement Address, 1987, Georgetown University Law Center, *reprinted in* RES IPSA LOQUITER (Fall, 1987).

Commencement Address, Washington College of Law, *reprinted in* THE ADVOCATE (Fall, 1989).

*Becoming a Player: A Credo for Young Lawyers*, 51 MD. L. REV. 422 (1992) (copy of document filed with 1991 speech file).

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XI. Tributes

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XII. Online

*Comment on Sotomayor Nomination*, WASH POST, May 27, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052601170_pf.html.

*The Duty to Apply (Not) Make Law*, WASH. POST, July 15, 2009 (on Sotomayor confirmation).

Book Review of THE EICHMANN TRIAL by Deborah Lipstadtl; Independent Book Reviews, David Stewart, March 2011, *available at* http://www.washingtonindependentreviewofbooks.com/bookreview/the-eichmann-trial/.

XIII. Op-Eds and Letters to the Editor

*Restore Fairness to the Judiciary* (with Michael Greco), BOSTON GLOBE, October 29, 2008, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/10/30/restore_fairness_to_the_judiciary/

Op-ed, *Congress Has the Authority to Do Right by D.C.*, (with Kenneth Starr) WASH. POST., Sept. 17, 2006, *available* at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/15/AR2006091500935.html

*Stay the Course In the Hague,* PROJECT SYNDICATE 2007, *available at* http://www.project-syndicate.org/commentary/wald1/English.

Letter to the Editor, *For Courts in Russia, Room for Improvement,* N.Y. TIMES, Sept. 15, 2003, *available at* http://www.nytimes.com/2003/09/15/opinion/l-for-courts-in-russia-room-for-improvement-299774.html.

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

I. Reports in which I authored parts or subscribed as a member of the issuing authority.

REPORT OF PRESIDENTS COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA (1966).

REPORT TO DC JUDICIAL CONFERENCE OF COMMITTEE ON THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS (1968).

ABA STANDARDS ON JUVENILE JUSTICE (over 30 volumes) (1978), *available at* http://www.americanbar.org/groups/criminal_justice/pages/JuvenileJusticeStandards.html.

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CONSTITUTION PROJECT, PROMOTING ACCURACY AND FAIRNESS IN THE USE OF GOVERNMENT WATCH LISTS (2007), *available at* www.constitutionproject.org/pdf/53.pdf.

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BAIL AND SUMMONS, INSTITUTE ON OPERATION OF PRETRIAL RELEASE PROJECTS (member planning committee and panel moderator) (1965).

CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES (2005), *available at* www.constitutionproject.org/pdf/28.pdf.

*Discovery in Federal Criminal Cases* (data collection and planner of symposium), 33 FRD 37 (1963).

ATTACKING LITIGATION COST AND DELAY (member ABA Commission to Reduce Court Costs and Delay) (1990).

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REPORT OF PRESIDENT'S COMMISSION ON U.S. INTELLIGENCE CAPABILITIES WITH REGARD TO WEAPONS OF MASS DESTRUCTION (member) (2005) *available at* govinfo.library.unt.edu/wmd/report/wmd_report.pdf.

AM. SOC'Y OF INT'L LAW, US POLICY TOWARD THE ICC: FURTHERING CONSTRUCTIVE ENGAGEMENT (2009), *available at* www.asil.org/files/ASIL-08-DiscPaper2.pdf.

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AM. BAR ASS'N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: INCARCERATION AND REENTRY STRATEGIES 29 (2007), *available at* http://www.pardonlaw.com/materials/rev_2ndchance(3).pdf.

CONSTITUTION PROJECT, A CRITIQUE OF "NATIONAL SECURITY COURTS" (June 23, 2008), available at http://www.constitutionproject.org/pdf/Critigue of the National Security Courts.pdf.

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CONSTITUTION PROJECT, LIBERTY AND SECURITY COMMITTEE STATEMENT ON LOCATION TRACKING (Sept. 21, 2011), *available at* http://www.constitutionproject.org/pdf/LocationTrackingReport.pdf.

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CONSTITUTION PROJECT, REFORMING THE MATERIAL SUPPORT LAWS: CONSTITUTIONAL CONCERNS PRESENTED BY PROHIBITIONS ON MATERIAL SUPPORT TO "TERRORIST ORGANIZATIONS" (Nov. 17, 2009), *available at* http://www.constitutionproject.org/pdf/355.pdf.

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THE CARNEGIE COMMISSION, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING CREATING OPPORTUNITIES AND MEETING CHALLENGES (March 1993).

II. Letters and Statements

Letter to Attorney General Eric Holder re: comprehensive review of racial bias in the federal death penalty system (Apr. 12, 2011) (On file with the Constitution Project).

Letter to Chair and Ranking Member of Senate Armed Services Committee re: proposed

amendments concerning Inspector General to NDAA (Jun. 18, 2010), *available at* http://www.constitutionproject.org/pdf/408.pdf.

Statement in Support of Elimination of Juvenile Life Without Parole Sentencing (Undated, statement first assembled June 2009 and updated February 2011) (On file with the Constitution Project).

Letter to Members of Congress Urging it Not to Pass Court-Stripping Measure that Would Deny Rights in the War on Terror (December 7, 2005).

Letter to Chair and Ranking Member of Senate Judiciary Committee Regarding Substitute Legislation for Streamlined Procedures Act (Jul. 12, 2005) (On file with the Constitution Project).

CONSTITUTION PROJECT, BEYOND GUANTANAMO: A BIPARTISAN DECLARATION (Mar.16, 2011), *available at* http://www.constitutionproject.org/pdf/347.pdf.

AM. BAR ASS'N, *The Decade After 9/11: A Search for Moorings,* 38 HUMAN RIGHTS No. 1 (Winter 2011), *available at* http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/winter2011_home/the_decade_after911asearchformoorings.html.

Letter to Senators Levin and McCain Regarding the National Defense Authorization Act of 2011 (June 2, 2011), *available at* http://www.constitutionproject.org/pdf/ltrtosenateresec1034ndaa.pdf.

Letter to Senators Specter and Leahy Regarding the Streamlined Procedures Act of 2005 (July 12, 2005), *available at* http://www.constitutionproject.org/pdf/Former%20Federal%20Judges%20Letter%20to%20Senate.pdf.

Letter to House Leadership Regarding the National Defense Authorization Act of 2011 (May 20, 2011), *available at* http://www.constitutionproject.org/pdf/5202011 aumfltrtocongress.pdf.

CONSTITUTION PROJECT, STATEMENT OF THE COALITION TO DEFEND CHECKS AND BALANCES (Feb. 27, 2006), *available at* http://www.constitutionproject.org/pdf/Checks and Balances Initial Statement.pdf.

CONSTITUTION PROJECT, STATEMENT OF LIBERTY & SECURITY INITIATIVE (Regarding Domestic Spying) (Jan. 5, 2006), *available at* http://www.constitutionproject.org/pdf/55.pdf.

CONSTITUTION PROJECT, STATEMENT ON THE NATIONAL SECURITY AGENCY'S DOMESTIC SURVEILLANCE PROGRAM (July 25, 2007), *available at* http://www.constitutionproject.org/pdf/NSA Statement 20071.pdf.

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THE MILITARY COMMISSIONS ACT (Mar. 4, 2007), *available at* http://www.constitutionproject.org/pdf/MCA Statement.pdf.

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

I. Testimony

*Hearings on Preventive Detention: Before the Subcommittee on Constitutional Rights of the S. Comm. on the Judiciary,* 91st Cong. (May-June 1970) (testimony).

*Intercircuit Panel of the United States Act on S. 704: Hearing Before Subcommittee on Courts of the S. Comm. on the Judiciary,* 99th Cong. (October 9, 1985) (testimony).

*Statutory Interpretation and Uses of Legislative History: Hearing Before Subcommittee on Courts, H. Comm. on the Judiciary,* 101st Cong. (April 19, 1990) (testimony).
*Interbranch Relations: Hearings Before the Joint Comm. on the Organization of Cong.,* 103d Cong. (1993) (testimony).

*20th Anniversary of the Individuals with Disabilities Education Act: Joint Hearing Before Subcommittee on Early Childhood, Youth and Families and Subcommittee on Disability Policy of S. Comm. on Labor and Human Resources,* 104th Cong. (May 9, 1995) (testimony).

*The U.N. Criminal Tribunals For Yugoslavia and Rwanda: International Justice or Show of Justice?: Before H. Comm. on Int'l Relations,* 107th Cong. (Feb. 20, 2002) (testimony).

*Hearing Before the Inter-American Commission on Human Right* (Mar. 3, 2006) (testimony on behalf of the Am. Bar Ass'n).

*Standards of Military Commissions And Tribunals: Before H. Comm. On Armed Services,* 109th Cong. (July 26, 2006) (testimony).

*Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing Before the S. Comm. on the Judiciary,* 110th Cong. (May 23, 2007) (testimony).

*State Secret Protection Act of 2009: Before Subcommittee on the Constitution, Civil Rights, and Civil Liberties of H. Comm. on the Judiciary,* 112th Cong. (Jan. 29, 2008) (testimony).

*Negative Implications of the President's Signing Statement on the Sudan Accountability and Divestment Act: Hearing Before the H. Comm. on Financial Services,* 110th Cong. (Feb. 8, 2008) (testimony).

*Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability* (Feb. 13, 2008) (testimony), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da133c4a9&wit_id=e655f9e2809e5476862f735da133c4a9-1-2.

*Pathways to Statehood, From Voting Rights to Full Self-Determination: Political and Constitutional Considerations: Before the Council of the District of Columbia and the Special Committee on Statehood and Self-Determination* (June 1, 2009) (testimony).

I recall testifying as a Legal Services attorney on the DC Court Reorganization Act in the early 1970s, but have no record of it. While at the Justice Department I testified in an official capacity on the extension of the Equal Rights Amendment, abolition of the electoral college, D.C. representation, and lobbying law reform.

II. Amicus Briefs filed on Behalf of Retired Judges

Brief of Former Judges, State Officials, and Prosecutors as Amici Curiae in Support of Petitioner in *Hood v. Texas*, 130 S. Ct. 2097 (2010) (No. 09-8610) (cert denied), *available at* http://www.constitutionproject.org/pdf/378.pdf.

Brief of Retired Judges as Amici Curiae Supporting Petition for Certiorari in *Buntion v. Quarterman*, 129 S.Ct. 1306 (2009) (No. 98-5698), *available at* http://www.constitutionproject.org/pdf/196.pdf.

Brief of Former Federal Judges and Former Senior Justice Department Officials as Amici Curiae Supporting Petitioner, *Al-Marri v. Pucciarelli*, 555 U.S. 1066 (2008) (No. 08-368), *available at* http://www.constitutionproject.org/pdf/188.pdf.

Brief of Former Judges of the United States Courts of Appeals as Amici Curiae in Support of Petitioner in *Miller v. United States*, 549 U.S. 1278 (2007) (No. 06-643) (cert denied).

Brief of Retired Federal Jurists as Amici Curiae Supporting Petitioners' Supplemental Brief Regarding The Military Commissions Act of 2006, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2006) (Nos. 05-5062 to 05-5064, 05-5095 to 05-5116), *available at* http://www.constitutionproject.org/pdf/190.pdf.

Brief of Former Federal Judges as Amici Curiae Supporting Petitioner, *Boumediene v. Bush*, 550 U.S. 981 (2007) (Nos. 06-1195, 06-1196), *available at* http://www.constitutionproject.org/pdf/195.pdf.

Brief of Former U.S. Government Officials as Amici Curiae Supporting Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

Replacement Brief of Retired Federal Judges as Amici Curiae Supporting Plaintiff-Appellant and Urging Reversal for Rehearing En Banc, *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2006) (06-4216-

cv).

Brief of the Constitution Project's Liberty and Security Committee, *United States v. Jones* (Jan. 23, 2012) (No. 10-1259).

Brief of 145 Individuals, Including Former United States Attorneys General, Retired United States Circuit Court Judges, Retired United States District Judges, Former United States Attorneys and Other Former High Ranking United States Department of Justice Officials in Support of Petitioner, *Angelos v. U.S.*, 549 U.S. 1077 (2006) (No. 06-26).

Brief of Hon. Edward N. Cahn, et al. as Amici Curiae in Support of Respondent on the Third Question Presented, *Whorton v. Bockting*, 549 U.S. 406 (2006) (No. 05-595).

III. Letters to Congress

Open Letter to Congress Urging Creation of a Congressional Clerkship Program (March 2011).

Letter to Senate Judiciary Committee Supporting Nomination of Elena Kagan as Supreme Court Justice (May 2010).

Letters to Senators Olympia Snow and Thad Cochran urging confirmation of Caitlin Halligan to D.C. Circuit Vacancy (June 2011).

Letters to D.C. Judicial Nominating Commission urging selection of Geoffrey Kleinberg and Christopher Handman to Judgeships on the District of Columbia Court of Appeals

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

I. Speeches and Remarks

The following list contains all formal speeches that I have on record. It is followed by a list of the occasions of which I have some record or recollection on making remarks not based on a text. Since my legal career spans more than 50 years, there are probably many such occasions I do not remember or have any record of, although I have made a good faith attempt to search my papers; this is especially true of the years before I became a judge in 1979 and the years since I came back from the Hague in 2002. Where I have notes of remarks, I have so indicated. Finally I have included a list, known to me, of newspaper clippings in which I am quoted. I note that the several occasions in the 1990s on which I made remarks abroad were principally based on the

formal speeches listed below.

Second Annual Ann Schlesinger Law Day Lecture, May 1980.

Georgetown Law School Appellate Criminal Legal Clinic, Nov. 20, 1980.

Yale Law School - 30 Year Reunion, 1981.

Yale Law School Luncheon, April 8, 1981.

Women's Bar Association, Boston, Massachusetts, April 2, 1981.

Connecticut College Commencement Address, May 24, 1981.

American Association of Law Libraries Convention, September 1981.

New York University, Conference on Career and Family, April 24, 1982.

Wayne State University Law School Commencement, June 19, 1982.

Observations on the Use of Legislative History in 1981-1982 Supreme Court Term Eighth Circuit Judicial Conference, July 1982.

Remarks at Yale Law Journal Symposium, New Haven, Connecticut, February 12, 1983.

Remarks at Meeting of National Association of Women Judges, March 15, 1983.

Remarks at Iowa. Law Journal Banquet, April 11, 1983.

Remarks to Paralegals, May 10, 1983.

Remarks at George Washington University Law Center's Commencement, Washington, D.C., May 22, 1983.

Remarks at the Annual Meeting of the District of Columbia Bar, Capitol Hilton Hotel, Washington, D.C., June 22, 1983.

Remarks to the Washington Council of Lawyers Public Interest Forum, New York Avenue Presbyterian Church, Washington, D.C., June 23, 1983.

Remarks to the Administrative Conference of the United States, Washington, D.C., July 7, 1983.

Remarks to the American Bar Association's Criminal Justice Panel, Atlanta, Georgia, August 2, 1983.

Remarks to the National Association of Women Judges Panel on Judicial Review, October 1983.

Informal Remarks at Yale Law School's Symposium on State Courts and Individual Rights, New Haven, Connecticut, October 15, 1983.

West Virginia Law Review Conference, March 26, 1984.

Remarks Before Federal Communications Bar Association, April 7, 1984.
Law Day, Emory Law School, Atlanta, Georgia, April 28, 1984.

Connecticut College Commencement, May 1984.

Michigan Law School Senior Day Speech, May 12, 1984.

Remarks to Women's Bar Association, May 22, 1984.

Symposium on Commission Report, American Bar Association Annual Meeting, August 6, 1984.

Conference on Negotiation Remarks, October 2, 1984.

Association of Transportation Practitioners 1984 Eastern Transportation Law Seminar, October 29, 1984.

National Association of Women Judges, November 1984.

Women's Bar Association of Maryland, New Admittees Banquet, November 20, 1984.

Institute of Public Utilities, Williamsburg, Virginia, December 3, 1984.

Portrait Presentation of Honorable Carl McGowan, December 11, 1984.

Remarks at Cleveland Marshall College of Law (including footnotes), February 27, 1986.

Attacking Litigation: Cost and Delay: A Finale, April 2, 1986.

Remarks at Duke University School of Law, Durham, North Carolina, Economists on the Bench (including footnotes), April 11-12, 1986.

Remarks Before the Administrative Law and Agency Practice and Environment, Energy and Natural Resources Divisions of the District of Columbia Bar, National Press Club, Washington, D.C., April 16, 1986.

Remarks at Graduation of CUNY at Queens Law School, June 6, 1986.

Essay for Harvard Law Review, Some Random Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books, August 8, 1986.

Remarks at American Political Science Association (APSA) Conference on Appellate Court Management, Washington Hilton Hotel, August 30, 1986.

Remarks at St. John's University School of Law, Jamaica, New York, Joseph Belsky Memorial Lecture, February 19, 1987.

Remarks at University of Minnesota Law School, April 2, 1987.

Women in the Judicial System, Remarks at Goucher College, Towson, Md., Sarah T. Hughes Memorial, April 30, 1987.

Women's Bar Association of New York City, May 13, 1987.

Remarks at Commencement Ceremony, Northwestern University School of Law, Chicago, Illinois, May 16, 1987.

Remarks at Commencement Ceremony, Georgetown University Law Center, Washington; D.C., May 25, 1987.

Remarks at Annual Meeting of The Bar Association of Baltimore City, Baltimore, Maryland, June 2, 1987.

Remarks at 1987 Judicial Conference of the District of Columbia Circuit, The Homestead, Hot Springs, Virginia, May 27, 1987.

Remarks at Yale Law School Luncheon, Washington, D. C., June 17, 1987.

Remarks at the 1987 Judicial Conference of the Tenth Circuit, Westgate Hotel, San Diego, California, July 29, 1987.

Remarks at Canadian Superior Court Judges Conference, Ottawa-Ontario, Canada, August 11, 1987.

Contribution to Texas Law Review, Voices-A Response, September 8, 1987.

Remarks at the 1987 Third Circuit Judicial Conference, Philadelphia, PA, September 17, 1987.

Remarks at American Bar Association's Administrative Law Section Panel Discussion, International Club, Washington, D.C., October 9, 1987.

Remarks at Merit Award Ceremony (PMW recipient), Yale Law School, New Haven, Connecticut, October 17, 1987.

Remarks at Memorial Service for Judge Carl McGowan, St. John's Church, Washington, D.C., December 29, 1987.

Rita Charmatz Davidson, Reminiscence, January 1985.

Final Meeting of the National Coalition for Jail Reform, March 6, 1985.

Women in Law Conference, Luncheon Remarks, March 23, 1985.

Multi-Door Dispute Resolution Program, April 3, 1985.

National Association of Legal Secretaries Seminar, March 16, 1985.

Association of American Law Schools, Civil Litigation Workshop, April 12, 1985.

Franklin Pierce Law Center Commencement, May 11, 1985.

Memorial Service for Senator Sam Ervin, June 13, 1985.

Remarks to Monday Luncheon Club, London, July 13, 1985.

Remarks to ABP, Panel on Bill of Rights, London England, July 18, 1985.

Remarks to Harvard Law School Association, September 17, 1985.

Remarks to National Association of Women Judges Conference, Minnesota, October 12, 1985.

Remarks at the Annual Meeting of the Association of Public Policy and Management on "Deregulation and Courts," Shoreham Hotel, Washington, D.C., October 24, 1985.
Remarks at the Conference of Chief Justices and Conference of State Court Administrators in Williamsburg, Virginia, January 27, 1988.

Remarks at the Yale Law School, New Haven, Connecticut, February 2, 1988.

Introduction of Associate Justice Blackmun at Women's Bar Association's Woman Lawyer of the Year Award Ceremony, New Zealand Embassy, Washington, D.C., May 17, 1988.

Remarks in Honor of Patricia P. Bailey as Women's Bar Association's Woman Lawyer of the Year, New Zealand Embassy, Washington, D.C., May 17, 1988.

Remarks at Commencement Ceremony, Villanova University School of Law, Villanova, Pennsylvania, May 20, 1988.

Remarks at 1988 Judicial Conference of the District of Columbia Circuit, Williamsburg, Virginia, May 23, 1988.

Introduction of Associate Justice Antonin Scalia at 1988 Judicial Conference, Williamsburg, Virginia, May 23, 1988.

Introduction of Circuit Judge David Sentelle at 1988 Judicial Conference, Williams, Virginia, May 23, 1988.

Remarks at Commencement Ceremony, New York Law School, New York, N.Y., June 12, 1988.

Remarks at American Bar Association's Annual Meeting in Toronto, Canada, August, 5, 1988.

A Tribute to Skelly Wright, Harvard Law Review, September 15, 1988.

A Tribute to Judge Oscar Davis, Memorial Service, October 5, 1988.

Remarks at Luncheon Meeting of American Bar Association, Litigation Section at the Marriot Hotel, Washington, D.C., October 20, 1988, *available at* http://www.c-spanvideo.org/program/Liti.

Remarks Before Appellate Judges' Seminar (Bicentennial Conference of Judges of the United States Courts of Appeals) at Hyatt Regency, Washington, D.C., October 26, 1988.

Remarks at Luncheon Meeting of Federal Administrative Law Judges Conference, The Touchdown Club, Washington, D.C., November 18, 1988.

Remarks at Dinner Meeting of Anne Arundel County Women's Law Center, Annapolis, Maryland, February 16, 1989.

Remarks at Funeral Services for Irving Jaffe, Temple Sinai, 3100 Military Road, N.W., Washington, D.C., May 9, 1989.

Remarks at Commencement Exercises, American University, Washington College of Law, May 14, 1989 *available at* http://www.c-spanvideo.org/program/CommencementAddress5

Opening Remarks, District of Columbia Circuit's 50th Judicial Conference, Williamsburg, Virginia, June 4-6, 1989.

A Tribute to Skelly Wright, District of Columbia Circuit's 50th Judicial Conference, Williamsburg, Virginia, June 4-6, 1989.

Monday Evening Remarks, District of Columbia Circuit's 50th Judicial Conference, Williamsburg, Virginia, June 4-6, 1989.

Dialogue on Separation of Powers, District of Columbia Circuit's 50th Judicial Conference, Williamsburg, Virginia, June 4-6, 1989.
Closing Remarks, District of Columbia Circuit's 50th Judicial Conference, Williamsburg, Virginia, June 4-6, 1989.

Remarks at Portrait Presentation Ceremony of Circuit Judge Spottswood W. Robinson, III,

Ceremonial Courtroom, U.S. Courthouse, June 9, 1989.

The Role of the Courts in the Governance of Major Social Institutions in American Society, Salzburg Seminar, July 15-27, 1989.

Administrative Law, Salzburg Seminar, July 15-27, 1989.

Separation of Powers, A Principle in Peril, Salzburg Seminar, July 15-27, 1989.

Remarks at U.S. Law Week's Annual Constitutional Law Conference, The Westin Hotel, Washington, D.C., September 8, 1989.

Remarks at Grand Opening of the Courthouse Cafeteria, United States Courthouse, Washington, D.C., September 15, 1989.

Remarks at The James Madison Lecture (Fall 1989), New York University School of Law 40 Washington Square South, New York, NY, October 26, 1989.

Remarks at Annual Convention of the North Carolina Association of Women Attorneys, Charlotte, North Carolina, November 18, 1989.

Comments on Federal Courts Study Committee Tentative Recommendations, Washington, D.C., January 1990.

Remarks at the Women's Law Symposium, Florida State University College of Law, Tallahassee, Florida, February 8, 1990.

Remarks to The Colloquium by and for Regulatory Analysts, Washington, D.C., February 16, 1990.

Remarks at Georgia State University Law School, Henry J. Miller Distinguished Lecture, Atlanta, Georgia, March 15, 1990.

Remarks at Harvard Law School's National Conference on Rethinking Attorney Representation of Children, Cambridge, Massachusetts, April 7, 1990.

Remarks at Ira C. Roth Gerber Constitutional Law Conference, Boulder, Colorado, April 14, 1990.

Testimony Before the Subcommittee on Courts, Intellectual Property, and Administration of Justice of the Committee on the Judiciary, United States House of Representatives, Washington, D.C., April 19, 1990.

Remarks at The Cosmos Club, Washington, D.C., April 19, 1990.

Remarks at Stanford Law School, Stanford, California, May 11, 1990.

Opening Remarks, District of Columbia Circuit's 51st Judicial Conference, Hershey, Pennsylvania, May 20-22, 1990.

Panel on the Federal Courts, District of Columbia Circuit's 51st Judicial Conference, Hershey, Pennsylvania, May 20-22, 1990.

Remarks at University of Illinois, Department of Medical Education, Chicago, Illinois, May 23, 1990.

Remarks at The Prettyman-Leventhal American Inn of Court Annual Banquet, National Press Club, Washington, D.C., May 25, 1990.

Remarks at Women's Bar Association's Woman of the Year Award Program, Hyatt Regency Hotel, Washington, D.C., May 30, 1990.

Remarks at Employees' Awards Ceremony, U.S. Courthouse, June 13, 1990.

Remarks at American Association of Law Schools Workshop on Administrative Law, Marriott Hotel, Washington, D.C., June 23, 1990.

Remarks at The 1990 Noreen E. McNamara Memorial Lecture, Fordham Law School, New York City, October 4, 1990.

Opening Remarks and Introduction of Retired Associate Justice Lewis F. Powell, Jr. at Dedication Ceremony for the Bill of Rights Plaque, John Marshall Park, United States Courthouse, Washington, D.C., October 16, 1990.

A Tribute to John Pickering at Council for Court Excellence, November 15, 1990.

Remarks at Amherst College (Mellon Lecture Series), Amherst, Massachusetts, March 13, 1991.

Remarks at Federal Bar Association Luncheon Honoring Circuit Judge Wald, International Club, Washington, D.C., March 14, 1991.

Remarks at Reception Honoring Judge Wald, Taylor House, Washington, D.C., March 19, 1991.

Remarks on Sunstein's Administrative Substance at Duke University School of Law, Duke Law Journal's Symposium on New Directions in Administrative Law, Durham, North Carolina, March 22, 1991.

Remarks on Edley's "New Administrative Law" at Duke University School of Law, Duke Law Journal's Symposium on New Directions in Administrative Law, Durham, North Carolina, March 22, 1991.

The Central and East European Law Initiative, Technical Assistance Workshop, Prague,

Czechoslovakia, April 22-26, 1991.

Remarks at Connecticut College, Marjorie Dilley Lecture, New London, Connecticut, May 1, 1991.

Remarks at Ohio State University College of Law, Commencement Ceremony, Columbus, Ohio, May 11, 1991.
Remarks at New England College, Commencement Ceremony, Henniker, New Hampshire, May 12, 1991.

Remarks at University of Maryland School of Law Commencement Ceremony, Baltimore, Maryland, May 24, 1991.

Remarks at Hofstra University School of Law, Commencement Ceremony, Hempstead, New York, May 30, 1991.

Remarks at The Cambridge Lectures, Cambridge, England, July 12, 1991.

Remarks at Conference Sponsored by The American Academy of Arts and Sciences and The Rockefeller Foundation (Complete and Outline of Paper), Bellagio, Italy, August 5-9, 1991.

Remarks for ABA Administrative Law Panel, Atlanta, Georgia, August 12, 1991.

Remarks for United States-Romanian Judicial Program, August 20, 1991.

Remarks at Suffolk University Law School, Donohue Lectures, Boston, Massachusetts, October 24, 1991.

Remarks at Thurman Arnold Memorial Service, United States Courthouse, Washington, D.C., October 30, 1991.

Remarks at ABA Conference on Alternative Dispute Resolution in Energy and Environmental Regulatory Proceedings, Washington, D.C., November 15, 1991.

Remarks at Portrait Presentation of Judge Harold Leventhal, Ceremonial Courtroom, United States Courthouse, Washington, D.C., November 20, 1991.

Bulgarian Workshop, Sofia, Bulgaria, Dec. 9-12, 1991.

Russian Constitutionalism, Dec. 16, 1991.

Remarks at Women's Bar Association of Massachusetts Annual Meeting, Boston, Massachusetts, March 11, 1992.

Remarks at Indiana University School of Law, Jurist in Residence Program, Indianapolis, Indiana, April 5, 1992.

Remarks at Women's Bar Association of the District of Columbia - 75th Anniversary Celebration, Washington, D.C., May 15, 1992.

Panel on Courts, Lithuania, May 25, 1992.

Panel on the Constitution, Lithuania, May 25, 1992.

Remarks at Eighth Annual Meeting of the American Inns of Court, Washington, D.C., June 6, 1992.

Remarks at Conference on Security and Cooperation in Europe (CSCE), Assembly in Helsinki, Finland, June 1992.

Remarks at Federal Judicial Center, Washington, D.C., July 3, 1992.

Remarks at University of Cincinnati College of Law, William Howard Taft Lecture on Constitutional Law (Footnoted and Short Versions), Cincinnati, Ohio, September 15, 1992.

Remarks at Administrative Conference Colloquy, Washington, D.C., September 24, 1992.

Remarks at University of Chicago Legal Forum, Symposium, A Free and Responsible Press, Chicago, Illinois, October 9, 1992.

Remarks at Southern Methodist University, Murrah Lecture, Dallas, Texas, October 19, 1992.

Remarks at Attorney General's Advocacy Institute, Washington, D.C., October 24, 2010.

Remarks at Federal Litigation Training for Legal Services Attorneys, Chevy Chase, Maryland, December 8, 1992.

Remarks at 1993 National Workshop for Judges of the U.S. Courts of Appeals, Washington, D.C., February 8, 1993.

Remarks at Memorial Service for Judge David Bazelon, Washington, D.C., February 21, 1993.

Remarks at Mental Health Law Project's 20th Anniversary and Renaming Celebration, Washington, D.C., March 20, 1993.

Remarks at Ed Sparer Public Interest Law Conference, University of Pennsylvania Law School Philadelphia, Pennsylvania, March 27, 1993.

Remarks at Seton Hall University School of Law, Sandra Day O'Connor Medal of Honor Award Program, Newark, New Jersey, April 21, 1993.

Remarks at Annual Dinner - Federal American Inn of Court, Fort McNair Officers Club,

Washington, D.C., April 22, 1993.

Remarks at Corporate Counsel Luncheon, Washington, D.C., April 27, 1993.

Remarks at the American College of Bankruptcy, Great Hall of the Supreme Court, Washington, D.C., May 6, 1993.

Remarks at Awards Ceremony for Senior Executive Service Members, Office of Personnel Management, Washington, D.C., July 20, 1993.

Remarks, Overview of Government Ethics, Beijing, China, August 11-22, 1993.

Remarks, Judicial Review of Administrative Action, Beijing, China, August 11-22, 1993.

Remarks, Administrative Federalism, Beijing, China, August 11-22, 1993.

Remarks at University of Southern California Law Center - Roth Lecture, Los Angeles, California, October 28, 1993.

Remarks at Federal Bar Association's Reception for Newly-Appointed Judges, Supreme Court, Washington, D.C., November 4, 1993.

Judicial Discipline Presentation, CEELI Slovakian Workshop, November 16-18, 1993.

Remarks at Mary Lawton Memorial Service, Dept. of Justice, Washington, D.C., December 16, 1993.

National Woman's Party, Honoring U.S. Supreme Court Justice Ruth Bader Ginsburg, National Press Club, Washington, D.C., March 22, 1994.

Judge Solomon Liss Memorial Lecture, University of Baltimore School of Law, Baltimore, Maryland, April 20, 1994.

1994 Gisela Konopka Lecture, University of Minnesota, Minneapolis, Minnesota, May 4, 1994.

Introduction of Jamie S. Gorelick at American Law Institute Meeting, Washington, D.C., May 20, 1994.

International Congress on Domestic Violence, Rome, Italy, May 27, 1994.

Margaret Brent Awards Luncheon, New Orleans, Louisiana, September 7, 1994.

1994 Coffin Lecture, University of Maine, September 28, 1994.

NAWJ Annual Conference, Scottsdale, Arizona, October 1, 1994.

Fourth Annual Appellate Advocacy Program, Washington, D.C., October 28, 1994.

Introduction of Professor Roger Newman, Biographer of Justice Hugo Black, National Archives, Washington, D.C., October 31, 1994.

Federal Bar Association 75th Anniversary Dinner, Washington, D.C., January 5, 1995.

Panelist, Practicing Law Reform Before Federal Agencies in the New World of ADR, Washington, D.C., March 21, 1995.

Appellate Writing Workshop for Federal Defenders, Washington, D.C., May 12, 1995.

Commencement, Vermont Law School, South Royalton, Vermont, May 20 1995.

Judicial Conference of the Fifth Judicial Circuit, Panel on Ethics, New Orleans, Louisiana, May 23, 1995.

Juvenile Law Center, 20th Anniversary Dinner, Philadelphia, Pennsylvania, June 12, 1995.

Aspen Law & Business, Third Annual Institute: Woman Advocate '95, New York, N.Y., June 13, 1995.

Association of American Law Schools, Conference on Civil Procedure, Washington, D.C., June 14, 1995.

Yale Law School Association Annual Dinner, National Press Club, Washington, D.C., June 26, 1995.

Ode to Joyce Green (On Taking Senior Status), Gurne/Porter Summer Dinner Party, Alexandria, Virginia, July 1, 1995.

The Advocate on Paper: 50 Ways to Enhance Your Writing, Chicago, Illinois, August 7, 1995.

Swearing-In of Federal Bar President Marvin Morse, Washington, D.C., September 16, 1995.

Administrative Law Program on Regulatory Reform (Panel), Washington, D.C., October 6, 1995.

Yale Law School Luncheon Presenting Citation of Merit Award to Burke Marshall, New Haven, Connecticut, October 7, 1995.

Women's Bar Association (Planning for Success), Washington, D.C., October 25, 1995.

Canadian Judicial Council, Ottawa, Canada, November 18, 1995.

Twenty-Sixth Annual Conference on Environmental Law, Washington, D. C., February 17,

1996.

Awards Ceremony, Environmental and Natural Resources Division, Department of Justice, Washington, D. C., April 17, 1996.

Yale Law Journal Banquet, New Haven, Connecticut, April 26, 1996.

Commencement Exercises, Washington & Lee University, Lexington, Virginia, May 18, 1996.

Introduction of Marcia Greenberger at Women's Bar Association's Annual Award Ceremony, Washington, D.C., May 22, 1996.

Washington Council of Lawyers Summer Forum, Washington, D.C., June 25, 1996.

National Association of Women Judges Training Project, July 26, 1996.

American Academy of Appellate Lawyers, Orlando, Florida, August 02, 1996.

Welcoming Remarks, Women's Bar Association of the District of Columbia, Washington, D.C., September 25, 1996.

Panel Moderator-Commentator, Symposium: Constitutional "Refolution" In the Ex-Communist World, American University's Washington College of Law, Washington, D.C., September 27, 1996.

National Association of Women Judges 1996 Annual Conference, Memphis, Tennessee, September 28, 1996.

Conference of the Maryland Circuit Judges Association, Ocean City, October 6, 1996.

Alliance for Justice Program, Washington, D.C., October 07, 1996.

Presentation of Judge Harold Greene Portrait, Washington, D.C., November 7, 1996.

Separation of Powers in Presidential Systems, Workshop for Constitutional Court Judges, Hungary, Budapest, December 17, 1996.

The Press, Courts and the Public, Workshop for Constitutional Court Judges, Hungary, Budapest, December 18, 1996.

28th Annual Administrative Law Conference, Duke Law Journal, Durham, North Carolina, March 7, 1997.

Third Circuit Judicial Conference, Philadelphia, Pennsylvania, March 15, 1997.

Introduction of Lois Schiffer as Luncheon Speaker, Annual Meeting of The American Law

Institute, Washington, D.C., May 21, 1997.

Remarks at the Meeting on the 30th Anniversary of the Report by the President's Commission on Law Enforcement and the Administration of Justice, Washington, D. C., June 20, 1997.

Administrative Law and Agency Practice Section, The District of Columbia Bar, Harold Leventhal Lecture Series, Washington, D.C., July 1, 1997.

Comments on Plessy v. Ferguson, October 9, 1997.

Federalist Society, Panel on The Lawyer's Role in the American Republic, Washington, D. C., October 18, 1997.

Texas Law Review's Symposium on Federal Practice and Procedure, Austin, Texas, October 31, 1997.

Panel on Judicial Ethics, 1977 CEELI Seminar on Establishing an Independent Judiciary in Yugoslavia originally scheduled for November 8, 1997.

Panel on Funding the Judicial System and Its Effect on Judicial Independence in Yugoslavia originally scheduled for November 8, 1997.

Justice Hugo Black Lecture Series, Wesleyan University, Middletown, Connecticut, November 11, 1997.

FERC Lecture, Washington, D.C., December 9, 1997.

Retirement of Paul Nejelski, Washington, D.C., March 6, 1998.

Harvard Civil Rights-Civil Liberties Law Review Conference, Cambridge, Massachusetts, March 14, 1998.

Women's History Month Celebration, Washington, D.C., March 18, 1998.

Women's Bar Association of D. C., Washington, D.C., April 1, 1998.

1998 Minnesota Law Schools' ALI Luncheon, Hamline Law School; St. Paul, Minnesota, April 20, 1998.

Boston Bar Association's 1998 Law Day Dinner, Boston, Massachusetts, April 29, 1998.

Trial Lawyers Association of Metropolitan Washington, D.C., Judicial Excellence Award for 1998, National Press Club, Washington, D.C., May 2, 1998.

Poling Symposium on Professional Responsibility for Government Attorneys; Sponsored by Capitol Hill Chapter of the Federal Bar Association, Washington, D. C., June 10, 1998.

District of Columbia Bar Thurgood Marshall Awards Dinner, Washington, D. C., June 23, 1998.

American Bar Association, Veterans Panel, Toronto, Canada, August 2, 1998.

Investiture of Mary Schroeder to Presidency of National Association of Women Judges, St. Louis, Missouri, October 11, 1998.

Federal Bar Association Reception for Administrative Law Judges, Washington, D. C., October 14, 1998.

Women's Foreign Policy Forum Breakfast, Washington, D.C., December 20, 1998.

Cosmos Club, Committee on Legal Affairs, Washington, D.C., December 2, 1998.

Naturalization Ceremonies, United States District Court, Washington, D. C., January 12, 1999.
Enrichment Speaker, George Washington University, Washington, D.C., February 10, 1999.

Women in Law As a Second Career, Georgetown University Law Center, Washington, D. C., March 23, 1999.

National Judicial Institute, Appellate Courts Seminar, Halifax, Canada, April 18, 1999.

Introduction of The Honorable Stephen F. Williams at ALI Annual Meeting, May 18, 1999.

Arps Lecture, New York, N. Y., October 26, 1999.

National Women's Law Center, November 2001.

Washington Lawyers Council, January 2002.

Council on Court Excellence, January 2002.

Harvard Law School, Human Rights Center, February 2002.

Sarajevo ICTY Criminal Defense Conference, February 2002.

Pennsylvania State Bar Chancellors Forum, February 2002.

Naples Florida Global Forum, March 4, 2002.

Cosmos Club Symposium on Globalization, March 22, 2002.

Third Branch Interview, March 2002.

Frederich Efert Symposium, April 2, 2002.

Appellate Division Judges Article

International Human Rights Law Group Award, April 24, 2002.

Social Research Conference (New School), April 27, 2002 reprinted at 69 Social Research 1119 (Winter 2002).

American Law Institute Keynote Address, May 14, 2002.

University of Connecticut Law School Graduation, May 19, 2002.

Evidence (Association of Law School Professors), June 3, 2002.

D.C. Judicial Conference, June 15, 2002 (instructor at Brandeis Workshop for International Judges, June 11-12).

CEELI Annual Luncheon Remarks (ABA), August 10, 2002.

ASIL Proceedings of the 96th Annual Meeting, Panel on Horizontal Growth of International Courts, March 2002.

AALS, Scholars in the Arena, August 10, 2002.

Tribute to David Andrews, October 25, 2002.

Laurence Silberman Portrait Presentation, November 8, 2002.

Yale Conference of Librarians, November 12, 2002.

Georgetown University Law School (Krstic War Crimes), November 6, 2002.

Wisconsin Law School, Conference on International Criminal Court, March 1, 2003.

Gender Matters, Yale University

German Law Journal, Globalization and Human Rights, June 1, 2003.

Wickersham Award Remarks, March 18, 2003.

Harvard Law Review Banquet, April 12, 2003.

Lawyers Committee for Civil Rights Award, June 3, 2003.

California State Bar/Temple University, September 2003.

Inns of Court Award, October 11, 2003.

Federalist Society, November 15, 2003.

Buckley Remarks, December 12, 2003.

CAIR Award, January 20, 2004.

Owen Roberts Lecture, U. Penn. Law School, March 30, 2004 and University of New Mexico Law School, April 8, 2004.

ASIL Panel Presentation, April 2, 2004.

American Lawyer Award, April 28, 2004.

Tributes to Orm Ketcham, Lloyd Cutler and Alan Morrison, April-June 2004.

Global Rights Forum, June 29, 2004.

Fordham-Stein Award, October 21, 2004.

American Philosophical Society, November 3, 2004

University of Virginia Thomas Jefferson Award, April 13, 2005.

American Academy of Arts & Sciences Panel on Constitutionalism and Terrorism, May 12, 2005.

Lloyd Cutler Funeral, May 16, 2005.

Cambodian Article on Genocide, October 2005.

American U. War Crimes Research Office Symposium.

American Academy in Berlin, American Justice and American Attitude Toward International Law, November 2005.

Reflections, ABA Business Law Section, January 2006.

Leon Jaworski May Day Madison Symposium, May 1, 2006.

Keynote Address to Maryland Legal Service Consortium, May 10, 2006.

ABA Signing Statement Task Force Report (history, PMW), July 24, 2006.

ABA Conference on Advancing Rule of Law, Panel Presentation on Judicial Independence,

Chicago, September 16-17, 2006.

U.D.C. Award, March 29, 2007.

Columbia U. Friedman Symposium, March 22, 2007.

Influence of War Crimes Tribunals on International Law, Wilton Park Conference, April 2008.

Alliance for Justice Award Remarks, May 28, 2008.

AA Medal of Honor Remarks, August 11, 2008.

McCain v. Obama (simulated argument and opinion) October 28, 2008.

ASIL Comment on Medellin Case, (ASIL Newsletter) April 2008.

Remarks at ASIL Forum on ICC, Feb. 13, 2008 and ASIL Panel March 30, 2008.

Annual Survey of American Law, Dedication to PMW, Remarks, NYU Law School, March 12, 2009.

St Thomas Law School Graduation, May 10, 2009.

American Jewish Center/IAWJ Speech on Women Judges, June 15, 2009.

Chataqua Prosecutors Conference Speech, September 2, 2009.

Constitution Day Remarks, Georgetown Law Center, Sept. 17, 2009.

Shattuck Award ABA International law Sector, Mar. 16, 2010.

NAWJ Award to Judge Kessler, May 24, 2010.

Defining Human Rights: What Role Does International Law Play in Our Constitutional System?, May 19, 2010, *available at* http://www.youtube.com/watch?v=A9idpKSib2s.

Remarks at ACLU International Rights Coalition, December 15, 2010.

Remarks at Kate Stoneman Award, Albany Law School, March 10, 2011.

Constitution Project, Constitutional Champion Award, April 14, 2011.

Judicial Investiture of Paul Engelmayer, November 29, 2011.

Remarks at Induction into Connecticut Women's Hall of Fame, October 25, 2011.

Panel: A Seven Year Assessment of the International Criminal Court, July 17, 2009, Hosted by Citizens for Global Solutions, *available at* http://www.youtube.com/watch?v=HhuJo3zTc-k and http://www.youtube.com/watch?v=lwCtGprAqLM

Women in the Criminal Justice System, Constitution Project, Mar 10, 2011, available at http://www.youtube.com/watch?v=kAInkicYkTE.

II. Remarks Made Without Text

American Constitution Society Annual Convention, Panel on June 16, 2006, Keeping Faith with the Constitution (moderator).

Constitution Project Panel on Domestic Spying, NSA Surveillance and Rule of Law, Jan 5, 2006 (transcript available).

Business Section, ABA, Words of Wisdom on Changes In the Legal Profession, March 17, 2007 (notes).

Remarks at Symposium, Paving the Road to Supreme Court: How Pro Bono Cases Changed My Career and My Life (moderator) at University of North Carolina Law School, February 27, 2007 (notes available).

National Symposium Pretrial Justice (USDOJ and Pretrial Justice panel), June 7, 2011.

International Association of Women Judges Reception in Honor of Justice Carmen Argiby, Oct. 11, 2007 (program).

American University Law School panel on Justice Brennan Biography, October 23, 2010 (notes).

ACS Convention Panel on Government Secrecy and Public Access, June 14, 2008 (brief notes).

Brandeis Center for Ethics and Justice, Panel on International Judges, Spring 2008 (notes).

Washington Council Lawyers Panel on 40th Anniversary of WCL, Nov 2, 2011.
National Women's Law Center Award, Nov 14, 2001 (tape available).

United Nations Association and Citizens for Global Solutions, International Criminal Court in a New Era, February 13, 2009 (media report).

Constitution Project and Brennan Center for Justice, "Restoring Justice to Guantanamo Detainees," May 17, 2010 (panel).

DC Circuit Historical Society has produced 4 programs in which I participated, all posted on its website, concerning free speech in the McCarthy era, FOIA and national security, FCC and Indecency and Review of Agency Rules.

Hill Briefings on ASIL-ICC Report, March-June 2009 (summaries of report).

Foreign Relations Council (NYC) Briefing on ASIL-ICC Report (notes).

Prague CEELI Institute on 20th Anniversary CEELI, July 2010.

OSI+1RW (Human Rights Watch) Panel on Burma at SEISS (notes) October 2010.

NYU Law School Panel on Trying the Tyrants, February 22, 2011 (notes); same ABA/ROLI Panel (Jan 2011).

Panel on Using International Law by American Judges, ABA Section on International Law, May 5, 2007 (tape).

American University Law School Panel on International Cooperation Panel on Apprehending War Criminals (tape) Feb. 2011.

Women's Symposium at Harvard '47 60th Reunion, June 5, 2007.

Remarks at Arnold and Porter Celebrating National Women's Month, March 2007.

Remarks at Women's Bar Association, December 2008.

ACS Convention Panel Honoring PMW, July 2008.

Summary of WMD Report, Chicago Lawyer's Club, September 2005.

Global Rights Policy Forum on War and Rights, July 12, 2004 (transcript).

30th Anniversary Celebration of NLSP Program (Covington and Burling) March 31, 2000.

CEELI Workshop on Governing Russia: Developing a Constitution for a Democratic Society (participant in Judiciary Panel), January 1993.

USIA Teleconference with Women's Advisory Council for Western Australia in Perth, Jan. 1993.

CEELI Workshop on Developing a Criminal Code for Kazakhstan (participant), May 17-19, 1993.

Mentor Group, Forum for U.S.-EC Legal and Economic Issues, Second Plenary Session, Edinburgh, Scotland, (presentation) August 31- September 3, 1993.

Constitutional Symposium on Poland Constitution (NDI) Warsaw, Poland (presentation), April 26-29, 1994 (notes).

Member, United States and Egypt Judicial Exchange Team (Federal Judicial Center/George Washington University), Summer 1994-95.

CHECCI Briefing of Ukrainian Supreme Court on Draft Judicial Law, November 16, 1995.

CEELI Bosnian Federation Workshop, Lecturer on Judicial Ethics, Sarajevo, February 1996.

Leader, American Delegation of Judges to Egypt for Exchange Team, March 10-17, 1996.

Slovakian Constitutional Court Visit to United States (CEELI) (Briefing) April 1996.

Belarus Constitutional Court Visit to United States (CEELI) (Briefing) April 1996.

Constitutional Tribunal Workshop (CHECCHI/SOROS) Paris, France (Panels on Judicial Independence for Kazakhstan, Kyrgyzstan, and Mongolian Courts) March 10-13, 1996.

CEELI Workshop on Separation of Powers and Judicial Independence, Belgrade, Serbia, March 1998.

CEELI - Uzbekian Judiciary Workshop on Ethics, November 3, 1998.

American University Workshop for Argentine Judges, November 9, 1998.

Judicial Activism and Judicial Independence, Canadian Judicial Institute, Halifax, April 19, 1999.

Faculty for Frank Kaufman Symposium on Judicial Independence in the NIS.EEC, Washington, D.C. (panels on independence, ethics, judicial training and media), May 2, 1999.

CHECCI-Federal Judicial Center Symposium for Georgian Judges (court administration), July 27, 1999.

CEELI Symposium for Georgian Judges (media and courts), August 30, 1999.

International Law Conference, Association of the Bar of the City of New York (Moderator, Panel on 100th Anniversary of the 1899 Hague Conventions), November 4, 1999.

Honoree, International Association of Women Judges, Nov. 2001.

Lunch Remarks at US Court of Appeals (notes), January 8, 2002.

D.C. Bar Speech on ICTY (notes), March 2002.

American University Forum on Terrorism, April 4, 2002.

Forum at Yale Law School on International Courts, April 14, 2002.

ABA Mid-Winter Meeting (Panel on Wartime Justice), 2003.

Aspen Institute Seminar on International Law, April 2003.

National Association of Women Judges Annual Meeting (panel on International Criminal Court), October 2003.

Federalist Society Annual Meeting, November 2003.

Yale Law School Alumni, Weekend Panel on Judging International Law, October 2004 (copy available).

Judicial Training for Afghan Women Judges, 2004 (excerpts available).

Training Institute for Iraqi Judges (London-IBA)

Technical Assistance to Extraordinary Chamber for Trying Khmer Rouge Defendants (Cambodia), August 2005.

Aspen Institute Program on International Criminal Court (Faculty), September 2005.

ICTY/ICTR/ICC Joint Appellate Advocacy Training Program (Faculty) (Tanzania and the Hague), January 2006-07.

Evaluation of New Perimeters Kosovo Project (Kosovo), April 2006.

ASIL/FJC Training for Federal Judges on International Law, October 2006.

ABA International Law Section, "Can Foreign Law Tip the Balance in U.S. Courts?" (panel), May 2007 (tape available).

ASIL/Summer Associate Training in International Law, July 2007.

International Association of Women Judges Panel, October 2007.

Brandeis Center on International Ethics in Justice, Panel on International Judges, November 2007 (tape available).

National Center for State Courts, Training Program for Egyptian Women Judges, November 2007 (notes).

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IV. Media Clippings with Quotes

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*California Ass'n of Physically Handicapped, Inc. v. F.C.C.*, 778 F.2d 823 (D.C. Cir. 1985) (dissenting).

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*Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 774 F.2d 1180 (D.C. Cir.1985) (on suggestion for rehearing en banc).

*National Treasury Employees Union v. Federal Labor Relations Authority*, 774 F.2d 1181 (D.C. Cir. 1985).

*Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985).

*Consolidated Gas Transmission Corp. v. F.E.R.C.*, 771 F.2d 1536 (D.C. Cir. 1985).

*Steele v. F.C.C.*, 770 F.2d 1192 (D.C. Cir. 1985) (dissenting).

*Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521(D.C. Cir. 1985) (dissenting)

*Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985).

*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. E.P.A.*, 768 F.2d 385 (D.C. Cir. 1985).

*Natural Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355, 247 (D.C. Cir. 1985).

*Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir.1985) (concurring).

*American Financial Services Ass'n v. F.T.C.*, 767 F.2d 957 (D.C. Cir. 1985).

*Natural Gas Pipeline Co. of America v. F.E.R.C.*, 765 F.2d 1155 (D.C. Cir. 1985).

*Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985) (dissenting only as to part VIII(A))

*American Maritime Ass'n v. U.S.*, 766 F.2d 545 (D.C. Cir. 1985).

*Salt River Project Agr. Imp. and Power Dist. v. U.S.*, 762 F.2d 1053 (D.C. Cir.1985) (concurring).

*Moore v. National Ass'n of Securities Dealers, Inc.*, 762 F.2d 1093 (D.C. Cir.1985) (concurring).

*National Classification Committee v. U.S.*, 765 F.2d 164 (D.C. Cir. 1985).

*Eastern Carolinas Broadcasting Co. v. F.C.C.*, 762 F.2d 95 (D.C. Cir. 1985).

*U.S. v. North American Reporting, Inc.*, 761 F.2d 735 (D.C. Cir. 1985).

*Davis v. Giles*, 769 F.2d 813 (D.C. Cir. 1985) (dissenting).

*Mississippi River Transmission Corp. v. F.E.R.C.*, 759 F.2d 945 (D.C. Cir. 1985).

*Wilson v. Good Humor Corp.*, 757 F.2d 1293 (D.C. Cir. 1985).

*Gott v. Walters*, 756 F.2d 902 (D.C. Cir. 1985) (dissenting).

*Local Union No. 501, Intern. Broth. of Elec. Workers, AFL-CIO v. N.L.R.B.*, 756 F.2d 888 (D.C. Cir. 1985).

*Beattie v. U.S.*, 756 F.2d 91 (D.C. Cir.1984) (concurring).

*Doe v. U.S. Dept. of Justice*, 753 F.2d 1092 (D.C. Cir. 1985).

*Federal Labor Relations Authority v. Social Sec. Admin.*, 753 F.2d 156 (D.C. Cir. 1985).

*Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405 (D.C. Cir. 1985).
Deukmejian v. Nuclear Regulatory Com'n, 751 F.2d 1287 (D.C. Cir. 1984) (concurring in part and dissenting in part).

*Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1985).

*F.E.R.C. v. Triton Oil and Gas Corp.*, 750 F.2d 113 (D.C. Cir. 1984).

*Reuber v. U.S.*, 750 F.2d 1039 (D.C. Cir. 1984).

*Pennsylvania Public Utility Com'n v. U.S.*, 749 F.2d 841 (D.C. Cir. 1984).

Railway Labor Executives' Ass'n v. U.S. R.R. Retirement Bd., 749 F.2d 856 (D.C. Cir. 1984).

*Mallick v. International Broth. of Elec. Workers*, 749 F.2d 771 (D.C. Cir. 1984).

*Krodel v. Young*, 748 F.2d 701 (D.C. Cir. 1984).

*Ollman v. Evans*, 750 U.S. 970 (D.C. Cir. 1984) (dissenting).

*White House Vigil for ERA Committee v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984) (dissenting in part).

*Donovan v. A.A. Beiro Const. Co., Inc.*, 746 F.2d 894 (D.C. Cir. 1984).

*Northland Capital Corp. v. Silver*, 735 F.2d 1421 (D.C. Cir. 1984) (dissenting).

*Piech v. Pension Ben. Guar. Corp.*, 744 F.2d 156 (D.C. Cir. 1984).

*Rettig v. Pension Ben. Guar. Corp.*, 744 F.2d 133 (D.C. Cir. 1984).

*National Treasury Employees Union v. U.S. Merit Systems Protection Bd.*, 743 F.2d 895 (D.C. Cir. 1984).

*General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984).

*Neighborhood TV Co., Inc. v. F.C.C.*, 742 F.2d 629 (D.C. Cir. 1984).

*U.S. v. North American Reporting, Inc.*, 740 F.2d 50 (D.C. Cir. 1984).

*Quinn v. DiGiulian*, 739 F.2d 637 (D.C. Cir. 1984).

*Council of Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984).

*Koller By and Through Koller v. Richardson-Merrell Inc.*, 737 F.2d 1038 (D.C. Cir. 1984).

*Union of Concerned Scientists v. U.S. Nuclear Regulatory Com'n*, 735 F.2d 1437 (D.C. Cir. 1984).

*Kennedy for President Committee v. Federal Election Com'n*, 734 F.2d 1558 (D.C. Cir. 1984).

*Reagan for President Committee v. Federal Election Com'n,* 734 F.2d 1569 (D.C. Cir. 1984).

*Koropoulos v. Credit Bureau, Inc.,* 734 F.2d 37 (D.C. Cir. 1984).

*U.S. v. Thornton,* 733 F.2d 121 (D.C. Cir. 1984).

*Department of Transp., Federal Highway Admin. v. I.C.C.,* 733 F.2d 105 (D.C. Cir. 1984).

*Local 1814, Intern. Longshoremen's Ass'n, AFL-CIO v. N.L.R.B.,* 735 F.2d 1384 (D.C. Cir. 1984) (dissenting).

*Cleveland Television Corp. v. F.C.C.,* 732 F.2d 962 (D.C. Cir. 1984).

*Iowa State Commerce Com'n v. Office of Federal Inspector of Alaska Natural Gas Transp. System,* 730 F.2d 1566 (D.C. Cir. 1984).

*Boroughs of Ellwood City, Grove City, New Wilmington, Wampum, and Zelienople, Pa. v. F.E.R.C.,* 731 F.2d 959 (D.C. Cir. 1984).

*U.S. v. Doe,* 730 F.2d 1529 (D.C. Cir. 1984).

*Lucas v. Hodges,* 730 F.2d 1493 (D.C. Cir. 1984).

*Fort Pierce Utilities Authority of City of Fort Pierce v. F.E.R.C.,* 730 F.2d 778 (D.C. Cir. 1984).

*Farmers Union Cent. Exchange, Inc. v. F.E.R.C.,* 734 F.2d 1486 (D.C. Cir. 1984).

*National Souvenir Center, Inc. v. Historic Figures, Inc.,* 728 F.2d 503 (D.C. Cir. 1984).

*Belland v. Pension Ben. Guar. Corp.,* 726 F.2d 839 (D.C. Cir. 1984) (dissenting in part).

*Bartel v. F.A.A.,* 725 F.2d 1403 (D.C. Cir. 1984).

*Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie,* 725 F.2d 695 (D.C. Cir. 1984).

*Del Mfg. Co. v. U.S.,* 723 F.2d 980 (D.C. Cir. 1983) (dissenting).

*Ruckelshaus v. Sierra Club,* 463 U.S. 680 (D.C. Cir. 1983).

*Wydra v. Law Enforcement Assistance Admin.,* 722 F.2d 834 (D.C. Cir. 1983).

*Naartex Consulting Corp. v. Watt,* 722 F.2d 779 (D.C. Cir. 1983).

*U.S. v. Lemon,* 723 F.2d 922 (D.C. Cir. 1983).

*Sotomayor v. F.C.C.*, 721 F.2d 1408 (D.C. Cir. 1983).

*Conair Corp. v. N.L.R.B.*, 721 F.2d 1355 (D.C. Cir. 1983).

*Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) (dissenting).

*U.S. v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983).

*McGehee v. Casey*, 718 F.2d 1137 (D.C. Cir. 1983).

*International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. National Mediation Bd.*, 712 F.2d 1495 (D.C. Cir. 1983) (dissenting).

*American Friends Service Committee v. Webster*, 720 F.2d 29 (D.C. Cir. 1983).

*Ryan v. Bureau of Alcohol, Tobacco and Firearms*, 715 F.2d 644 (D.C. Cir. 1983).

*Ollman v. Evans*, 750 F.2d 970 (D.C. Cir.1983) (concurring).

*Byers v. Burleson*, 713 F.2d 856 (D.C. Cir. 1983).

*Water Transport Ass'n v. I.C.C.*, 715 F.2d 581 (D.C. Cir. 1983) (cert denied).

*Reiner v. Washington Plate Glass Co., Inc.*, 711 F.2d 414 (D.C. Cir. 1983).

*Washington Ass'n for Television and Children v. F.C.C.*, 712 F.2d 677 (D.C. Cir. 1983).

*F.E.R.C. v. Triton Oil & Gas Corp.*, 712 F.2d 1450 (D.C. Cir. 1983).

*Central Vermont Ry., Inc. v. I.C.C.*, 711 F.2d 331 (D.C. Cir. 1983).

*Lamoille Valley R. Co. v. I.C.C.*, 711 F.2d 295 (D.C. Cir. 1983).

*Carter/Mondale Presidential Committee, Inc. v. Federal Election Com'n*, 711 F.2d 279 (D.C. Cir. 1983).

*Harr v. U.S.*, 705 F.2d 500 (D.C. Cir. 1983).

*Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506 (D.C. Cir. 1983).

*Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

*Lewis v. Sawyer*, 698 F.2d 1261 (D.C. Cir.1983) (concurring).

*U.S. v. Lipscomb*, 702 F.2d 1049 (D.C. Cir. 1983).

*Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1983) (dissenting).

*International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536 (D.C. Cir. 1983).

*U.S. v. Blackwell*, 694 F.2d 1325 (D.C. Cir. 1982).

*Beins v. U.S.*, 695 F.2d 591 (D.C. Cir. 1982).

*Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838 (D.C. Cir. 1982).

*Aeron Marine Shipping Co. v. U.S.*, 695 F.2d 567 (D.C. Cir. 1982).

*U.S. v. Mangieri*, 694 F.2d 1270 (D.C. Cir. 1982).

*National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

*Hensley v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1054 (D.C. Cir. 1982).

*Process Gas Consumers Group v. U.S. Dept. of Agriculture*, 694 F.2d 778 (D.C. Cir. 1982).

*Washington Post Co. v. U.S. Dept. of Health and Human Services*, 690 F.2d 252 (D.C. Cir. 1982).

*Kentucky Utilities Co. v. F. E. R. C.*, 689 F.2d 207 (D.C. Cir. 1982).

*De Medina v. Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982).

*Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982).

*Local 1219, American Federation of Government Employees v. Donovan*, 683 F.2d 511 (D.C. Cir. 1982).

*Attorney General of U.S. v. Irish People, Inc.*, 684 F.2d 928 (D.C. Cir.1982) (concurring).

*Borrell v. U.S. Intern. Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982).

*Wren v. Merit Systems Protection Bd.*, 681 F.2d 867 (D.C. Cir. 1982).

*Southern Ry. Co. v. I. C. C.*, 681 F.2d 29 (D.C. Cir. 1982).

*Flannery v. President and Director of Georgetown College*, 679 F.2d 960 (D.C. Cir. 1982) (dissenting).

*Arthur Andersen & Co. v. I. R. S.*, 679 F.2d 254 (D.C. Cir. 1982).

*Puerto Rico Maritime Shipping Authority v. Federal Maritime Com'n*, 678 F.2d 327 (D.C. Cir.

1982) (cert denied).

*Western Coal Traffic League v. U.S.*, 677 F.2d 915 (D.C. Cir. 1982) (cert denied).

*Consolidated Edison Co. of New York, Inc. v. Federal Energy Regulatory Commission*, 676 F.2d 763, (D.C. Cir. 1982).

*In re Sealed Case*, 146 F.3d 1031 (D.C. Cir.1998) (concurring).

*Raicovich v. U.S. Postal Service*, 675 F.2d 417 (D.C. Cir. 1982).

*Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982).

*Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).

*United Mine Workers of America v. Federal Mine Safety and Health Review Commission*, 671 F.2d 615 (D.C. Cir. 1982) (dissenting).

*Cities of Batavia, Naperville, Rock Falls, Winnetka, Geneva, Rochelle and St. Charles, Ill. v. Federal Energy Regulatory Commission*, 672 F.2d 64 (D.C. Cir. 1982).

*Sierra Club v. Ann M. Gorusch (On Motion for Award of Attorneys' Fees)*, 672 F.2d 33 (D.C. Cir. 1982).

*Demby v. Schweiker*, 671 F.2d 507(D.C. Cir. 1981) (dissenting).

*Consolidated Freightways v. N. L. R. B.*, 669 F.2d 790 (D.C. Cir. 1981).

*Anaheim, Riverside, Banning, Colton and Azusa, Cal. v. Federal Energy Regulatory Commission*, 669 F.2d 799 (D.C. Cir. 1981).

*Baurer v. Planning Group, Inc.*, 669 F.2d 770 (D.C. Cir. 1981).

*Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238 (D.C. Cir. 1981) (dissenting).

*Costello Pub. Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981).

*Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir.1981) (concurring).

*U.S. v. Heldt*, 668 F.2d 1238 (D.C. Cir.1981) (concurring).

*In re Search Warrant Dated July 4, 1977, for Premises at 2125 S St., Northwest, Washington, D. C.*, 667 F.2d 117 (D.C. Cir.1981) (concurring).

*Lawrence v. Acree*, 665 F.2d 1319 (D.C. Cir.1981) (concurring).

*American Petroleum Institute v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981) (dissenting).

*In re Corrugated Container Antitrust Litigation*, 662 F.2d 875 (D.C. Cir. 1981).

*Gulf Oil Corp. v. U.S. Dept. of Energy*, 663 F.2d 296 (D.C. Cir. 1981).

*N. L. R. B. v. Blake Const. Co., Inc.*, 663 F.2d 272 (D.C. Cir. 1981).

*Illinois Cities of Bethany v. Federal Energy Regulatory Commission*, 670 F.2d 187 (D.C. Cir. 1981).

*City of Charlottesville, Va. v. Federal Energy Regulatory Commission*, 661 F.2d 945 (D.C. Cir.1981) (concurring).

*Process Gas Consumers Group v. U.S. Dept. of Agriculture*, 694 F.2d 728 (D.C. Cir. 1981) (dissenting).

*Lane-Burslem v. C. I. R.*, 659 F.2d 209 (D.C. Cir. 1981).

*Hatch v. Federal Energy Regulatory Commission*, 654 F.2d 825 (D.C. Cir. 1981).

*Ohio Ass'n of Community Action Agencies v. Federal Energy Regulatory Commission*, 654 F.2d 811 (D.C. Cir. 1981).

*U.S. v. District of Columbia*, 654 F.2d 802 (D.C. Cir. 1981) (cert denied).

*State Water Control Bd., et al. v. Wash. Sub. San. Comm.*, 654 F.2d 802 (D.C. Cir. 1981) (cert denied).

*Moody v. I.R.S.*, 654 F.2d 795 (D.C. Cir. 1981).

*National Treasury Emp. Union v. Campbell*, 654 F.2d 784 (D.C. Cir.1981) (concurring).

American Federation of Government Emp., AFL-CIO v. Federal Labor Relations Authority, 653 F.2d 669 (D.C. Cir. 1981).

*National Federation of Federal Emp. v. Federal Labor Relations Authority*, 652 F.2d 191 (D.C. Cir. 1981).

*North Carolina Utilities Commission v. Federal Energy Regulatory Commission*, 653 F.2d 655 (D.C. Cir. 1981).

*Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981).

*Federal Election Commission v. Citizens for Democratic Alternatives in 1980*, 655 F.2d 397

(D.C. Cir. 1981).

*Murphy v. U.S.*, 653 F.2d 637 (D.C. Cir. 1981).

*Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

*Cannon v. U.S.*, 645 F.2d 1128 (D.C. Cir. 1981).

*Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264 (D.C. Cir. 1981).

*Consolidated Rail Corp. v. I. C. C.,* 646 F.2d 642 (D.C. Cir. 1981).

*U.S. v. Hubbard,* 650 F.2d 293 (D.C. Cir. 1981).

*U.S. v. White*, 648 F.2d 29 (D.C. Cir. 1981).

*Miller v. Langhorne Bond*, 641 F.2d 997 (D.C. Cir. 1981) (cert denied).

Communications *Inv. Corp. v. F.C.C.,* 641 F.2d 954 (D.C. Cir. 1981).

*Daye v. Harris*, 655 F.2d 258 (D.C. Cir. 1981).

*United States v. Pollack*, 655 F.2d 243 (D.C. Cir.1980) (concurring).

*United States v. Federal Maritime Com'n*, 694 F.2d 793 (D.C. Cir. 1982) (dissenting).

*Office of Consumers' Counsel v. Federal Energy Regulatory Commission*, 655 F.2d 1132 (D.C. Cir. 1980).

*Fenster v. Schneider*, 636 F.2d 765 (D.C. Cir. 1980).

*13th Regional Corp. v. U.S. Dept. of Interior*, 654 F.2d 758 (D.C. Cir. 1980).

*Energy Action Educational Foundation v. Andrus*, 654 F.2d 735 (D.C. Cir. 1980).

*Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980).

*Virgin Islands v. Blumenthal*, 642 F.2d 641 (D.C. Cir. 1980).

*Soft Drink Workers Union Local 812, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N. L. R. B.,* 657 F.2d 1252 (D.C. Cir. 1980) (dissenting).

*De Magno v. U.S.,* 636 F.2d 714 (D.C. Cir. 1980).

*Electronic Industries Ass'n Consumer Electronics Group v. F.C.C.*, 636 F.2d 689 (D.C. Cir. 1980) (dissenting).

*J. F. Hoff Elec. Co. v. N.L.R.B.*, 642 F.2d 1266 (D.C. Cir. 1980).

*In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C. Cir.1980) (concurring).

*McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980) (dissenting).

*Carson v. United States Dept. of Justice*, 631 F.2d 1008 (D.C. Cir. 1980).

*Good Luck Nursing Home, Inc. v. Harris*, (D.C. Cir.1980) (concurring).

*United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980).

*Swinomish Tribal Community v. Federal Energy Regulatory Commission*, 627 F.2d 499 (D.C. Cir. 1980) (dissenting).

*Postow v. OBA Federal Sav. and Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980).

*U.S. v. Harris*, 627 F.2d 474 (D.C. Cir. 1980) (cert denied).

*Conn. Light and Power Co. v. FERC*, 627 F.2d 468 (D.C. Cir. 1980) (concurring).

*National Lime Ass'n v. Environmental Protection Agency*, 627 F.2d 416 (D.C. Cir. 1980).

*Krohn v. Department of Justice*, 628 F.2d 195 (D.C. Cir. 1980).

*Martin Tractor Co. v. Federal Election Commission*, 627 F.2d 375 (D.C. Cir. 1980).

*Peoples Gas System, Inc. v. N.L.R.B.*, 629 F.2d 35 (D.C. Cir. 1980).

*Common Cause v. National Archives and Records Service*, 628 F.2d 179 (D.C. Cir. 1980).

*Robintech, Inc. v. Chemidus Wavin, Ltd.*, 628 F.2d 142 (D.C. Cir. 1980) (concurring).

*MCI Telecommunications Corp. v. F.C.C.*, 627 F.2d 322 (D.C. Cir. 1980).

*Pendleton v. Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980) (dissenting).

*F.T.C. v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966 (D.C. Cir. 1980) (dissenting).

*Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

*Macellaro v. Goldman*, 643 F.2d 813 (D.C. Cir. 1980) (dissenting).

*Hanson v. Hoffmann, 628 F.2d 42 (D.C. Cir. 1980).*

*Sami v. U.S., 617 F.2d 755 (D.C. Cir. 1979).*

*Energy Action Educational Foundation v. Andrus*, 631 F.2d 751 (D.C. Cir. 1979) (concurring).

*U.S. v. Crawford*, 613 F.2d 1045 (D.C. Cir. 1979).

*Diplomat Lakewood Inc. v. Harris*, 613 F.2d 1009 (D.C. Cir. 1979).

State of Tex. v. U.S., 785 F.Supp. 201 (D.C. Cir. 1992).

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

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

Member of District of Columbia Crime Commission appointed by President Lyndon Johnson 1965- 1967; Assistant Attorney General for Office of Legislative Affairs (1977-79) appointed by President Jimmy Carter); Judge, U.S. Court of Appeals for District of Columbia Circuit (1979-1999) (Chief Judge 1986-1991); Justice, International Criminal Tribunal for Former Yugoslavia (1999-2001) by US Department of State; Member of Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (2004-2005) appointed by President George W. Bush; Member Council of Administrative Conference of the United States (ACUS) (2010- ) appointed by President Barack Obama.

No unsuccessful candidacies

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

Head of Policy Office for Vice Presidential Candidate Sargent Shriver (Sept.-Nov. 1972); volunteer campaigner for Presidential Candidate Barack Obama (Dec. 2007-Nov. 2008)

14. **Legal Career**: Answer each part separately.

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

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

I served as law clerk to Judge Jerome N. Frank on the U.S. Court of Appeals (2d Cir.) in 1951-2.

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

I have not practiced solo except for 2 occasions in 2007 and 2011. On the first occasion, I appeared as counsel of record in the 10th Circuit in *Simpson v University of Colorado at Boulder*, 500 F.3d 1170 (10th Cir. 2007). On the second occasion, I appeared as counsel of record in *Shirk v Farsmach*, No. 10CA 2141 (Colo. App. Jan. 5, 2012).

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.
1952-1953: I was an associate at Arnold, Fortas and Porter, 555 12th St NW, Washington, D.C.

1964-1966: I was a consultant to the Office of Criminal Justice, US Dept. of Justice and Vera Institute of Justice on the National Bail Conference and coauthor of the Conference publication (Bail in the United States: 1964); Consultant and author of two reports for the National Commission on Law Enforcement and Criminal Justice (1966).

1965: I was a consultant to Office of Economic Opportunity and US Dept. Justice to write publication for the Conference on Law and Poverty (Law and Poverty 1965).

1967-1968: I was a consultant and author of staff report to National Advisory Commission on Civil Disorders.

1969: I was a consultant and author of staff report to National Commission on Causes and Prevention of Violence.

1964-1972: I was a consultant to and Board Member of the Vera Institute of Justice.

1968-1970: I was an attorney at the Neighborhood Legal Services Project (D.C.)

1970-1972: I was Co-Director at the Ford Foundation Drug Abuse Project and co-authored DEALING WITH DRUG ABUSE (Praeger Press 1971).

1972-1977: I was an attorney at Center for Law and Social Policy (1971-1972); and Attorney at the Mental Health Law Project (1972-1977), Director of Litigation (1975-1977).

1972-77: I was a member of the Carnegie Council on Children.

1971-78: I was a member of ABA Juvenile Justice Standards Commission.

1977-79: I was Assistant Attorney General for Office of Legislative Affairs.

1979-1999: I served as a Judge for the Court Appeals for D.C. Circuit; Chief Judge 1986-1991.

1999-2001: I served as a Justice, for the International Criminal Tribunal for Former Yugoslavia

2002- present: I pursued various legal activities including: board memberships (listed under Question 11), Membership on the WMD Commission, and technical assistance to international courts and American Bar Association and American Law Institute projects on criminal sentencing.

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I served as the Chair of an arbitration panel convened by the American Arbitration Association from 2002-2007 in the case of Westinghouse v CBS, 16x19200937702 dealing with the allocation of costs for a nuclear plant site cleanup.

v. whether you have held any judicial office, including positions as an administrative law judge, on any U.S. federal, state, tribal, or local court and if so, please provide the name of the court, the jurisdiction of that court, whether the position was appointed or elected, and the dates of your service.

I was appointed by President Jimmy Carter to the United States Court of Appeals for the D.C. Circuit in 1979 and served until 1999, including as Chief Judge from 1986-1991. I was then nominated by the U.S. Department of State to fill the unexpired term of Judge Gabriel McDonald on the International Criminal Tribunal for the former Yugoslavia where I served from 1999-2001. The ICTY is a United Nations tribunal which prosecutes and tries war crimes, crimes against humanity and genocide committed on the territory of the former Yugoslavia during the Balkan Wars of the 1990s.

b. Describe:

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

Except for one year in private practice after my clerkship and the two recent cases in Colorado mentioned above (which were pro bono), I have worked in the public sector or with nonprofit public interest organizations.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

My areas of specialization were criminal law, juvenile law, special education law, mental health law, civil rights, and after retirement from the bench, international public law and war crimes. During my year in private practice I worked with Thurman Arnold on the defense of Owen Lattimore for perjury. The indictment was ultimately dismissed by Judge Luther Youngdahl and the dismissal was upheld by the D.C. Circuit.

c. Describe the percentage of your practice that has been in litigation and whether you appeared

in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

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

Overall (excluding judicial service), I would estimate the percentage of my legal work involving litigation to comprise approximately 10 years of my 50 year career. During those years I did appear frequently in court, primarily in class action cases involving civil rights litigated in federal court.

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

I did represent pro bono several criminal defendants including an appeal before the DC Circuit en banc in which I was the appointed counsel by the Court. United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973).

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

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

I was co-counsel in approximately 10 cases tried (or appealed) to final judgment. I was principally an appellate advocate, though I participated in several trials, only one of which involved a jury.

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

I argued in one case as amicus for the United States Government before the Supreme Court (Penn, Central v. New York City, 438 U.S. 104 (1978) but was counsel of record on several amicus briefs in that Court. They include:

*In re Winship*, 397 U.S. 358 (1970) (Juvenile's right to proof beyond a reasonable doubt standard.)

*McKeiver v. Pennsylvania*, 403 US 528 (1971) (Juvenile's right to jury trial)

*Dorszynski v. U. S.*, 418 U.S. 424 (1974) (Duty of sentencing judge under federal youth corrections act).

15. **Litigation**: Describe the ten (10) most significant litigated matters that you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

I was involved in litigation for less than a decade (1968-1977) and many of the cases I worked on were class action types that lasted several years, therefore I am citing only 5 that I believe were most significant.

(1) *United States v. Lattimore*, 112 F Supp, 507 (DDC 1953). As an associate at Arnold, Fortas and Porter in 1952-3, I was assigned to assist lead counsel Thurman Arnold and former Senator Joseph O'Mahoney in defending Johns Hopkins professor Owen Lattimore accused of lying about sympathizing and supporting Communist policies for his consulting work with the State Department and his editorial work on a magazine called Pacific Affairs. My drafting work was principally on a bill of particulars granted in large part when Judge Luther Youngdahl dismissed the indictment on First Amendment grounds, stressing the role of that amendment in protecting political thought and speech. His ruling was upheld by the D.C. Circuit. Lattimore was later indicted again on the basis of the same conduct and this indictment too was dismissed by Judge Youngdahl a decision also upheld by the Circuit Court. The lead counsel are now deceased as is the US Attorney who defended the indictment, Leo Rover. A fuller account of the case can be found in the attached tape of a DC Circuit Historical Society program based on the case.

(2) *Harris v Harris*, 424 F2d 806 (DC Circuit 1970). As a Legal Service attorney in 1969, I was assigned to participate in writing a brief and to argue an appeal from a ruling pursuant to D.C. Superior Court Family Division Rule that a person ordinarily qualifying for in forma pauperis waiver of fees could not obtain such a waiver in divorce proceeding as opposed to legal separation. The local courts upheld the policy and a petition was brought before the US Court of Appeals, which at that time had discretionary jurisdiction to review local court rulings. I argued the case before a panel consisting of Judges Robinson, McGowan, and MacKinnon who ruled in our favor that the Equal Protection Clause did not permit such a distinction, This case came several years before the United States Supreme Court ruled similarly and was hailed as a

breakthrough in poverty law, permitting DC residents, especially those deserted by their spouses, to make a new start. The Corporation Counsel supported our view so a special amicus curiae was appointed to argue the other side of the case, Walter Johnson, Jr. Mr. Johnson currently resides at 8701
Georgia Ave, Silver Spring, MD (tel. 301 587 2090).

(3) *Mills v Board of Education*, 348 F Supp. 866 (1972) I was co-counsel on this class action, the second such case in the country, which sought to establish the legal rights of physically and mentally or emotionally disabled children to an appropriate education as part of the public education system. Up to that time such exceptional children were accepted only as the resources and the discretion of the public schools permitted. The action was argued on statutory and constitutional grounds in a summary judgment motion before Judge Josepth Waddy in the United States District Court. Julian Tepper, my co-counsel represented the National Legal Aid and Defender Association as an attorney at the Mental Health Law Project. Judge Waddy granted summary judgment in our favor and laid down a detailed protocol for evaluating the needs of such children that met due process requirements and the process for meeting their special needs. The Board did not appeal. The decision had momentous consequences for the special education program in the DC schools and was followed by federal legislation providing funds to localities which met certain requirements patterned in large part after the Mills case. I monitored the special masters operations implementing the decision and testified before Congress on the legislation, until 1977 when I left to work in the Department of Justice. Julian Tepper, my co-counsel, now resides in Albuquerque and works at the Walz and Associates law firm there. The Board was represented by Corporation Counsel Attorney John H. Suda who later became a D.C. Superior Court Judge now retired who lives in Berkeley Springs, West Virginia (address and telephone not obtainable).

(4) *Dixon v Weinberger*, 405 F Supp. 974 (DDC 1975). This too was a class action brought on behalf of thousands of institutionalized patients at St Elizabeth's Hospital who could be accommodated in community based settings if proper services were provided. Ben Heineman and I were co-counsel from the Mental Health Law Project who filed the suit in 1974. The action was brought on a "right to treatment" theory as well as on the basis of the local D.C. civil commitment act. Judge Aubrey Robinson granted summary judgment on the civil commitment theory and ruled that the District and the federal government, which then jointly governed St E's, must come up with a plan to create community services for those who did not need institutionalization. Over the next 40 years, there has been slow progress toward that goal and Judge Hogan just recently closed out the case. Ben Heineman is now at the Kennedy School of Government at Harvard (tel. 617-496-4260). The federal government was represented by Royce Lambert, now Chief Judge of the District Court and Colleen Kollar-Kotelly, a judge on that court. When I left to work for the government in 1977, Peter Nickles at Covington and Burling took over as counsel for Dixon et al.

(5) *Morales v Turman*, 326 F Supp. 677 (1971); 364 F Supp. (1973); 383 F Supp. 53 (E D Tex, 19 ); see also 430 US 322 (1977). This civil rights action was brought on behalf of the institutionalized juveniles in the several Texas Youth Authority (TYA) institutions located around the state, alleging inhumane treatment, enforced segregation, and denial of needed treatment. It proceeded from 1971 through more than a decade. I represented along with

Lawrence Schwartz, also at the Mental Health Law Project, "litigating amici" composed of several nongovernmental organizations including: the American Orthopsychiatric Association; the American Psychological Association; and the United States Government. We were permitted basically all of the litigating privileges of the plaintiffs attorneys who were legal service lawyers. Thus we deposed witnesses, proposed interrogatories, and engaged in settlement discussions. The case came before Judge William Wayne Justice in Tyler, Texas and culminated in a five week trial in July-August 1973, at which I presented and cross-examined witnesses and proposed findings of fact. Judge Justice rendered a lengthy decision in our favor in early 1973 finding civil rights violations and ordering the TYA to negotiate a plan with us to correct them. I represented the litigating amici at these sessions for at least two years. The case continued after I left to join the government. In 1977 the TYA appealed Judge Justice's order on the basis that holding a state policy like the TYA's unconstitutional required a 3 judge court. I argued in the fifth circuit against this position, but the Circuit agreed with the Texas Attorney General (535 F2d 864) and reversed Judge Justice's rulings. We petitioned the US Supreme Court and it granted the writ, reversing the Fifth Circuit in a memorandum opinion at 430 U.S. 322 (1977). My co-counsel Laurence Schwartz is deceased. The plaintiff's counsel Peter Sandmann, then with the Juvenile Law Center is now with Tesler, Sandmann, Fishman, 235 Pine Street, Ste. 1300, San Francisco, CA 94104, 415-781-5600. Larry York of Baker & Botts in Houston was the TYA lead counsel but Thomas Choate at the Office of the Attorney General, PO Box 12548, Austin, TX was our contact ; Mike Thrasher at the U.S. DOJ Civil Rights Division was the lead federal lawyer.

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

Apart from the litigation activities described in Question 10, my most significant activities have taken place within the context of my judicial activities.

During my tenure as judge on the D.C. Circuit, I authored over 830 opinions, the most notable of which included *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), dealing with the relationship between agency rulemaking and ex parte input from private parties; and *Finzer v. Barry,* 798 F.2d 1450 (D.C. Cir. 1986) (dissenting), dealing with the First Amendment right to protest in front of an embassy. In *Finzer*, my dissent in favor of such protests under the First Amendment was upheld by the Supreme Court in an opinion by Justice Scalia. *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987) reinstated a class action on behalf of women foreign service agents who alleged bias in their assignments to less prestigious "cones" of work. It eventually resulted in a major recovery for the class. *Armstrong v. Executive Office of the President,* 92 F.2d 282 (D.C. Cir. 1991) preventing the NSA from destroying important information in its computer caption until it had been evaluated by the archivist under the Federal and Presidential Records Act. *In re Sealed Case*, 67 F.3d 965 (D.C. Cir. 1995) laid down perimeters for the exercise of executive privilege. My years on the D.C. Circuit were the most satisfying of my career.

During my years at the International Criminal Tribunal for the former Yugoslavia (ICTY) I sat as

one of three judges on the first genocide trial in that tribunal resulting from the Srebrenica massacres, a multi-defendant trial of the commanders of the notorious Serbian prison camp Omarska and an appeal from conviction of Croatian military who burned a Bosnian Muslim village in which we reversed the conviction for failure to give notice of the core violation in the indictment and other procedural errors. During my tenure as Assistant Attorney General (1977-9), I helped to shepherd the Foreign Intelligence Surveillance Act (FISA) through Congress as well as the Omnibus Judgeship Act of 1978, the two acts creating the Federal Circuit and the International Trade Court, and the Rights of Institutionalized Persons Act.

Another significant legal activity has been my work on the advancement of law reforms to make the legal process more fair and efficient. From 1971-77 I was a member of the ABA and IJA (Institute of Judicial Administration) Juvenile Justice Standards Commission, which produced a comprehensive set of volumes on all aspects of juvenile law. I reviewed and in some cases edited all 20 plus volumes. During the same period I was a member of the Carnegie Commission on Children, which produced a report "All Our Children" in which I wrote and edited portions. For the ABA I have been a member of its Commission on Signing Statements and authored the history of signing statements in its 2006 report; also a member of the ABA Criminal Section's Task Force on Effective Sanctions (2006-8), which sought to effect a better system for reentry of convicted defendants back into the community, a goal I also worked on as an advisor to the ALI's restatement to the model criminal code.

My work as a Member of the President's Commission on WMD in 2004-2005 deserves special mention. This was a bipartisan Commission, which surveyed the Intelligence agencies performance in the WMD area, particularly the National Intelligence Estimate that preceded our entry into the Iraq war. The Commission met frequently and dealt with much sensitive and classified material. I found the subject matter, though at times complex, to be of such gravity and importance that it compelled the closest attention and thought. I also found that my 20 years on the D.C. Circuit in reviewing thousands of complex administrative agency rules in technical areas from the EPA, FCC, SEC, and on occasion the intelligence agencies had provided a useful background for my work on the Commission. The judicial role of balancing statuary text and purpose, with agency discretion and the separation of powers principles under our Constitution, gave me a unique perspective in evaluating the performance of the intelligence agencies. The Commission's Report was unanimous, well received, and instrumental in many subsequent changes made in the agencies operations.

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

2004: At Yale Law School, I was the visiting Skelly Wright lecturer and co-taught a seminar on International Courts, which covered the then-existing international and hybrid courts and the issues they raised in their mission and operation. (no syllabus available). The only other teaching was at the Aspen Institute in 1995 as a two-week course with Bert Neuborne from NYU Law School on constitutional questions (no syllabus available) and one two-week course at the Salzburg Seminar in, Austria in July 1989 on Law and Society (lectures listed under Speeches).

I also participated in instructing international prosecutors in appellate advocacy from 2007 to 2008 at Arusha, Tanzania and the Hague.

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

My federal pension is my only deferred income.

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

I have informed the office of government ethics that if confirmed, I will resign from the Justice Initiative, New Perimeter, and the Constitution Accountability Center, as well as the American Constitution Project's Initiative on Liberty and Security and Task Force on Detainee Treatment.

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

Financial Disclosure Report is attached.

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

Statement of net worth is attached.

22. **Potential Conflicts of Interest:**

a. Identify the family members or other persons, parties, affiliations, pending and categories of litigation, financial arrangements or other factors that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I do not anticipate any conflicts of interest from family or other sources. If a potential conflict were to arise, I would consult the relevant statutes and the Privacy and Civil Liberties Oversight Board's designated agency ethics official for guidance.

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

I do not anticipate any conflicts of interest from family or other sources. If a potential conflict were to arise, I would consult the relevant statutes and the Privacy and Civil Liberties Oversight Board's designated agency ethics official for guidance.

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

As my answers to the prior questions indicate, the vast majority of my legal activities in the last decade have been uncompensated and aimed at the interests of justice for disadvantaged persons in the system. Before becoming a judge, similarly, my work at Legal Services was entirely directed at the poor, and my work for the Mental Health Law Project for children denied education for disability or institutionalized persons deserving of adequate treatment. I have also represented individual criminal defendants pro bono.

## FINANCIAL STATEMENT

### NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 542 | 000 | Notes payable to banks-secured | | | |
| U.S. Government securities | | | | Notes payable to banks-unsecured | | | |
| Listed securities - see schedule | | 710 | 000 | Notes payable to relatives | | | |
| Unlisted securities | | | | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | | |
| Due from relatives and friends | | | | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Dividends | | | | Real estate mortgages payable | | | |
| Real estate owned - personal residence | | 725 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | | | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| Municipal bonds | | 134 | 244 | | | | |
| Annuities | | 389 | 766 | | | | |
| | | | | Tax liabilities | | | 0 |
| | | | | Net Worth | 2 | 501 | 010 |
| Total Assets | 2 | 501 | 010 | Total liabilities and net worth | 2 | 501 | 010 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | | | Are any assets pledged? (Add explanation) | No | | |
| On leases or contracts | | | | Are you defendant in any pending lawsuit action? | No | | |
| Legal Claims | | | | Have you ever taken bankruptcy? | No | | |
| Provision for Federal Income Tax | | | | | | | |
| Other special debt | | | | | | | |

# FINANCIAL STATEMENT

## NET WORTH SCHEDULES

| Listed Securities | |
|---|---|
| American Funds Fundamental Investors Fund | $ 67,829 |
| American Funds Investment Fund of America | 22,384 |
| Fidelity Diversified International Fund | 20,945 |
| Fidelity Gold Fund | 27,478 |
| Fidelity High Income Municipal Fund | 98,560 |
| Fidelity Strategic Income Fund | 98,387 |
| Hudson Bond Fund | 73,527 |
| Lord Abbett Short Duration Income Fund | 122,906 |
| Principal High Yield Fund | 58,600 |
| Royce Pennsylvania Mutual Fund | 27,063 |
| T. Rowe Price Short Term Bond Fund | 50,051 |
| Victory Diversified Stock Fund | 42,370 |
| Total Listed Securities | $ 710,000 |

AFFIDAVIT

I, PATRICIA M. WALD, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

3/26/2012
(DATE)

Patricia M Wald
(NAME)

Stephanie Chandler
(NOTARY)

District of Columbia: SS

Subscribed and sworn to before me, in my presence,

on 26th day of March, 2012

by Stephanie Chandler

Stephanie Chandler, Notary Public

My commission expires: December 14, 2016

STEPHANIE CHANDLER NOTARY PUBLIC EXPIRES DEC 14 2016 DISTRICT OF COLUMBIA

Chairman LEAHY. Thank you.

We have been joined by Senator Whitehouse, a former Attorney General of his State and U.S. Attorney.

Senator WHITEHOUSE. Thank you, Chairman, and thank you to each one of you for being willing to step into the service of our country in this very important way. These are not easy questions, and I respect that you have been willing to take on this responsibility.

I just came from the Senate floor where I gave some remarks about the cyber threat that the country faces and my concern that we pass adequate legislation to actually meet that threat. And I think that is going to be an issue that you are going to have to face, and I wanted to get a sense, I guess particularly from Mr. Dempsey, who has testified on this subject before us, both I think in this Committee and the Intelligence Committee, if I remember correctly, Jim.

Let me start with what do you consider the scale of the cyber threat to our National and economic security to be.

Mr. DEMPSEY. Good morning, Senator.

Senator WHITEHOUSE. Good morning.

Mr. DEMPSEY. I agree with you that this is a very critical threat and one that could have obviously very broad implications for our economy as well as for our National security. And I also believe that further action by Congress is necessary and appropriate.

One of the critical issues, actually, is the issue that we were just discussing to some extent with Chairman Leahy, which is the information-sharing issue. And it has been my personal view and my colleagues at CDT have testified to this fact—although when I am on the board, if confirmed, I would only be acting in my personal capacity. But my personal view is that some changes to the privacy laws are necessary, in fact, to promote more information sharing.

Senator WHITEHOUSE. Do you accept that—one of the things we often hear in the Senate, particularly from people who want to attack environmental protection rules, is that there is a stark choice: You can either protect the environment, or you can have a good economy, but you cannot do both. I consider that to be a completely false choice, and I think that in some respects the choice between security and privacy is also a false choice. If you are a consumer and your credit card and Social Security number are right now up for sale on a Web site run by Estonian gangsters, you have a pretty serious privacy issue. If your art or your music or your design is presently being sold by foreign criminals without your permission, you presently have a pretty serious privacy issue about your own talents and ability to control your product. And when your company has to compete with a Chinese competitor who hacked into your computer and stole your R&D and is now making on the cheap the product that you spent hundreds of millions of dollars to design, you have got a pretty significant privacy issue.

And so I assume that you all agree that the choice between security and privacy is also a false one in the sense that the choice between environment and economy is a false one.

Mr. DEMPSEY. Absolutely, and I have dedicated much of my career to reconciling and balancing those two interests and working to achieve them, and if——

Senator WHITEHOUSE. Which sometimes actually are common interests.

Mr. DEMPSEY. Exactly. And I think that that is a very powerful concept, actually, when you realize that many of the same actions which will protect privacy may enhance security and many of the same things that you would do from an operational or effectiveness standpoint are actually also good for privacy. So, if confirmed to this board, I would very much want to bring that perspective, and I know that the other members of the panel that we have talked about this all share this view of achieving both of those goals. That is our National goal, it is the stated goal in the goal in the legislation, and it is the goal that I am committed to.

Senator WHITEHOUSE. And, of course, we have to recognize that when you are cold and dark because the power grid is down or when you are alone because the communications networks you rely on have been hacked and are down or when you cannot get access to your bank account and the neighborhood store cannot process a purchase because the servers that process our financial transactions have been taken down, in those circumstances there are basic priorities in life that also emerge that need to be given considerable value in the equation, correct?

Mr. DEMPSEY. Exactly.

Senator WHITEHOUSE. Thank you, Chairman.

Chairman LEAHY. I will place in the record a letter signed by a number of different groups urging the Senate Judiciary Committee to move forward quickly with the confirmation process so that the PCLOB is finally able to "begin its important work," to quote them. I happen to agree with that, and I hope we can move quickly.

[The letter submitted by Senator Leahy appears as a submission for the record.]

From what you said earlier, Judge Wald, I understand you feel there is a need to balance government secrecy and the public's right to know in our National security matters.

Judge WALD. Yes, sir.

Chairman LEAHY. Do you want to elaborate on that at all?

Judge WALD. Well, I can elaborate basically mainly through my past experience. I have run into this problem both in my capacity as a judge on the court of appeals where we have many issues of national security that came before us. I also would like to mention that while I certainly do not feel as technologically expert as some of my hopefully future comrades here, in the D.C. Circuit, I am sure you are aware, we passed on most of the agency regulations, which included everything from the electric grids that Senator Whitehouse referred to down through pollution technology. So I have found that it is possible, and I think necessary, to look at some of these very complex issues from the point of view of the ordinary citizens that we are basically told to protect in the statute.

As you know, Senator, I testified before this Committee about a bill which I believe you were a chief sponsor of, the state secrets bill, which dealt in that case with how state secrets are handled in the judicial process. And while I do not expect that this board will have any litigation problems—at least we hope not—I do think that the same kind of balance comes up again and again because most of our constitutional doctrines and our constitutional require-

ments, as well as many of the statutory requirements, are based in terms of balancing the need for something against the least restrictive kinds of alternatives for arriving at that. And I believe the board can do a great deal of work at an earlier stage in that process by being in on the evolution of many of these techniques and to review the rules and regulations that would govern them.

Chairman LEAHY. Thank you.

I am going to submit some other questions for the record which I would ask you to respond to because I do want to put this on—I want to put this nomination on the agenda as soon as possible. Let me just ask you one question.

What, in your view—and I will start with you, Mr. Medine—is the most significant privacy issue that Americans face today? And how can the board address that?

Mr. MEDINE. A challenging question.

Chairman LEAHY. I meant it to be.

Mr. MEDINE. Our mandate is, again, the massive amounts of information that are being gathered by the government in its efforts to combat terrorism and, as you have pointed out and Senator Whitehouse has pointed out, how to balance those concerns with privacy and civil liberties of Americans who are subject to that information. And so our goal, if confirmed, would be to strike the right balance to make sure that privacy and civil liberties rights are protected, but at the same time making sure that our efforts to combat terrorism remain extremely effective.

Chairman LEAHY. Mr. Dempsey.

Mr. DEMPSEY. Well, Mr. Chairman, as you well know, this technology that has become so woven into our law, both personally and professionally, is very powerful, and it provides businesses with a tool, and it provides the government with tools. And the government should certainly take advantage of those tools. But as we also know, the technology has its downsides, which in various ways policymakers, including this Committee, have been dealing with now really since the dawn of the digital age.

So I think, if confirmed and if the board comes into existence, I think our challenge is to, as I said before, understand the needs of the agencies that are using these technology tools and to look at the whole question of effectiveness and how the information is being used, what outcomes it is yielding. And with that foundation, the foundation of the need and the utility, then looking at what are the adverse consequences, what are the unintended consequences, and how can you develop a set of checks and balances, a set of rules, guidelines, and due process protections, whatever, that would give us the benefit of the technology while mitigating or limiting the downsides of it.

Chairman LEAHY. Ms. Cook.

Ms. COOK. I think that for a government to be effective, it needs the trust and consideration of its citizenry, and if there is even a perception that the government is misusing or abusing data to which it has access, that creates both a privacy problem and a security problem. I think this is recognized by the implementing legislation for this board—which we have been referring to as "P-CLOB," by the way. That was our attempt at a pronunciation of that. But this is reflected in the implementing legislation for

PCLOB, and I think that is a starting point for this board, if we are confirmed.

Chairman LEAHY. Ms. Brand.

Ms. BRAND. Mr. Chairman, I think your question was what is the biggest privacy challenge that people are facing today. I suspect the biggest challenge that people are facing is that so much more information about them is in the public and is online than ever was the case before. I think probably the biggest challenge arises in areas that are outside of the board's jurisdiction in the consumer privacy area, for example, which is not something that we are mandated to look at. But the new technologies of, you know, Facebook, for example, things that law enforcement and individuals were not dealing with 15 years ago, create a challenge both for people in protecting their own privacy and for the government in dealing with how to get the information they need and how to implement appropriate privacy safeguards. So we will be looking at some of those issues on the board.

Chairman LEAHY. Judge Wald.

Judge WALD. I agree with my companions at the table here that the aggregation of vast amounts of data and files on people, thereby evoking concern among them as to what is going to happen, is perhaps the biggest civil liberty problem that I am aware of. And I would only say that it seems to me that one of the functions of the board in its statute, one we do not talk about very much, is informing the public and public awareness. And I think it may do—the board may be able to perform a good function there in looking at all of these, whatever technologies we prioritize, with regard to some very simple questions: who collects it, what is collected, who has access to it once collected, and along those lines, what are the protections against any abuse, how long it is retained.

I realize there will always be exceptions, and that is the highest security where all of those may not be public, but I think to the extent that we can reassure the public by being somewhat more transparent about the process, that will be a useful function.

Chairman LEAHY. I agree on the length of how long they can be retained. I will have a question I will be submitting to you on these new proposals for the five years. But Judge Wald, and Ms. Cook, what you said about people have to have trust in their government, too, and what they are doing, I think that is also part of this. Government works only if you trust it, and if people feel they cannot be trusted with information, then we do have problems.

I have told this story before about Vermonters' attitude toward this. An article once written about me in a major newspaper—actually, I think it was the only article in 37 years I have actually clipped out and framed because I enjoyed it so much. To put this in perspective, my wife and I live on a dirt road in an old farmhouse where we spent our honeymoon 50 years ago. There is a lot of land on this little farm on a dead-end road, and neighboring farmers, successive generations, they have hayed our fields and what-not, they have known me since I was a child. And the whole thing goes like this:

On a Saturday morning, a reporter in out-of-State car sees this farmer sitting on the porch and says, "Does Senator Leahy live up this road?"

He said, "Are you a relative of his?"

He said, "No."

"Are you a friend of his?"

"Well, not really."

"Is he expecting you?"

"No."

"Never heard of him."

I have a listed phone number at home, but people respect your privacy in Vermont. I just want, in a far more technologically advanced time, that our private sector is protected, too. I want our country to be protected, but I want our privacy to be protected, and I do not think those two concepts are contradictory. So I thank you all very much.

Senator WHITEHOUSE. Mr. Chairman, if I could just add one question for the record, it would be an optional question for the record. Nobody has to respond to it. But I saw an awful lot of heads nodding during my discussion with Mr. Dempsey. If there is any disagreement with the points that I made or with points that he made, I would be delighted if you would set that out so I am not just assuming agreement from silence. This will give people a chance to respond otherwise if they disagreed with that discussion.

And thank you, Mr. Chairman, for this. Certainly you are one of the towering figures in privacy protection in this Committee's and this country's history, and it is great to be here with you on this occasion.

Chairman LEAHY. We have some experts here. We all want the same thing, to protect our privacy.

I am going to another Committee meeting, and I am going to turn the gavel over to Senator Grassley, who has been here long enough to know how to do it.

Senator GRASSLEY. Thank you.

Chairman LEAHY. And I think we are going to have a couple other Members coming. I think Senator Franken may be coming to take over.

Senator GRASSLEY. You are probably going to the Agriculture Committee.

Chairman LEAHY. I am.

Senator GRASSLEY. I will try to be there soon after you get there.

Chairman LEAHY. And if Senator Franken is on his way, when you are ready to leave, if you can just recess subject to the call of the Chair.

Senator GRASSLEY. I will do that.

Chairman LEAHY. Thank you all very much, and good luck in this.

Senator GRASSLEY [presiding.] The first question would be to all of you, but I have a lead-in. The board has broad jurisdiction "to review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such action is balanced with the need to protect privacy and civil liberties."

One recent high-profile action involved the targeting and killing of American citizens abroad that were engaged in terrorist activity. I will start with Mr. Medine and then ask all of you: Do you believe that the President has the power to target and kill an American citizen abroad based upon due process that does not include judi-

cial review? Why or why not? And I would appreciate it if we could have fairly short answers because we have five people I would like to get the answer from. Go ahead.

Mr. MEDINE. Thank you, Senator Grassley. That is a very important and challenging issue that I have not had a chance to delve into, but if confirmed, I would expect that that is just the kind of issue that the board would look at and have the benefit of the legal analysis of the administration and other sources to consider that issue.

Senator GRASSLEY. Okay. Mr. Dempsey.

Mr. DEMPSEY. Yes, Senator, I would have to say the same, that it is clearly a very important issue and one that a lot of attention has already been given to.

I think in our prioritization of issues, to my mind it remains to be seen whether we take that one on at all, but if it is the desire of the board and of the agencies that we interface with that we do look into that, I am certainly going to approach that with an open mind and listen to the current thinking that has evolved both within the administration and within this Congress.

Senator GRASSLEY. Okay. Ms. Cook.

Ms. COOK. I really cannot improve upon Mr. Dempsey's answer.

Senator GRASSLEY. Ms.—I call you "Rachel." Ms. Brand.

Ms. BRAND. I cannot improve upon it either. I would just add that when we are—if we are confirmed, when we are on the board and have the clearances that we would need, it would be easier for us to make a judgment than sitting here not really knowing what is going on on the outside.

Senator GRASSLEY. Okay. Judge Wald.

Judge WALD. I think that is a very complex question, and I would only note that I think the administration's legal memorandum or basis has not been made public yet, so I do not really know what their thinking is. I can only add that in my two years' experience abroad with international law in the International Tribunal, I realize that even international law has tried to catch up with new developments and does not have a yes or no answer very clearly.

Senator GRASSLEY. Along the same line—and this is in regard to whether you think the board has certain powers—do you believe the board would have the power to declare the President's actions in targeting American citizens abroad is a violation of constitutional civil rights? Mr. Medine.

Mr. MEDINE. The board is tasked with providing oversight and advice, and so I do not think the board can really make affirmative decisions or mandates but can give its advice and its views on those kinds of questions, and would do so, obviously, very cautiously and carefully.

Senator GRASSLEY. Mr. Dempsey.

Mr. DEMPSEY. Yes, Senator, I agree with that. I honestly do not know that we are going to be—if confirmed and if the board comes into existence, I do not know that we will be making declarations at all, and any advice we give is going to be very deliberative and based upon the evidence that we acquire.

Senator GRASSLEY. Ms. Cook.

Ms. COOK. I agree with what has been said. I would also note that the statute does contemplate a situation in which the board does give advice and that advice is disregarded. The recourse for the board at that point is to report back to Congress. It is not a declaration. It is a report to Congress.

Senator GRASSLEY. Ms. Brand.

Ms. BRAND. I agree. The statute charges us with providing advice and expressing opinions, but it does not give us any authority to declare something unconstitutional beyond that.

Senator GRASSLEY. Judge Wald.

[No response.]

Senator GRASSLEY. Okay. Then this question is more pointed. Do you support Attorney General Holder's public statement that due process does not necessarily include judicial process when it comes to national security? What national security matters require judicial process and which ones do not? Mr. Medine.

Mr. MEDINE. As I have said, if confirmed, those are the kinds of issues we would have to look into very carefully, again, with the benefit of legal memoranda, confidential information, and our deliberations. So I am not prepared to answer that right now.

Senator GRASSLEY. Okay. Mr. Dempsey.

Mr. DEMPSEY. Yes, I am sorry, Senator. Again, I am going to have to say that that is——

Senator GRASSLEY. Okay. Ms. Cook.

Ms. COOK. I would defer this question as well.

Senator GRASSLEY. Ms. Rachel—or Ms. Brand.

[Laughter.]

Ms. BRAND. I guess I would say that where process is due is very dependent upon the circumstances, so it is hard to answer that category.

Senator GRASSLEY. Judge Wald.

Judge WALD. Ms. Brand's answer, there are many situations in which due process does not require a judicial type process, but what they are would depend completely on the facts and circumstances.

Senator GRASSLEY. Okay. A lead-in to the next question. The 9/11 Commission found that the wall created in the 1990s by DOJ and memorialized by the Gorelick memo was a root cause of the failure to connect the dots. This memo limited use of information from foreign intelligence investigations in criminal cases and was misapplied and misinterpreted across the government. Breaking down that wall has been one of the great successes of the post-9/11 reorganization. In addition, the 9/11 Commission found that the stovepiping of information among national security agencies was harmful to finding, tracking, and capturing terrorists, but the new age of information sharing has raised civil liberties and privacy concerns that the board is empowered to investigate.

So, again, to each of you, as we did previously, we will start with Mr. Medine, how will you ensure that none of your work contributes to the creation of a new wall between law enforcement and intelligence?

Mr. MEDINE. Senator, if confirmed, we would take our responsibilities very seriously that our actions would have great consequences. And so we are very sensitive to the motivations behind

information collection. And so in the course of balancing privacy and civil liberties, at least I personally accept the views of the 9/11 Commission which said it is a false conflict to say we cannot have both security and privacy. So, if confirmed, our goal would be to work with the intelligence agencies to gather the information they need to do their mission, but at the same time take into account privacy and civil liberties.

One of the best ways to do that is at the design stage, and the board, we hope, could be a resource if set up to help the agencies accomplish their goals but at the same time protect privacy.

Senator GRASSLEY. I guess I would ask each of you, Mr. Dempsey on through, to comment if you have got anything to add or disagreement with what was said.

Mr. DEMPSEY. Certainly nothing to disagree with. I would just add that my view is that the wall is properly down, should remain down, that as you say it had become perverted. In my view, it served neither clearly national security nor did it really provide adequate—or any protection, really, for civil liberties. So we need to keep it down and find the ways other than that wall to protect the interest at stake here.

Senator GRASSLEY. Ms. Cook.

Ms. COOK. I agree with Mr. Dempsey's position here. In 2001, Congress spoke to this issue and took down the statutory basis for the wall. It has taken more than a decade, I think, of development of information-sharing policies, the development of which is also reflected in the statute setting up this board for our government to attempt to turn in a different direction akin to an aircraft carrier. So I think, if confirmed, we should be extraordinarily careful about taking actions or giving advice moving the other direction.

Senator GRASSLEY. Ms. Brand.

Ms. BRAND. I completely agree, and I would just add that it is important to remember how difficult it was to change the culture toward an information-sharing culture within the government, and so anything that would go in the other direction would be damaging.

Senator GRASSLEY. Judge Wald.

Judge WALD. I think I am already on record as a member of President Bush's intelligence capabilities in which we looked at this problem and agreed with everything that my colleagues have said.

Senator GRASSLEY. And, again, with the same lead-in that I gave, this would be the last question on this issue. Many cybersecurity bills limit the use of cyber threat information for purposes outside cybersecurity, including national security and counterintelligence. Do you support re-creating the wall as part of cybersecurity legislation? Mr. Medine.

Mr. MEDINE. Senator, I have not really examined that question as much, and so I do not have a position on that at this moment.

Senator GRASSLEY. If that is true for all of you—well, I better let you speak for yourself. Mr. Dempsey.

Mr. DEMPSEY. I think we want to look at the cybersecurity issue very carefully. I think that Congress is going to have a say on that issue, I think, before this board comes into creation, and we will

work with the authorities and decisions that Congress makes on that cybersecurity legislation.

Senator GRASSLEY. Okay. Ms. Cook.

Ms. COOK. I agree with Mr. Dempsey that to the extent that Congress speaks specifically on this issue, that is our mandate. In the absence of specific direction, I anticipate that, if confirmed, we would follow the direction in the statute for this board as to how to approach these types of questions and the balancing that must be undertaken.

Senator GRASSLEY. Ms. Brand.

Ms. BRAND. I have nothing to add to that.

Senator GRASSLEY. And Judge Wald.

Judge WALD. Nothing to add.

Senator GRASSLEY. Okay. I am going to submit the rest of my questions in writing. Maybe based upon what other Members ask you, I may submit some questions for answer in writing, and I am going to go up to the Agriculture Committee.

Senator FRANKEN. [presiding.] You do that. It is important.

Thank you all. I am sorry I missed your testimony. I read it, though, and thank you all for being here. I want to thank the Ranking Member for holding down the fort here.

Over the past 20 or 30 years, the ability of our government to monitor the everyday lives of our citizens has just exploded, and our privacy laws have not kept up. Today, right now, the police can track an American citizen through his cell phone without a warrant. The FBI is rolling out a facial recognition program. The FAA is expanding the use of pilotless drone for the government and the private sector without privacy safeguards. If anyone had predicted this in 1980 or 1990, they would have been told that they were reading too much science fiction.

Unfortunately, since 2008, there really has been no such thing as the Privacy and Civil Liberties Oversight Board. This is really a bad thing, because we need this board. And though the PCLOB was established to prevent abuses of civil liberties in our war against terror, I hope and expect that we will see its mission expand beyond that. Because of that, my questions are going to go a little further afield than just the war on terror.

My first question is for all of the nominees. Right now, the House and Senate are considering various cybersecurity bills, as the Ranking Member just mentioned. Some of these proposals would allow private companies to share threat information pulled from their customers' communications and files directly with the National Security Agency, which, as you know, is part of our Nation's military. These proposals also protect these companies from almost any legal liability for doing so.

Do you think it is a good idea—and this is for all of you. Do you think it is a good idea to allow private companies to directly share and share with immunity information from their customers' communications with our Nation's military? Specifically, do you think this would be sufficiently protective of Americans' civil liberties? We will start with Mr. Medine.

Mr. MEDINE. Thank you, Senator. The cybersecurity threats are certainly very real to our critical infrastructure and to many of our companies, and so it is understandable that the Congress would

want to take a very close look at that. I have not had a chance to balance the various issues you have raised, but I would note that several of the bills that are pending would create a role for the PCLOB, as we call it, the Privacy and Civil Liberties Oversight Board, to give oversight to the privacy issues that are raised by information sharing between the private sector and the government. And so if we are confirmed and if the legislation is adopted, we—at least I—could speak for myself. I would be happy to have that as a charge to oversee that process and make sure that privacy and civil liberties are protected when that information is shared.

Senator FRANKEN. Does anyone have a specific thought other than if you are confirmed that you would look at this? Anybody want to go beyond that at all, explore the idea at all, what the issues might be in a very noncommittal way so that you do not ruin your chances of being confirmed?

[Laughter.]

Mr. DEMPSEY. Senator, even despite that warning, I will rise to the bait a little bit here to say the following: As I said to Senator Grassley, if confirmed and if this board comes into creation, we will work with whatever Congress creates, and to the extent that the Congress authorizes information sharing—and I believe that any legislation that passes will include and probably should include information-sharing authority—we will work—certainly I commit to work within that framework and to make it work effectively.

I think a separate question is what about between now and the time that legislation is enacted, and as I said to Senator Grassley, I think that in all likelihood that legislative process will play itself out before this board, even if we are confirmed, before this board would have an opportunity to weigh in on the legislation.

The issues you raise are certainly the key issues to be addressed. My own view is that a scheme can be drafted that permits more information sharing than is currently permitted without it becoming a flow of information to the government that we would find undesirable. Again, my own view is that what I would call peer-to-peer sharing, that is, between the companies, is very important so that they can improve their own defenses. It is also important to get some of the information from the government to the private sector companies so that they can improve their capabilities based upon some of the unique insights that the government has.

The hardest element of information sharing is private sector back to the government. But there is a role for the government to play, and there is some information clearly which, when the private sector sees it, in my view, should appropriately be shared with the government. And if we can properly define what that is, I think we can advance the issue of cybersecurity, which is so important to many Senators and to the country, and at the same time have the kinds of limits and checks and balances.

Senator FRANKEN. Ms. Cook.

Ms. COOK. The statute, as currently drafted, is focused on government action, and as a general matter, I think it is always legitimate to ask questions about whether government should have access to information and what it does with that information once it has that information.

That said, it is very difficult sitting here today to opine on specific circumstances because, as I understand it, much of the threat is classified. Much of what the agencies, what the government is actually facing is not public. So, if confirmed, I think we would have to do two things: one, meet with these folks to understand the threat that they are facing; and, two, listen to their thoughts on how they currently anticipate responding to those threats.

Senator FRANKEN. Judge Wald.

Judge WALD. Senator, I would just add that—you asked if we thought it was a good idea to have this kind of channeling. Obviously, at least obvious to me, it is not a yes and no answer. You were not present, I think, earlier, but I suggested that from point of view much of it would depend on questions which I think some of the legislation in varying ways tends to answer, like, you know, who collects it, what is collected, what are the minimization or anonymization requirements, how long will it be kept, where can it be shared once it is retained. Many of those questions, I think, are the ones which will decide—we certainly—I think few of us would say a carte blanche kind of regime would be an optimal one.

Senator FRANKEN. Thank you, Judge Wald. I was not looking for a carte blanche. I was looking more for your thoughts about that.

Judge WALD. I understand.

Senator FRANKEN. And I appreciate that.

Ms. Brand.

Ms. BRAND. I echo actually what Judge Wald said. You referred to the content of communications, and in the electronic surveillance area, the contents communications are the most heavily protected thing, and rightfully so.

Now, I have not studied the provisions of the cybersecurity legislation, so I do not know exactly how it provides for sharing, but as Ms. Cook said, one of the first things I would want to do, if confirmed, would be to better understand what the threat is that the government is facing and what the need for that sharing is, and then also look at the details of the legislation in terms of what protections are provided.

Senator FRANKEN. Very good. Thank you.

Ms. Brand, in 2005, you wrote an op-ed in *USA Today* that offered a strong defense of the government's use of national security letters. You argued that these letters can only be used to obtain information related to an international terrorism investigation or espionage investigations, not for criminal investigations. As you know, the DOJ's Inspector General issued a number of scathing reports on the FBI's use of national security letters. These reports uncovered widespread abuse of this authority and indicated that many of the 143,000 letters that were issued between 2003 and 2005 pertained to U.S. citizens who were not subject to any national security investigation.

Ms. Brand, given the IG's findings of widespread abuse of national security letters, would you like to re-evaluate your statement that they were "carefully, lawfully, and consistent with civil liberties"?

Ms. BRAND. Well, thank you, Senator Franken. A couple of points.

There is a difference between the provisions of law and how they are implemented, and so I read that op-ed before the things that you mentioned came to light. Looking at the NSL statutes themselves, they contain many protections, and they are limited in the way that I wrote in that op-ed. As the Inspector General mentioned, there were some problems, significant problems with the way the NSLs were being used. My understanding—and this is after I left the government. My understanding is that those problems have been addressed and that the more recent IG reports reflect that they have been addressed adequately. So, again, there is a difference between the law and how it is implemented.

Senator FRANKEN. Okay. Well, thank you. That is a fair answer.

Mr. Dempsey, in April of last year, the Department of Justice reported that the FBI made over 24,000 national security letter requests pertaining to 14,000 U.S. persons in 2010. In 2009, these requests only involved 6,000 people, so the 2010 numbers are more than double the level of 2009. This strikes me as very problematic, especially because when I asked the Attorney General about this trend, he stated, "To the extent these numbers may indicate an upward trend, we are unable to explain the increase because we do not collect statistics or other information that would enable us to discern the reasons for this increase."

This kind of bothers me given the IG reports that uncovered widespread abuse. Mr. Dempsey, what role do you think the board can play to bring greater transparency to the use of this powerful tool?

Mr. DEMPSEY. Well, that is a good question, and I think, you know, the NSL authority is one of the authorities that I think is potentially within the scope of the board's authority, should we be confirmed. As Mr. Medine has said, we will have to carefully prioritize our issues. I think we will have and should have and the statute contemplates that a board such as this would have access to additional information. And I think we have to, if confirmed, dig in on certain issues. I am certainly hearing from you that the national security letter authority remains of concern to you, and that is important.

So at this point, all I can say is that——

Senator FRANKEN. Is it important to you because it is important to me?

Mr. DEMPSEY. Well, it is important to me independently.

Senator FRANKEN. Oh, good. Or maybe that is not so good.

Mr. DEMPSEY. I have testified in the past on the issue, spent considerable time thinking about how that authority could be best defined and best used. I think it merits some—may merit some probing.

Senator FRANKEN. Okay. Well, let us move on.

Mr. Dempsey, if you look at a record of someone's location, you can figure out where they go to church, where their kids go to school, what they do after work. This is sensitive information. You can put together who they are, I guess, from that. Thankfully, after the *Jones* case, police departments around the country will likely need to get a warrant before they install a GPS tracking device on someone's car. But recently the ACLU released a report showing that police departments around the country are not just tracking

people's care; they are also getting detailed reports of people's movements from their smartphones and cell phones. The ACLU also found that police departments are usually not getting warrants. They are getting the information through a court order, or they are just issuing subpoenas for it.

Mr. Dempsey, what do you think about this discrepancy? If I need to get a warrant to track you in your car, shouldn't I have to get a warrant to track your cell phone? And if anyone else wants to weigh in on that, please feel free.

Mr. DEMPSEY. Certainly that is my personal view, and I have testified to that effect before this Committee. Certainly in the criminal law enforcement context, I think there is a separate question about how location tracking should work under FISA, and I think the first question would be how does it work under FISA, and I have literally no insight of how FISA applies to location tracking. I could speculate from a reading of the law, but in terms of how it is applied, I really have no idea. If confirmed, we might want to take a look at those issues.

So on the law enforcement side, I have testified that a warrant is appropriate. Now, in terms of what position the board would take, I am one person. I will bring—undoubtedly, I will bring that position to the board if we choose to deliberate on that. I will also, if confirmed, listen very, very carefully, as I always do, listen very carefully to the concerns and interest and needs from the executive branch.

Senator FRANKEN. Is there anyone else who would like to weigh in on that?

Judge WALD. I would just say that I think that the pervasiveness of cell phones in our society—you cannot walk down Connecticut Avenue without everybody having one at their ear—would make the question of regulation following the *Jones* act a very plausible one. And I would think that actually it would be among a list that we would consider when we are considering priorities after we get together.

I think I am also on record as having signed a report which was in accord with Mr. Dempsey.

Senator FRANKEN. Thank you, Your Honor. Thank you, Former Your Honor.

Oh, by the way, Ms. Brand, are you "Your Honor" now, or what are you?

Ms. BRAND. "Ms. Brand" is just fine.

Senator FRANKEN. Okay. Ms. Brand, I understand that you graduated from the University of Minnesota, Morris. Is that correct?

Ms. BRAND. I did.

Senator FRANKEN. Okay. So my chief of staff or my State director in Minnesota also graduated from there. In fact, we have something of what we call the "Morris Mafia" in my office in St. Paul. That is a great school.

Ms. BRAND. Yes, I agree.

Senator FRANKEN. I just—that was a waste of time.

[Laughter.]

Senator FRANKEN. No, it was not.

Mr. Medine, the Privacy and Civil Liberties Oversight Board is basically an independent oversight body, but unlike Congress, you

cannot pass laws to address the problems that you see, and unlike the DOJ or the Federal Trade Commission or the Federal Communications Commission or any other federal enforcement agency, you also cannot bring a lawsuit to enforce your findings.

Mr. Medine, if you are confirmed as Chair of the Privacy and Civil Liberties Oversight Board, what will you do to make sure that your findings are taken seriously? Would you ever consider resigning your post in protest, as Lanny Davis did in May 2007, if you felt that the executive branch was infringing upon the civil liberties of Americans?

Mr. MEDINE. There are a number of ways that the board, if we are confirmed, would address those issues. One is to involve the public. We may not be able to issue regulations or engage in litigation, but we do have the authority to speak to the public and the Congress to express our views. We are required and would be happy, if confirmed, to report twice a year to the Congress, largely in an unclassified forum, or classified if necessary. We are directed to and would look forward to holding public hearings to involve the public in our efforts. But, most importantly, to blow the whistle if we see a problem out there and raise concerns, either within the executive branch, in a classified forum if necessary, but ideally in as unclassified a forum as possible to alert the public and have the powers of suasion and influence bring to bear on these issues.

In terms of matters of principle, I think the issue that Lanny Davis faced was that the board was inside the White House, and I think the Congress has addressed that by making us an independent agency so we are not subject to undue influence by outside parties, and we as a bipartisan independent group can feel free to express our views with a term of office that ensures us some security, as you have as well, to express views about what we think are privacy and civil liberties concerns.

Senator FRANKEN. Good point.

Judge Wald, by statute, the purpose of the Privacy and Civil Liberties Oversight Board is to ensure that privacy and civil liberties are "appropriately considered" in the development and implementation of laws, regulations, and executive branch policies. Unfortunately, the implementing statute of the PCLOB never really defines what constitutes appropriate consideration of privacy and civil liberties.

Judge Wald, what do you think is involved in making sure that privacy and civil liberties are appropriately considered in developing legislation? And how might you act?

Judge WALD. Senator, it is one of our greatest challenges, if confirmed, and I believe that one route we might consider, and I hope consider seriously, would be to engage in an intensive effort of contact with all of the agencies and related branches, whatever, bureaus, et cetera, that will be involved in the overall counterterrorism effort and try to establish from the very beginning—I do not mean this to sound like apple pie, but to engage with them in what I hope would be a trust-building effort so that they realize that we want to be of help to them, we want to add value to their operations, we are not headed toward waiting for them to develop something and then come in on a "gotcha" basis and say, "We gotcha." But, rather, that as we move along, as Mr. Dempsey sug-

gested, there may be technological solutions to some of these problems. There may be alternatives. But I think based on my own experience in government and even in courts, the whole business of engaging with people, listening to their problems, adding your piece, knowing that they can trust you to the degree where sometimes honest differences will come out, and those I expect the board will have to pursue its independent status and will take strong stands on what it believes in and try to carry them upward through the hierarchy, and if not, over to Congress.

But I do believe working from the bottom up and building these relationships with the related agencies would be key to making sure that these considerations come in from the very beginning.

Senator FRANKEN. Well, thank you, Judge, and thank you all.

I have a statement in support of Elisebeth Collins Cook that we will enter into the record.

[The statement appears as a submission for the record.]

Senator FRANKEN. Those are my questions for now. I will submit more questions in writing for the record.

Senator FRANKEN. I sincerely hope that we can act on your nominations promptly. The hearing record will be open for a week for questions and other materials. Thank you all for your testimony and for being here.

This hearing is adjourned.

[Whereupon, at 11:30 a.m., the Committee was adjourned.]

# APPENDIX

## Additional Material Submitted for the Record

Witness List

Hearing before the
Senate Committee on the Judiciary

on

"Nominations to the Privacy and Civil Liberties Oversight Board"

Wednesday, April 18, 2012
Dirksen Senate Office Building, Room 226
10:00 a.m.

David Medine, to be Chairman and Member of the Privacy and Civil Liberties Oversight Board

James Xavier Dempsey, to be a Member of the Privacy and Civil Liberties Oversight Board

Elisebeth Collins Cook, to be a Member of the Privacy and Civil Liberties Oversight Board

Rachel L. Brand, to be a Member of the Privacy and Civil Liberties Oversight

Patricia M. Wald, to be a Member of the Privacy and Civil Liberties Oversight Board

## PREPARED STATEMENT OF CHAIRMAN PATRICK LEAHY

**Opening Statement Of Senator Patrick Leahy (D-Vt.),**
**Chairman, Senate Committee On The Judiciary,**
**Hearing On Nominations To The Privacy And Civil Liberties Oversight Board**
**April 18, 2012**

Today, the Committee holds an important hearing to consider several nominations to the Privacy and Civil Liberties Oversight Board (PCLOB). At a time when our Nation faces growing threats to national security at home, abroad, and in cyberspace, having a fully functioning Privacy and Civil Liberties Oversight Board is more important than ever. I welcome President Obama's nominees to this critical Board.

During the decade since the tragic events of September 11, 2001, our Government has developed many new tools to combat terrorism. I have always believed that we also need meaningful checks and balances, so that we safeguard our fundamental values as we work to better secure the Nation. I worked with Senator Durbin, Senator Lieberman, Senator Collins and others to create the Privacy and Civil Liberties Oversight Board at the recommendation of the 9/11 Commission. We intended for it to help ensure that Americans' privacy and civil liberties are effectively protected, even while the Government implemented heightened national security measures. As the 9/11 Commission observed in its report: "[I]f our liberties are curtailed, we lose the values that we are struggling to defend."

The Board was initially established within the Executive Office of the President. Five years ago, we revised the legislation to improve the Board's effectiveness by reconstituting it as an independent executive branch entity. We did so to strengthen the Board so that it would have a greater impact on the policies that affect Americans' privacy rights and civil liberties.

Today, Congress is considering various proposals to enhance the Nation's cybersecurity. These proposals would have a significant impact on the privacy rights and liberties of all Americans. Our Nation is also grappling with important questions about how our national counterterrorism strategy impacts the rights and liberties of U.S. citizens at home and abroad. Smartphones, GPS devices, and other mobile technologies are making it easier for our Government to identify and track potential threats. These new technologies and increased Government surveillance can also imperil our privacy rights and civil liberties. Over the last several weeks, we have seen reports in *The New York Times* and elsewhere about the increased location tracking conducted by local police and the fact that such surveillance is neither limited to terrorist threats, nor, most importantly, subject to a warrant requirement, or judicial review. That is why I have been working so hard to update and strengthen the Electronic Communications Privacy Act.

Safeguarding our liberties should not be a partisan issue. It should not be a Democratic idea, or a Republican idea. These are American values that we all should embrace. I hope that we will join together to consider these nominations to this important Board in a bipartisan manner. On behalf of the Committee, I welcome the nominees and thank them for their willingness to serve.

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# QUESTIONS

## QUESTIONS SUBMITTED BY SENATOR LEAHY FOR DAVID MEDINE

**Written Questions of Senator Patrick Leahy,**
**Chairman, Senate Committee On The Judiciary**
**To David Medine, Nominee for Chair, Privacy and Civil Liberties Oversight Board**

***Hearing on "Nominations to the Privacy and Civil Liberties Oversight Board"***

**Held April 18, 2012**

**Data Retention**

On March 22, the Director of National Intelligence and the Attorney General jointly released new guidelines governing the acquisition and retention of data by the National Counterterrorism Center (NCTC). Under these new guidelines, it is now conceivable that the NCTC could retain vast amounts of data regarding U.S. citizens for up to five years – well beyond the six months that was allowed under the previous guidelines. The new guidelines specifically state that the Privacy and Civil Liberties Oversight Board shall have "access" to all relevant NCTC records, reports, and other material relevant to its oversight of NCTC. However, the guidelines do not require any of the oversight and compliance reporting to go to the Privacy and Civil Liberties Oversight Board.

Mr. Medine, as Chair of the Privacy and Civil Liberties Oversight Board, how would you view the Board's role in reviewing this new policy and other emerging policy issues that involve the collection and retention of Americans' personal data?

## QUESTIONS SUBMITTED BY SENATOR LEAHY FOR JAMES DEMPSEY

**Written Questions of Senator Patrick Leahy,**
**Chairman, Senate Committee On The Judiciary**
**To James Dempsey, Nominee for Member, Privacy and Civil Liberties Oversight Board**

***Hearing on "Nominations to the Privacy and Civil Liberties Oversight Board"***

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Mr. Dempsey, as a member of the Privacy and Civil Liberties Oversight Board, how would you view the Board's role in reviewing this new policy and other emerging policy issues that involve the collection and retention of Americans' personal data?

## QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR DAVID MEDINE

**Senator Chuck Grassley**
**Additional Questions for the Record**

**David Medine, Nominee, to be Chairman and Member of the Privacy and Civil Liberties Oversight Board**

**(1) Chairman Responsibilities:**

The Board's authorizing statute provides for extremely broad, vaguely-defined purposes and functions. If it were to try to do everything the statute authorizes, it would be a large bureaucracy with intrusive powers that could become a serious impediment to effective counterterrorism efforts. For example, although nominally bipartisan, it is to be run primarily by one full-time chair (a Democrat) and four part-time commissioners. It is likely that the chairman will dominate selection of the staff. The statute provides very broad authority for the board's functions.

The Board is authorized to provide advice on, and oversight of, policy development and implementation, as well as laws and regulations, of Executive Branch agencies. The board is to "continuously review" any actions by the Executive Branch. They are allowed access to any information they want, may compel production of documents or testimony through subpoena power, hold public hearings, report and testify to Congress, and oversee other privacy and civil liberty offices within the Administration.

A. Please describe how you will accomplish the broad statutory mandate for the Board.

B. Will you prioritize certain functions or subject-matter areas?

C. How large a staff do you expect to hire? What types of backgrounds will they have?

## QUESTIONS SUBMITTED BY SENATOR GRASSLEY FOR DAVID MEDINE, JAMES DEMPSEY, RACHEL BRAND, ELISEBETH COLLINS COOK, AND PATRICIA WALD

**Senator Chuck Grassley**
**Questions for the Record**

**David Medine, Nominee, to be Chairman and Member of the Privacy and Civil Liberties Oversight Board**

**Rachel L. Brand, Elisebeth Collins Cook, James Xavier Dempsey, Patricia M. Wald Nominees to be a Member of the Privacy and Civil Liberties Oversight Board**

**(1) Scope of the Board's Authority and Responsibilities of its Members**

Following the terrorist attacks on 9/11, Congress made a number of reforms in order to protect the nation from further terrorist attacks. These reforms included tearing down the artificial "wall" between law enforcement and national security cases that the Justice Department had created; passage of the USA PATRIOT Act; reforming the intelligence community; and updating the Foreign Intelligence Surveillance Act (FISA).

All told, the various reforms, recommended by the 9/11 Commission and then implemented, have strengthened our national security and have helped to prevent another major terrorist attack on U.S. soil. However, we must remain vigilant against terrorist threats and not let down our guard. That said, some have argued that all these reforms to our intelligence, law enforcement, and national security agencies have been at the cost of civil liberties and individual rights. Recognizing this concern, the 9/11 Commission recommended that Congress create the Privacy and Civil Liberties Oversight Board to oversee the new authorities granted to these agencies.

Congress also acted by passing and signing into law the Intelligence Reform and Terrorism Prevention Act of 2004, which included provisions creating the Privacy and Civil Liberties Oversight Board in statute. In 2007, legislation updated the board's statute, reestablishing it as an independent agency in the executive branch.

As President Obama waited until December 2010 to nominate two of the five Board members and other three were not nominated by President Obama until December 2011, the role of the PCLOB has yet to be fleshed out and many details of the scope of its authority remain unclear. Thus, the philosophical perspectives of the board members of the utmost importance, and your thorough answers are appreciated.

A. What is your philosophy about privacy and civil liberties, especially when considered in the context of national security, law enforcement and cybersecurity efforts?

B. Describe how you would view your role as a member of this Board. Specifically, do you see the position as akin to that of a judge, an advocate, an investigator or

something else? And if you see yourself as having the role of an advocate, which groups or interests will you be advocating on behalf of, if confirmed?

C. Do you believe that your work on the Board must be impartial and neutral? Or do you believe that in carrying out your work, you would be free to have empathy for certain positions or groups?

D. In the area of privacy and civil liberties, do you have any heroes or role models? And if you do, who are they and why are they your heroes or role models?

**(2) Views on Duplication Existing Government Privacy and Civil Liberties Efforts**

The Board was created in the Intelligence Reform and Terrorism Prevention Act of 2004, as amended in 2007. The same legislation also created the Office of the Director of National Intelligence (ODNI). And consistent with the provisions of the Act, within ODNI there is an Office of Privacy and Civil Liberties. And the Department of Justice, as required by its 2005 reauthorization, has a Chief Privacy and Civil Liberties Officer with a supporting office. The Department of Homeland Security has a statutorily created Office of Civil Rights and Civil Liberties and a separate Office of Privacy. And the Department of Defense has a Privacy and Civil Liberties Office, as well as the State Department, and other departments and agencies. The Board's authorizing legislation provides that the Board will "receive reports from" other similar offices in the Executive Branch, "make recommendations" to those other offices, and "coordinate" their activities. It's not clear what the unique contribution of the Board is to this arrangement.

Although the Board has been on the books for many years, it has yet to actually function. Meanwhile, each of the relevant agencies in the war on terrorism—the Director of National Intelligence (DNI), Department of Justice (DOJ), Department of Defense (DOD), Department of Homeland Security (DHS), and others—have their own similar office. In fact, Homeland Security actually has two separate offices, one just for privacy, and one for civil rights and civil liberties - both created by the Homeland Security Act. Depending on how it is implemented, the Board is in danger of becoming another layer of bureaucracy.

I am interested in your views on what you envision your unique contribution might be, considering the vast number of privacy offices that currently exist. How do you plan to coordinate with these offices?

A. Can you describe what the privacy and civil liberties office does at the Office of the Director of National Intelligence (ODNI)?

B. Can you describe what the privacy and civil liberties office does at the Department of Homeland Security (DHS)?

C. Can you describe what the privacy and civil liberties office does at the Department of Justice (DOJ)?

D. Can you describe what the privacy and civil liberties office does at the Department of Defense (DOD)?

E. How will the Board's work differ from these offices?

F. How will you ensure that you do not duplicate the efforts of these offices?

The war on terrorism requires a careful balance between aggressive counter-terrorism policies and the protection of privacy and civil liberties. We can't be so aggressive that U.S. citizens rights' are violated, but we also can't ignore effective policies that will deter and prevent terrorist acts. Most relevant agencies have a civil liberties or privacy office now, that have been debating this balance for years. So, in many ways, this Board is late to the debate.

G. If an agency, or the President himself, disagrees with input the Board provides on a particular action or policy, what will you do?

H. Do you plan to make recommendations to Congress on legislation? If so, please describe how you will approach that effort.

**(3) <u>Preventing the Rebuilding of the "Wall" Between National Security and Law Enforcement.</u>**

One of the failures of the pre-9/11 mind-set was the strict separation between law enforcement and intelligence operations. The 9/11 Commission found that the "wall" created in the 1990s in the FBI and DOJ between collection of information for foreign intelligence purposes and the use of information to prevent terrorist acts inhibited crucial information sharing. Breaking down that wall has been one of the great successes of the post-9/11 reorientation of DOJ and the FBI to terrorism-prevention, not just post-hoc crime solving. In addition, the 9/11 Commission found that the "stove-piping" of information among national security agencies was harmful to finding, tracking, and capturing terrorists. It was this "stove-piping" that prevented anyone from fully "connecting the dots" to find the 9/11 terrorists.

However, many privacy and civil liberties advocates oppose widespread sharing of information across agencies because of the fear that it allows the government to aggregate too much information about individuals. Without such capabilities, however, full pictures of terrorists will not be possible, connections among them will be missed, and terrorist networks will go undetected.

When asked about how you will ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence, you seemed to agree that the wall should remain down, and that you would find ways to protect both the interests of law enforcement and civil liberties. There also appeared to be agreement among the panel of nominees that you should be involved at the design stage in creating law enforcement tools that implicate privacy or civil liberties concerns.

A. Based on your previous responses, please explain in greater detail how you plan to accomplish "finding ways to protect the interest of law enforcement and civil liberties," and "being involved at the design stage?"

B. How will you ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence?

C. What is your view of the relationship between law enforcement and intelligence gathering?

D. What is your view of the importance of information sharing between all Executive Branch agencies in order to ensure that someone can "connect the dots" to find terrorists?

E. Do you oppose "stove-piping" of information by Executive Branch agencies, in order to ensure that someone can "connect the dots" to find terrorists? Please explain.

**(4) Opinions on Patriot Act & FISA Provisions**

The PATRIOT Act provides tools in the fight against violent acts of terrorism and was reauthorized last year. It provides authority to a court to authorize a roving wiretap to obtain foreign intelligence information not concerning a U.S. person, under Section 206. It provides authority to a court to authorize obtaining records and information under Section 215, like a grand jury subpoena. And National Security Letters can be used like administrative subpoenas, but with high-level approvals.

The FISA Amendments Act (FAA) will expire at the end of 2012. The Intelligence Committee and the Judiciary Committee will have to address reauthorization of this highly classified national security tool soon. I am interested in your opinions about the national security and anti-terrorism tools in current law.

A. Would you vote to reauthorize the PATRIOT Act, as it now reads? If not, why not? What would you change?

B. Are there any tools authorized by the Patriot Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

C. What about the Foreign Intelligence Surveillance Act (FISA) – would you vote to reauthorize it, as it now reads? If not, why not? What would you change?

D. Are there any tools authorized by the FISA Amendments Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

E. Please describe when or how you have dealt with the FISA law?

**(5) Views on the Use of the Traditional Law Enforcement Model or Military Commissions in Counterterrorism**

We've been fighting the war on terrorism for more than 10 years. One of the key debates in the public has been the difference between war and law enforcement. For example, the creation and operation of military commissions has been very controversial, with many people opposing their use, even for terrorists captured abroad. Some want them to be tried only in civilian courts in the United States. Other controversial topics have included detention authority, enhanced interrogation, surveillance, and drone strikes. Some people want all of these to be subject to court review and constitutional and other legal restrictions. But how one approaches these problems may be determined by whether one believes we are at war or only engaged in law enforcement. Please explain your views on the following:

A. Do you believe that we are engaged in a war on terrorism?

B. Do you think that there are times when a law-of-war paradigm is appropriate, or should every action by the Executive Branch be governed by standard law enforcement models?

C. If the law enforcement model is appropriate, please give some examples of why it is superior to a law-of-war model.

D. Specifically, do you think military commissions have a place in the war on terrorism? Do you think that Miranda warnings must always be given to terrorist suspects? Do you think military operations conducted abroad should be reviewed by federal courts?

**(6) Views on Race and Ethnicity Relating to Terrorism Cases**

On April 17, 2012, the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights, held a hearing entitled "Ending Racial Profiling in America."

A. Do you believe that focusing the limited resources of an investigative agency where they are most likely to make an impact is the best method for combating terrorism?

B. How do you address the homegrown terrorism threat, and the appropriate response to it, while completely ignoring race, religion, or ethnicity as a factor in the investigation?

C. While most, including me, agree that racial profiling is unacceptable, is the same true for profiling foreign nationals coming to the U.S. from certain high-risk foreign nations?

**(7) Targeted Killing of Anwar Al Awlaki**

On March 5, 2012, Attorney General Holder gave a speech on national security matters to students at Northwestern University School of Law. In his speech, Attorney General Holder discussed a number of national security issues, including the Authorization for Use of Military Force (AUMF), the Foreign Intelligence Surveillance Act (FISA), adjudication of al Qaeda terrorists via civilian courts or military commissions, and the authority to kill American citizens working for al Qaeda abroad. Specifically, in discussing the President's unilateral authority to kill an American citizen abroad, Attorney General Holder stated, "'Due Process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."

Attorney General Holder further argued that "[t]he Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen." The Attorney General thus argued that the President has the constitutional power to authorize the targeted killing of an American citizen without judicial process.

The Board has broad jurisdiction to "review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties."

When asked if you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process, you all responded that you did not have enough information about the al Awlaki scenario to make a judgment call. Regardless of the White House's failure to make its legal reasoning public, please respond to the following question based on your own opinions or beliefs.

A. Do you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process? Why or why not?

When asked if you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties, most of you responded that you viewed your role as providing oversight and advice, and reporting to Congress. Mr. Dempsey stated that he believed the Board probably does not have the power to make "declarations." Please respond in greater detail than in your testimony to the following question, and also indicate whether or not you subscribe to Mr. Dempsey's belief that the Board does not have power to make "declarations."

B. Do you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties?

C. Do you support Attorney General Holder's public statement that due process does <u>not necessarily</u> include judicial process when it comes to national security? Which national security matters require judicial process and which ones do not?

D. If confirmed, would you request a copy of the legal reasoning used to justify the al Awlaki killing? Would you support Congress having a copy? As this legal reasoning implicates important constitutional rights, would you support the memo being made public, with appropriate security redactions?

**(8) Classified Information**

To carry out its duties, the Board is authorized to have access to information from any Department or agency within the executive branch, including classified information. To manage that classified information appropriately, the Board shall adopt "rules, procedures . . . and other security" "after consultation with the Secretary of Defense, the Attorney General, and the Director of National Intelligence." Please elaborate on background and experience in dealing with classified information.

A. Do you currently have a security clearance?

B. How do you plan to hold classified information without a SCIF? Do you anticipate asking Congress to give you funds to build one?

C. As a Board, how much time do you expect to spend reviewing classified information?

D. If it's a close call in determining whether to publish sensitive national security information, on which side do you err – the side of national security or public disclosure?

**(9) Scope of Constitutional Protections**

Currently, national security law defines a U.S person as a U.S. citizen (USC), a Lawful Permanent Resident (LPR), a U.S. corporation, or a group whose members are substantially USCs or LPRs. FISA, 50 U.S.C. 1801. Some argue that all persons found in the United States should receive the same protections under the Constitution that U.S. citizens possess.

A. Who should be entitled to protection as a U.S. person?

B. Do you believe that the definition of U.S. person should be broader, to include persons in the process of applying for permanent residence, or do you believe it should it be restricted to the traditional statutory definition in FISA?

C. If the definition of U.S. person is defined broadly, can it create problems for quickly sharing terrorism information? If not, why not?

**(10) Scope of Authority to File Amicus Briefs**

The Board is given very broad duties and authorities. The statute clarifies that this Board is to be treated as an agency and not an advisory committee.

A. Do you believe it is within the Board's authority and power to file an amicus brief in a case?

B. If the answer to the above question is yes, and if it takes only three Board members to make a quorum, can the Board file an amicus brief if two members don't agree?

C. If the answer to the above question is yes, could the two disagreeing members file a brief outlining their opposing view?

D. Where in the statute do you find the authority that allows the Board to file an amicus brief?

**(11) Cybersecurity Legislation**

Many of the Cybersecurity bills include language rebuilding the wall, by limiting the use of cyber-threat information for purposes outside Cybersecurity—including national security and counter intelligence.

(1) Do you support recreating the wall as part of cybersecurity legislation?

(2) Regardless of what Congress does, do you think that a wall should exist between cybersecurity information sharing to prevent cyber-attacks and law enforcement?

(3) At the hearing, many of you stated you have not studied this issue. Mr. Dempsey stated that, if confirmed, the Board would look closely at this issue. However, Mr. Dempsey added, "Congress is going to have a say on that issue, I think, before this board comes into creation, and we will work with the authorities and decisions that Congress makes on that cybersecurity legislation." While I appreciate your willingness to study the issue and your deference to Congress, I want to know your position on certain cybersecurity related topics.

1. Do you support private networks, service providers, and private industry sharing customer information with the Federal Government if that information evinces a cybersecurity threat or vulnerability to public or private systems? If not, why not?

2. What restrictions should be placed on information shared with the Federal Government? Should information be limited to metadata only or should it include contents of communications?

3. What restrictions should be placed upon cybersecurity threat information shared with the Federal Government? For example, should personally identifiable information (PII) be minimized or redacted? Should the use of this information be limited to merely address cybersecurity threats or could it be used for national security, intelligence, counterintelligence, national security, or criminal matters? If you believe it can be shared, what categories of the aforementioned purposes can it be shared?

4. How long should any shared information be retained?

**(12) United States v. Jones**

In her concurrence in the recent case, *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., *concurring),* Justice Sotomayor agreed with Justice Alito that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"

Her concurrence then elaborated that even with short-term monitoring, "some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention." Justice Sotomayor stated that GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." -She further indicated that she "would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements."

A. With respect to Justice Sotomayor's discussion of the temporal elements of the 4th Amendment, please explain your interpretation of her statements and whether or not you support her position.

B. Do you believe the 4th Amendment has a temporal restriction? Do you believe that information that is initially acquired lawfully may become subject to 4th Amendment restrictions over time?

**(13) Agency Authority**

The statute establishes the Board as "an independent agency within the executive branch". And the Board "shall" analyze and review actions taken by the executive branch. The Executive Office of the President is obviously part of the executive branch, and nowhere is the President excluded from the Board's review and purview.

A. Do you believe that the Board will have the duty to review and analyze actions of the President and the Executive Office of the President?

B. Do you believe that the Board will have the duty to review and analyze actions of the Vice President and the Office of the Vice President?

C. If the Board disagrees with the actions taken by the President, Vice President, or either of their offices, after the Board has fulfilled its duty to "advise the President… and executive branch", what options does the Board have?

D. What is your understanding of the term, "independent agency within the Executive Branch"? How would you compare your authority to that of other, fully independent boards outside the Executive Branch, such as the Securities and Exchange Commission?

The Board is given authorization for access to any Department, any information, any document, or any person to carry out its duties. And if that access is denied, the Board can ask the Attorney General to issue a subpoena.

E. What recourse will the Board have if the Department of Justice is the executive branch component that is denying access to information?

F. If it is the Office of the President that is denying the Board access to information, do you believe it is realistic that the Board will seek a subpoena from the Attorney General, who reports to the President?

**(14) Use of International and Foreign Law in Interpreting Privacy and Civil Liberties Issues**

At the hearing, Judge Wald noted her experience with international law, citing her time as a judge on the International Criminal Tribunal for Yugoslavia. This raises the disturbing problem of judges in the United States relying on international and foreign law in interpreting the U.S. Constitution and statutes. In a number of cases, justices of the Supreme Court have cited non-U.S. laws as support for overturning U.S. laws, such as those on execution of juveniles and of the mentally handicapped. Separate and apart from the ultimate wisdom of those decisions, the fact that justices had to rely on other countries' and international organizations' opinions on legal matters, and not on the text, history, and structure of the Constitution and on American legal traditions, is concerning. In addition, as Justice Scalia has pointed out, those justices and the advocates of the use of international and foreign law only selectively cite it as relevant. They typically cherry-pick foreign and international legal decisions that support their favored policy positions, such as abolition of the death penalty, but ignore those that disagree with their positions, such as restrictions on the availability of abortion in most countries around the world.

The problem of selective use of international and foreign law in interpreting U.S. law would seem to be equally at issue for the members of the Privacy and Civil Liberties Oversight Board. Protections for privacy and civil liberties vary widely from one country to another. For example, the United States provides far more rights to the accused than most other countries. In much of Europe, defendants accused of terrorist crimes can be held for up to a week without charge or without seeing a neutral magistrate, rather than the Constitutionally required 48 hours in the United States. Likewise, virtually all European countries, as well as others around the world, require citizens to possess and carry a national identification card that must be presented to authorities upon demand. Such a requirement would be denounced in the United States, and

proposals for such a card have never been successful. Laws on surveillance, leaks of classified information, and racial profiling are also far more lenient in much of the rest of the world.

At the same time, human rights advocates have greatly expanded the notion of international human rights law to cover areas of privacy and civil liberties, and they are fond of citing to international treaties, such as the International Covenant on Civil and Political Rights, as support for their attacks on U.S. law and appropriate interpretations of the U.S. Constitution. Like-minded members of international bodies, mainly law professors from around the world, such as the U.N.'s "special rapporteurs," parrot these arguments. Meanwhile, the non-democratic majority of the U.N. General Assembly passes resolutions against the United States motivated by dislike of our foreign policy and tradition of freedom and capitalism. Then human rights advocates claim that "international law" supports their positions.

A. If confirmed, do you commit that your evaluations of the legality and propriety of U.S. government actions to fight terrorism, as they relate to the protection of privacy and civil rights, will be based exclusively on the requirements of the U.S. Constitution, as interpreted by the Supreme Court, and on U.S. law, and not on foreign countries' laws or on allegations of what international law requires?

## QUESTIONS SUBMITTED BY SENATOR KLOBUCHAR FOR DAVID MEDINE, JAMES DEMPSEY, RACHEL BRAND, ELISEBETH COLLINS COOK, AND PATRICIA WALD

**QUESTIONS FOR THE RECORD**

**From Senator Amy Klobuchar**

***"Nominations to the Privacy and Civil Liberties Oversight Board"***

**April 18, 2012**

**Questions for all witnesses**

*Question No. 1: Career Experience*

You have all established very impressive careers with experience working in both public service and private legal practice.

- Can you describe any experiences you have had in your career in balancing civil liberties with national security or other priorities?
- How did you go about analyzing such conflicts?

*Question No. 2: Privacy Concerns in the Commercial Arena*

Privacy concerns are not just present in the national security context, but also in the commercial arena and with respect to the government's regulation of commerce.

- Can you talk about how the dynamics or considerations of privacy might be different in commercial contexts as opposed to security contexts?
- Specifically, how can industry, including telecommunications firms, and the government work together to improve our approach to privacy issues?

## QUESTIONS SUBMITTED BY SENATOR LEAHY FOR DAVID MEDINE

**Written Questions of Senator Patrick Leahy,**
**Chairman, Senate Committee On The Judiciary**
**To David Medine, Nominee for Chair, Privacy and Civil Liberties Oversight Board**

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*On March 22, the Director of National Intelligence and the Attorney General jointly released new guidelines governing the acquisition and retention of data by the National Counterterrorism Center (NCTC). Under these new guidelines, it is now conceivable that the NCTC could retain vast amounts of data regarding U.S. citizens for up to five years – well beyond the six months that was allowed under the previous guidelines. The new guidelines specifically state that the Privacy and Civil Liberties Oversight Board shall have "access" to all relevant NCTC records, reports, and other material relevant to its oversight of NCTC. However, the guidelines do not require any of the oversight and compliance reporting to go to the Privacy and Civil Liberties Oversight Board.*

*Mr. Medine, as Chair of the Privacy and Civil Liberties Oversight Board, how would you view the Board's role in reviewing this new policy and other emerging policy issues that involve the collection and retention of Americans' personal data?*

If confirmed as Chair of the Privacy and Civil Liberties Oversight Board (PCLOB), oversight of information collection, use and retention policies, such as the recently released National Counterterrorism Center (NCTC) guidelines, would be a top Board priority. The accumulation of vast quantities of personal information by the government raises both privacy and civil liberties concerns. PCLOB, if reestablished, would be proactive in overseeing these types of guidelines, gathering enough information to make an informed judgment about whether the program appropriately takes into account privacy and civil liberties concerns. This would be the case whether or not the guidelines contain their own oversight or compliance reporting mechanisms.

In 2008, the Department of Homeland Security issued Fair Information Practice Principles (FIPPs). These FIPPs would provide a useful starting point for the Board in analyzing whether a program, or proposed change in a program such as the extension of record keeping for up to five years, raise concerns. The FIPPs are: transparency, individual participation, purpose specification, data minimization, use limitation, data quality and integrity, security and accountability and auditing. In the case of the guidelines, the data minimization principle states that information should only be retained for as long as is necessary to fulfill the specified purpose. PCLOB, if constituted, would examine whether the expansion [illegible] six months to up [illegible] five years is [illegible]

An important oversight consideration is the efficacy of a program. In considering when privacy and civil liberties has properly been taken into account, PCLOB would examine the goals of a program and how well it was meeting those goals. If any program involving the collection and use of American's personal information is found to be problematic, where practical, PCLOB would work constructively with the relevant agency or agencies to convey recommended changes and assess whether alternative approaches would be possible that would address privacy and civil liberties concerns while still accomplishing the program's goals.

# ANSWERS

## RESPONSES BY DAVID MEDINE TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

**Senator Chuck Grassley**
**Questions for the Record**

**Responses of David Medine, Nominee, to be Chairman and Member of the Privacy and Civil Liberties Oversight Board**

**(1) Scope of the Board's Authority and Responsibilities of its Members**

*Following the terrorist attacks on 9/11, Congress made a number of reforms in order to protect the nation from further terrorist attacks. These reforms included tearing down the artificial "wall" between law enforcement and national security cases that the Justice Department had created; passage of the USA PATRIOT Act; reforming the intelligence community; and updating the Foreign Intelligence Surveillance Act (FISA).*

*All told, the various reforms, recommended by the 9/11 Commission and then implemented, have strengthened our national security and have helped to prevent another major terrorist attack on U.S. soil. However, we must remain vigilant against terrorist threats and not let down our guard. That said, some have argued that all these reforms to our intelligence, law enforcement, and national security agencies have been at the cost of civil liberties and individual rights. Recognizing this concern, the 9/11 Commission recommended that Congress create the Privacy and Civil Liberties Oversight Board to oversee the new authorities granted to these agencies.*

*Congress also acted by passing and signing into law the Intelligence Reform and Terrorism Prevention Act of 2004, which included provisions creating the Privacy and Civil Liberties Oversight Board in statute. In 2007, legislation updated the board's statute, reestablishing it as an independent agency in the executive branch.*

*As President Obama waited until December 2010 to nominate two of the five Board members and other three were not nominated by President Obama until December 2011, the role of the PCLOB has yet to be fleshed out and many details of the scope of its authority remain unclear. Thus, the philosophical perspectives of the board members of the utmost importance, and your thorough answers are appreciated.*

A. *What is your philosophy about privacy and civil liberties, especially when considered in the context of national security, law enforcement, and cybersecurity efforts?*

I share the philosophy expressed by Congress in the 9/11 Commission Act:

**(1)** In conducting the war on terrorism, the Government may need additional powers and may need to enhance the use of its existing powers.

**(2)** This shift of power and authority to the Government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our

way of life and to ensure that the Government uses its powers for the purposes for which the powers were given.

**(3)** The National Commission on Terrorist Attacks Upon the United States correctly concluded that "The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend."

B. *Describe how you would view your role as a member of this Board. Specifically, do you see the position as akin to that of a judge, an advocate, an investigator or something else? And if you see yourself as having the role of an advocate, which groups or interests will you be advocating on behalf of, if confirmed?*

If confirmed, my role would be to work to preserve our civil liberties and privacy while maintaining a vigorous defense against terrorism. As provided in the 9/11 Commission Act, the Board's role is to provide independent advice and counsel on policy development and implementation and oversight of regulations, policies and procedures, information sharing practices, and other executive branch actions relating to efforts to protect the Nation from terrorism. I see myself as an advocate for preserving America's liberties and not for any special interest groups.

C. *Do you believe that your work on the Board must be impartial and neutral? Or do you believe that in carrying out your work, you would be free to have empathy for certain positions or groups?*

If confirmed, I believe my work on the Board must be impartial and neutral.

D. *In the area of privacy and civil liberties, do you have any heroes or role models? And if you do, who are they and why are they your heroes or role models?*

No.

**(2) <u>Views on Duplication Existing Government Privacy and Civil Liberties Efforts</u>**

*The Board was created in the Intelligence Reform and Terrorism Prevention Act of 2004, as amended in 2007. The same legislation also created the Office of the Director of National Intelligence (ODNI). And consistent with the provisions of the Act, within ODNI there is an Office of Privacy and Civil Liberties. And the Department of Justice, as required by its 2007 reauthorization, has a Chief Privacy and Civil Liberties Officer with a supporting office. The Department of Homeland Security has a statutorily created Office of Civil Rights and Civil Liberties and a separate Office of Privacy. And the Department of Defense has a Privacy and Civil Liberties Office, as well as the State Department, and other departments and agencies. The Board's authorizing legislation provides that the Board will "receive reports from" other similar offices in the Executive Branch, "make recommendations" to those other offices, and "coordinate" their activities. It's not clear what the unique contribution of the Board is to this arrangement.*

*Although the Board has been on the books for many years, it has yet to actually function. Meanwhile, each of the relevant agencies in the war on terrorism—the Director of National Intelligence (DNI), Department of Justice (DOJ), Department of Defense (DOD), Department of Homeland Security (DHS), and others—have their own similar office. In fact, Homeland Security actually has two separate offices, one just for privacy, and one for civil rights and civil liberties - both created by the Homeland Security Act. Depending on how it is implemented, the Board is in danger of becoming another layer of bureaucracy.*

*I am interested in your views on what you envision your unique contribution might be, considering the vast number of privacy offices that currently exist. How do you plan to coordinate with these offices?*

A. *Can you describe what the privacy and civil liberties office does at the Office of the Director of National Intelligence (ODNI)?*

According to the ODNI website:

The office is led by the Civil Liberties Protection Officer, a position established by the Intelligence Reform and Terrorism Prevention Act of 2004. Reporting directly to the Director of National Intelligence, the Civil Liberties Protection Officer oversees compliance with civil liberties and privacy requirements within the ODNI and ensures that civil liberties and privacy protections are incorporated into policies and procedures developed and implemented by the elements of the Intelligence Community (IC).

Under his leadership, the Civil Liberties and Privacy Office (CLPO) ensures that the IC operates in a manner that advances national security while protecting the freedoms, civil liberties, and privacy rights guaranteed by the Constitution and federal law.

Drawing on a broad legal and policy framework, and in concert with partner offices and institutions, the CLPO provides oversight, advice, guidance, education, and training. CLPO engages in public outreach and communication initiatives that foster awareness of how the IC accomplishes its intelligence mission while protecting Constitutional values.

The CLPO also reviews, assesses, and, where appropriate, investigates complaints and other information indicating possible abuses of civil liberties and privacy in the administration of ODNI programs and operations.

B. *Can you describe what the privacy and civil liberties office does at the Department of Homeland Security (DHS)?*

As DHS states on its website:

The Department of Homeland Security (DHS) divides its functions into two separate offices: the Privacy Office and the Office for Civil Rights and Civil Liberties.

The Department of Homeland Security Privacy Office is the first statutorily required privacy office in any federal agency, responsible for evaluating Department programs, systems, and initiatives for potential privacy impacts, and providing mitigation strategies to reduce the privacy impact. The mission of the Privacy Office is to preserve and enhance privacy protections for all individuals, to promote transparency of Department operations, and to serve as a leader in the federal privacy community. The office works with every DHS component and program to ensure that privacy considerations are addressed when planning or updating any program, system or initiative. It strives to ensure that technologies used at the Department sustain, and do not erode, privacy protections.

The Privacy Office:

- Evaluates Department legislative and regulatory proposals involving collection, use, and disclosure of personally identifiable information (PII);
- Centralizes FOIA and Privacy Act operations to provide policy and programmatic oversight, and support implementation across the Department;
- Operates a Department-wide Privacy Incident Response Program to ensure that incidents involving PII are properly reported, investigated and mitigated, as appropriate;
- Responds to complaints of privacy violations and provides redress, as appropriate; and
- Provides training, education and outreach to build a culture of privacy across the Department and transparency to the public.

The Office for Civil Rights and Civil Liberties supports the DHS mission to secure the nation while preserving individual liberty, fairness, and equality under the law.
CRCL integrates civil rights and civil liberties into all of the Department activities:

- Promoting respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners.
- Communicating with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns. Investigating and resolving civil rights and civil liberties complaints filed by the public regarding Department policies or activities, or actions taken by Department personnel.
- Leading the Department's equal employment opportunity programs and promoting workforce diversity and merit system principles.

C. *Can you describe what the privacy and civil liberties office does at the Department of Justice (DOJ)?*

DOJ, on its website, describes the functions of the privacy and civil liberties office as:

The Office of Privacy and Civil Liberties (OPCL) supports the duties and responsibilities of the Department's Chief Privacy and Civil Liberties Officer (CPCLO). The principal mission of OPCL is to protect the privacy and civil liberties of the American people through review, oversight, and coordination of the Department's privacy operations. OPCL provides legal advice and guidance to Departmental components; ensures the Department's privacy compliance, including compliance with the Privacy Act of 1974, the privacy provisions of both the E-Government Act of 2002 and the Federal Information Security Management Act, as well as administration policy directives issued in furtherance of those Acts; develops and provides Departmental privacy training; assists the CPCLO in developing Departmental privacy policy; prepares privacy-related reporting to the President and Congress; and reviews the information handling practices of the Department to ensure that such practices are consistent with the protection of privacy and civil liberties.

D. *Can you describe what the privacy and civil liberties office does at the Department of Defense (DOD)?*

The DOD website provides the following description of the privacy and civil liberties office:

The mission of the Defense Privacy and Civil Liberties Office is to implement the Department of Defense's Privacy and Civil Liberties programs through advice, monitoring, official reporting, and training. The DPCLO is responsible for implementation of the Department of Defense (DoD) Privacy Program.

The Program is based on the Privacy Act of 1974, as amended (5 U.S.C. § 552a), as implemented by Office of Management and Budget (OMB) (OMB Circular A-130) and DoD regulatory authority (DoD Directive 5400.11 and DoD 5400.11-R), and is intended to provide a comprehensive framework regulating how and when the Department collects, maintains, uses, or disseminates personal information on individuals. The purpose of the Program is to balance the information requirements and needs of the Department with the privacy interests and concerns of the individual.

In discharging this assigned responsibility, the Defense Privacy and Civil Liberties Office performs multiple functions, to include:

- Developing policy, providing program oversight, and serving as the DoD focal point for Defense Privacy matters.
- Providing day-to-day policy guidance and assistance to the DoD Components in their implementation and execution of their Privacy Programs.

- Reviewing new and existing DoD policies which impact on the personal privacy of the individual.
- Reviewing, coordinating, and submitting for publication in the Federal Register Privacy Act system of records notices and Privacy Act rulemaking by the DoD Components.
- Developing and coordinating Privacy Act computer matching programs within the DoD Components and between the DoD Components and other Federal and State agencies.
- Providing administrative and operational support to the Defense Privacy Board, the Defense Data Integrity Board, and the Defense Privacy Board Legal Committee.

*E. How will the Board's work differ from these offices?*

The Board will bring a fresh, independent perspective to the issues addressed by the privacy and civil liberties officers, especially because four of the five board members will remain employed outside of government while serving on the Board. In the course of interacting with numerous agencies, the Board will be able to have a government-wide perspective, including a sense of how precedents established by one agency might affect other agencies. As an independent agency, the Board would not answer to the head of any of the agencies to which the privacy and civil liberties officers report. In addition, the Board's implementing statute calls upon the Board, when appropriate, to coordinate the activities of the privacy and civil liberties officers.

*F. How will you ensure that you do not duplicate the efforts of these offices?*

Under the implementing statute, the Board will receive and review reports and other information from the privacy and civil liberties officers. This will provide the Board the opportunity to determine what efforts and actions those officers have already undertaken to avoid duplication. In some cases, this will mean certain matters require no further attention; in others the Board will be able to build upon the work already done. Given limited budgets and the desire to not unduly burden counterterrorism efforts, it is in no one's interest to duplicate efforts.

*G. If an agency, or the President himself, disagrees with input the Board provides on a particular action or policy, what will you do?*

Under the Board's authorizing legislation, if a proposal is reviewed by the Board, the Board advises against implementation, and notwithstanding such advice, actions were taken to implement the proposal, the Board is required to address in reports to Congress.

*H. Do you plan to make recommendations to Congress on legislation? If so, please describe how you will approach that effort.*

One of the Board's key responsibilities is to review proposed legislation related to efforts to protect the Nation from terrorism. This review could involve recommending changes or additions to such legislation. As part of the Board's reporting function, there may be instances in which the Board's recommendations could include legislative proposals for Congress' consideration.

**(3) <u>Preventing the Rebuilding of the "Wall" Between National Security and Law Enforcement.</u>**

*One of the failures of the pre-9/11 mind-set was the strict separation between law enforcement and intelligence operations. The 9/11 Commission found that the "wall" created in the 1990s in the FBI and DOJ between collection of information for foreign intelligence purposes and the use of information to prevent terrorist acts inhibited crucial information sharing. Breaking down that wall has been one of the great successes of the post-9/11 reorientation of DOJ and the FBI to terrorism-prevention, not just post-hoc crime solving. In addition, the 9/11 Commission found that the "stove-piping" of information among national security agencies was harmful to finding, tracking, and capturing terrorists. It was this "stove-piping" that prevented anyone from fully "connecting the dots" to find the 9/11 terrorists.*

*However, many privacy and civil liberties advocates oppose widespread sharing of information across agencies because of the fear that it allows the government to aggregate too much information about individuals. Without such capabilities, however, full pictures of terrorists will not be possible, connections among them will be missed, and terrorist networks will go undetected.*

*When asked about how you will ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence, you seemed to agree that the wall should remain down, and that you would find ways to protect both the interests of law enforcement and civil liberties. There also appeared to be agreement among the panel of nominees that you should be involved at the design stage in creating law enforcement tools that implicate privacy or civil liberties concerns.*

A. *Based on your previous responses, please explain in greater detail how you plan to accomplish "finding ways to protect the interest of law enforcement and civil liberties," and "being involved at the design stage?"*

   A central function of the Board would be to strike the right balance between civil liberties and law enforcement directed toward combatting terrorism. The best way this can be done with new programs is for the Board to be involved at their design stage. For instance, if a program is proposed that might negatively impact on civil liberties, the Board might be able to work with the agency to redesign the program in a way that accomplishes the agency's goals while eliminating the civil liberties impact of the program. This could involve changes in the types of information collected or the duration for which it was retained.

B. *How will you ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence?*

As you note, there appears to be agreement among the nominees that a new "wall" should not be created. If confirmed, this means the Board can be expected to be sensitive to any proposals that would move in this direction and avoid contributing to the creation of such a wall.

C. *What is your view of the relationship between law enforcement and intelligence gathering?*

Both law enforcement and intelligence gathering collect information that is useful in combatting terrorism. So long as they are both collecting the information lawfully, and so long as they share the information within the approved legal framework and guidelines, such sharing should be encouraged.

D. *What is your view of the importance of information sharing between all Executive Branch agencies in order to ensure that someone can "connect the dots" to find terrorists?*

The sharing of information between Executive Branch agencies to "connect the dots" is of central importance as discussed in depth in the 9/11 Commission Report. In response, Congress, in the Intelligence Reform and Terrorism Prevention Act of 2004, created "an information sharing environment" (ISE) for sharing of terrorism information in a manner consistent with national security and with legal standards applicable to privacy and civil liberties. Demonstrating it importance, Congress has specifically required the Board to review the implementation of the information sharing guidelines required under the 2004 law.

E. *Do you oppose "stove-piping" of information by Executive Branch agencies, in order to ensure that someone can "connect the dots" to find terrorists? Please explain.*

I oppose "stove-piping" of information as it has been shown to prevent "connecting the dots." Information sharing should be done with due consideration of privacy and civil liberties concerns and consistent with legal requirements and guidelines, such as the ISE guidelines.

**(4) Opinions on Patriot Act & FISA Provisions**

*The PATRIOT Act provides tools in the fight against violent acts of terrorism and was reauthorized last year. It provides authority to a court to authorize a roving wiretap to obtain foreign intelligence information not concerning a U.S. person, under Section 206. It provides authority to a court to authorize obtaining records and information under Section 215, like a grand jury subpoena. And National Security Letters can be used like administrative subpoenas, but with high-level approvals.*

*The FISA Amendments Act (FAA) will expire at the end of 2012. The Intelligence Committee and the Judiciary Committee will have to address reauthorization of this highly classified*

*national security tool soon. I am interested in your opinions about the national security and anti-terrorism tools in current law.*

A. *Would you vote to reauthorize the PATRIOT Act, as it now reads? If not, why not? What would you change?*

B. *Are there any tools authorized by the Patriot Act that you have concerns about? If so, please list those provisions and why you have concerns with them.*

C. *What about the Foreign Intelligence Surveillance Act (FISA) – would you vote to reauthorize it, as it now reads? If not, why not? What would you change?*

D. *Are there any tools authorized by the FISA Amendments Act that you have concerns about? If so, please list those provisions and why you have concerns with them.*

E. *Please describe when or how you have dealt with the FISA law?*

In response to questions (A)- (E), Congress has devoted considerable attention to the reauthorization of the Patriot Act and prior amendments to the Foreign Intelligence Surveillance Act (FISA). These laws both provide important authority to the Executive Branch to combat terrorism. A review and comment on this type of legislation is squarely within the Board's mandate. If confirmed, I would carefully examine these laws along with the other Board members, consistent with the Board's mandate, and provide feedback to the Congress on reauthorization and potential amendment of these laws. The factors I would consider are whether the need for the government power is balanced with the need to protect privacy and civil liberties, there is adequate supervision of the use by the executive branch of the power to ensure protection of privacy and civil liberties, and there are adequate guidelines and oversight to properly confine its use. This process would address whether any of the authorized tools raise concerns. I have not had any personal dealings with the FISA law.

**(5) <u>Views on the Use of the Traditional Law Enforcement Model or Military Commissions in Counterterrorism</u>**

*We've been fighting the war on terrorism for more than 10 years. One of the key debates in the public has been the difference between war and law enforcement. For example, the creation and operation of military commissions has been very controversial, with many people opposing their use, even for terrorists captured abroad. Some want them to be tried only in civilian courts in the United States. Other controversial topics have included detention authority, enhanced interrogation, surveillance, and drone strikes. Some people want all of these to be subject to court review and constitutional and other legal restrictions. But how one approaches these problems may be determined by whether one believes we are at war or only engaged in law enforcement. Please explain your views on the following:*

A. *Do you believe that we are engaged in a war on terrorism?*

I believe that in appropriate cases it is permissible to use military power to combat terrorism.

B. *Do you think that there are times when a law-of-war paradigm is appropriate, or should every action by the Executive Branch be governed by standard law enforcement models?*

As noted in response to Question (A), I believe that there are times when a law-of-war approach is appropriate to combat terrorism.

C. *If the law enforcement model is appropriate, please give some examples of why it is superior to a law-of-war model.*

There may be times when the law enforcement model is appropriate. When it is, it can provide greater transparency and the perception of neutrality due to the independent decision making by a separate branch of government. This has been demonstrated in numerous successful terrorism-related prosecutions.

D. *Specifically, do you think military commissions have a place in the war on terrorism? Do you think that Miranda warnings must always be given to terrorist suspects? Do you think military operations conducted abroad should be reviewed by federal courts?*

There can be a place for military commissions to address certain terrorist acts. In some contexts, such as the battlefield, Miranda warnings would not be required. Likewise, in some circumstances, federal habeas corpus should be available.

**(6) Views on Race and Ethnicity Relating to Terrorism Cases**

*On April 17, 2012, the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights, held a hearing entitled "Ending Racial Profiling in America."*

A. *Do you believe that focusing the limited resources of an investigative agency where they are most likely to make an impact is the best method for combating terrorism?*

Yes, given limited resources, it makes sense for an investigative agency to focus on areas where it can have the most impact, if done in a legal, non-discriminatory fashion.

B. *How do you address the homegrown terrorism threat, and the appropriate response to it, while completely ignoring race, religion, or ethnicity as a factor in the investigation?*

One of the challenges of detecting and preventing homegrown terrorism threats is the fact that it is often not linked to any of the characteristics mentioned. As a result, the key is to develop intelligence regarding individuals and plots as the basis for taking action.

C. *While most, including me, agree that racial profiling is unacceptable, is the same true for profiling foreign nationals coming to the U.S. from certain high-risk foreign nations?*

In general, profiling of foreign nationals based solely on their point of departure to the United States is inappropriate. However, there may be intelligence regarding a plot being developed or partially implemented in a particular foreign country that could, under some circumstances, justify heightened scrutiny of visitors from that country linked to other information about the plot.

**(7) <u>Targeted Killing of Anwar Al Awlaki</u>**

*On March 5, 2012, Attorney General Holder gave a speech on national security matters to students at Northwestern University School of Law. In his speech, Attorney General Holder discussed a number of national security issues, including the Authorization for Use of Military Force (AUMF), the Foreign Intelligence Surveillance Act (FISA), adjudication of al Qaeda terrorists via civilian courts or military commissions, and the authority to kill American citizens working for al Qaeda abroad. Specifically, in discussing the President's unilateral authority to kill an American citizen abroad, Attorney General Holder stated, "'Due Process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."*

*Attorney General Holder further argued that "[t]he Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen." The Attorney General thus argued that the President has the constitutional power to authorize the targeted killing of an American citizen without judicial process.*

*The Board has broad jurisdiction to "review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties."*

*When asked if you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process, you all responded that you did not have enough information about the al Awlaki scenario to make a judgment call. Regardless of the White House's failure to make its legal reasoning public, please respond to the following question based on your own opinions or beliefs.*

A. *Do you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process? Why or why not?*

Under some circumstances, I believe the President would have the power to target and kill an American citizen abroad based upon due process that does not include judicial

process. For instance, the President, as Commander in Chief, may in appropriate cases make such a decision in the event the American citizen has joined forces with foreign powers in armed conflict against the United States. There may be other situations in which this power exists and it would be within the scope of the Board's mandate to address them.

*When asked if you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties, most of you responded that you viewed your role as providing oversight and advice, and reporting to Congress. Mr. Dempsey stated that he believed the Board probably does not have the power to make "declarations." Please respond in greater detail than in your testimony to the following question, and also indicate whether or not you subscribe to Mr. Dempsey's belief that the Board does not have power to make "declarations."*

B. *Do you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties?*

The Board is authorized by statute to provide advice and counsel, including resulting findings, conclusions, and recommendations. The statute does not address the making of declarations.

C. *Do you support Attorney General Holder's public statement that due process does <u>not necessarily</u> include judicial process when it comes to national security? Which national security matters require judicial process and which ones do not?*

As noted above, there may be situations in which due process does not require judicial process in the national security context. A determination of when this is the case would be specific to particular facts and circumstances and an appropriate topic for Board review and advice.

D. *If confirmed, would you request a copy of the legal reasoning used to justify the al Awlaki killing? Would you support Congress having a copy? As this legal reasoning implicates important constitutional rights, would you support the memo being made public, with appropriate security redactions?*

If confirmed, and if the Board decided to focus its attention on the al Awlaki matter, I would favor requesting a copy of the legal reasoning to inform the Board's consideration. It does not appear to be within the Board's authority to determine whether Congress should have access to Justice Department records. As a general matter, and as reflected in the Board's authorizing statute, I would favor making information, such as the memo, public consistent with legitimate security and legal considerations.

**(8) <u>Classified Information</u>**

*To carry out its duties, the Board is authorized to have access to information from any Department or agency within the executive branch, including classified information. To manage that classified information appropriately, the Board shall adopt "rules, procedures . . . and other*

*security" "after consultation with the Secretary of Defense, the Attorney General, and the Director of National Intelligence." Please elaborate on background and experience in dealing with classified information.*

A. *Do you currently have a security clearance?*

No.

B. *How do you plan to hold classified information without a SCIF? Do you anticipate asking Congress to give you funds to build one?*

In order to perform its functions, the Board will require access to highly classified information that will require the use of a SCIF. If confirmed, the Board will consider options for obtaining access to a SCIF and will make appropriate budgetary requests to accomplish it.

C. *As a Board, how much time do you expect to spend reviewing classified information?*

There will be matters that the Board may undertake that would not require access to classified information or, at least, highly classified information. It is impossible to predict the amount or percentage of time that will require review of classified information until the Board has had an opportunity to convene and establish its priorities.

D. *If it's a close call in determining whether to publish sensitive national security information, on which side do you err – the side of national security or public disclosure?*

If confirmed, I would generally favor public disclosure. However I would also be sensitive to and seriously consider the potential consequences of making sensitive national security information public.

**(9) <u>Scope of Constitutional Protections</u>**

*Currently, national security law defines a U.S person as a U.S. citizen (USC), a Lawful Permanent Resident (LPR), a U.S. corporation, or a group whose members are substantially USCs or LPRs. FISA, 50 U.S.C. 1801. Some argue that all persons found in the United States should receive the same protections under the Constitution that U.S. citizens possess.*

A. *Who should be entitled to protection as a U.S. person?*

As noted, FISA contains a definition of "United States person", for FISA purposes, that includes "a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101 (a)(20) of title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a

foreign power, as defined in subsection (a)(1), (2), or (3) of this section." By contrast, "United States Person" is defined in Executive Order 12333 to mean "a United States citizen, an alien known by the intelligence element concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments." If confirmed, I would consider whether and how these definitions should be reconciled in addressing the degree of Constitutional protection that should be provided to non-U.S. citizens found in the United States.

B. *Do you believe that the definition of U.S. person should be broader, to include persons in the process of applying for permanent residence, or do you believe it should it be restricted to the traditional statutory definition in FISA?*

I have not previously considered this issue but, if confirmed, believe it would be an appropriate topic for Board consideration.

C. *If the definition of U.S. person is defined broadly, can it create problems for quickly sharing terrorism information? If not, why not?*

Defining U.S. person broadly would impose burdens on the sharing of terrorism information. The Board would be in a position to address whether the benefits of a broader definition justify any such increased burdens.

**(10) <u>Scope of Authority to File Amicus Briefs</u>**

*The Board is given very broad duties and authorities. The statute clarifies that this Board is to be treated as an agency and not an advisory committee.*

A. *Do you believe it is within the Board's authority and power to file an amicus brief in a case?*

There is no express statutory authority for the Board to file amicus briefs. Given the Board's extensive responsibilities and limited budget, filing amicus briefs would not likely be a prudent use of the Board's resources.

B. *If the answer to the above question is yes, and if it takes only three Board members to make a quorum, can the Board file an amicus brief if two members don't agree?*

N/A

C. *If the answer to the above question is yes, could the two disagreeing members file a brief outlining their opposing view?*

N/A

D. *Where in the statute do you find the authority that allows the Board to file an amicus brief?*

N/A

**(11) <u>Cybersecurity Legislation</u>**

*Many of the Cybersecurity bills include language rebuilding the wall, by limiting the use of cyber-threat information for purposes outside Cybersecurity—including national security and counter intelligence.*

*(1) Do you support recreating the wall as part of cybersecurity legislation?*

I do not favor recreating the wall between national security and law enforcement as part of the cybersecurity legislation.

*(2) Regardless of what Congress does, do you think that a wall should exist between cybersecurity information sharing to prevent cyber-attacks and law enforcement?*

While I do not favor recreating the wall between national security and law enforcement, as noted in my response to Question 3 above, there would likely be a broader scope of information collected to prevent cyber-attacks that would require separate consideration, including potential use and disclosure restrictions.

*(3) At the hearing, many of you stated you have not studied this issue. Mr. Dempsey stated that, if confirmed, the Board would look closely at this issue. However, Mr. Dempsey added, "Congress is going to have a say on that issue, I think, before this board comes into creation, and we will work with the authorities and decisions that Congress makes on that cybersecurity legislation." While I appreciate your willingness to study the issue and your deference to Congress, I want to know your position on certain cybersecurity related topics.*

*1. Do you support private networks, service providers, and private industry sharing customer information with the Federal Government if that information evinces a cybersecurity threat or vulnerability to public or private systems? If not, why not?*

There is clearly an important benefit to having private networks, service providers, and private industry share cybersecurity threat or vulnerability information with the Federal Government. If confirmed, I would want to consider whether there should be any limitations or protections associated with such sharing depending on the nature of the entity sharing the information, the type of information being shared and the possible use and disclosure of such information.

2. *What restrictions should be placed on information shared with the Federal Government? Should information be limited to metadata only or should it include contents of communications?*

   Depending on the nature of the information being shared, there may be greater or less need to provide associated privacy protections. For instance, there may be good reasons to accord less protection to metadata than the contents of communications.

3. *What restrictions should be placed upon cybersecurity threat information shared with the Federal Government? For example, should personally identifiable information (PII) be minimized or redacted? Should the use of this information be limited to merely address cybersecurity threats or could it be used for national security, intelligence, counterintelligence, national security, or criminal matters? If you believe it can be shared, what categories of the aforementioned purposes can it be shared?*

   Consistent with fair information practices and the utility of the information for cybersecurity protection, personally identifiable information should be minimized or redacted. Secondary use of this information could implicate a wide range of legal and policy issues calling for case-by-case review. For instance, privacy and civil liberties protections in place elsewhere should not be circumvented by collecting information for cybersecurity purposes.

4. *How long should any shared information be retained?*

   Given that the cyberthreats tend to be time-limited, the "shelf life" of such information would presumably be relatively short, making it unnecessary for it to be retained for an extended period of time.

**(12) <u>United States v. Jones</u>**

*In her concurrence in the recent case, United States v. Jones, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring), Justice Sotomayor agreed with Justice Alito that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"*

*Her concurrence then elaborated that even with short-term monitoring, "some unique attributes of GPS surveillance relevant to the Katz analysis will require particular attention." Justice Sotomayor stated that GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." She further indicated that she "would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements."*

A. *With respect to Justice Sotomayor's discussion of the temporal elements of the 4th Amendment, please explain your interpretation of her statements and whether or not you support her position.*

Justice Sotomayor's concurrence in United States v. Jones attempts to wrestle with the application of the Fourth Amendment to technologies that may not require a physical intrusion, going beyond the basis of the majority decision, which turned on the physical occupation of private property for the purpose of gathering information. While she and Justice Alito note, and I agree, that longer term GPS monitoring could infringe on the expectations of privacy protected under *Katz*, as duration of surveillance can change its nature, Justice Sotomayor also recognized that even short-term monitoring could implicate the *Katz* analysis. Thus, it is not clear what weight she would give to long term versus short term monitoring, as compared to the weighting of the nature of the monitoring and the type of information collected. Nonetheless, I agree with the need to carefully evaluate new technologies under the Fourth Amendment in light of temporal and other factors, as the Supreme Court has now done by extending protections in both *Jones* as well as in Kyllo v. United States, 533 U.S. 27 (2001).

B. *Do you believe the 4th Amendment has a temporal restriction? Do you believe that information that is initially acquired lawfully may become subject to 4th Amendment restrictions over time?*

Please see my response to (A). In general, information lawfully required is unlikely to become suspect under the Fourth Amendment retroactively.

**(13) <u>Agency Authority</u>**

*The statute establishes the Board as "an independent agency within the executive branch". And the Board "shall" analyze and review actions taken by the executive branch. The Executive Office of the President is obviously part of the executive branch, and nowhere is the President excluded from the Board's review and purview.*

A. *Do you believe that the Board will have the duty to review and analyze actions of the President and the Executive Office of the President?*

The authorizing statute directs the Board to review actions taken by "the executive branch" which would include the President and the Executive Office of the President.

B. *Do you believe that the Board will have the duty to review and analyze actions of the Vice President and the Office of the Vice President?*

See the response to (A).

C. *If the Board disagrees with the actions taken by the President, Vice President, or either of their offices, after the Board has fulfilled its duty to "advise the President... and executive branch", what options does the Board have?*

The Board has the option of reporting on the matter to Congress. In the case of proposals reviewed by the Board, the Board is required by statute to report on instances in which the Board advised against implementation and, notwithstanding such advice, actions were taken to implement the proposal.

D. *What is your understanding of the term, "independent agency within the Executive Branch"? How would you compare your authority to that of other, fully independent boards outside the Executive Branch, such as the Securities and Exchange Commission?*

Congress did not define the term "independent agency within the Executive Branch." However, given the history of the Board under prior legislation, it is clear that Congress intended the Board to engage in oversight, give its advice, provide Congressional testimony, develop and communicate its views, and issue its reports without prior review or approval by the White House. In this respect, the Board's authority is similar to boards that have been established outside the Executive Branch, such as the Securities and Exchange Commission. In contrast to some other independent agencies, the Board does not have general rulemaking or law enforcement authority.

*The Board is given authorization for access to any Department, any information, any document, or any person to carry out its duties. And if that access is denied, the Board can ask the Attorney General to issue a subpoena.*

E. *What recourse will the Board have if the Department of Justice is the executive branch component that is denying access to information?*

The Board's authorizing statute provides an alternative mechanism from subpoenas for addressing cooperation by the Executive Branch. When information or assistance is unreasonably refused or not provided, the Board is required to report the circumstances to the head of the relevant agency who is, in turn, required to ensure the Board is given access to the information, assistance, material, or personnel the Board determines necessary to carry out its functions.

F. *If it is the Office of the President that is denying the Board access to information, do you believe it is realistic that the Board will seek a subpoena from the Attorney General, who reports to the President?*

See the response to (E).

**(14) Use of International and Foreign Law in Interpreting Privacy and Civil Liberties Issues**

*At the hearing, Judge Wald noted her experience with international law, citing her time as a judge on the International Criminal Tribunal for Yugoslavia. This raises the disturbing problem of judges in the United States relying on international and foreign law in interpreting the U.S. Constitution and statutes. In a number of cases, justices of the Supreme Court have cited non-U.S. laws as support for overturning U.S. laws, such as those on execution of juveniles and of the mentally handicapped. Separate and apart from the ultimate wisdom of those decisions, the fact that justices had to rely on other countries' and international organizations' opinions on legal matters, and not on the text, history, and structure of the Constitution and on American legal traditions, is concerning. In addition, as Justice Scalia has pointed out, those justices and the advocates of the use of international and foreign law only selectively cite it as relevant. They typically cherry-pick foreign and international legal decisions that support their favored policy positions, such as abolition of the death penalty, but ignore those that disagree with their positions, such as restrictions on the availability of abortion in most countries around the world.*

*The problem of selective use of international and foreign law in interpreting U.S. law would seem to be equally at issue for the members of the Privacy and Civil Liberties Oversight Board. Protections for privacy and civil liberties vary widely from one country to another. For example, the United States provides far more rights to the accused than most other countries. In much of Europe, defendants accused of terrorist crimes can be held for up to a week without charge or without seeing a neutral magistrate, rather than the Constitutionally required 48 hours in the United States. Likewise, virtually all European countries, as well as others around the world, require citizens to possess and carry a national identification card that must be presented to authorities upon demand. Such a requirement would be denounced in the United States, and proposals for such a card have never been successful. Laws on surveillance, leaks of classified information, and racial profiling are also far more lenient in much of the rest of the world.*

*At the same time, human rights advocates have greatly expanded the notion of international human rights law to cover areas of privacy and civil liberties, and they are fond of citing to international treaties, such as the International Covenant on Civil and Political Rights, as support for their attacks on U.S. law and appropriate interpretations of the U.S. Constitution. Like-minded members of international bodies, mainly law professors from around the world, such as the U.N.'s "special rapporteurs," parrot these arguments. Meanwhile, the non-democratic majority of the U.N. General Assembly passes resolutions against the United States motivated by dislike of our foreign policy and tradition of freedom and capitalism. Then human rights advocates claim that "international law" supports their positions.*

*A. If confirmed, do you commit that your evaluations of the legality and propriety of U.S. government actions to fight terrorism, as they relate to the protection of privacy and civil rights, will be based exclusively on the requirements of the U.S. Constitution, as interpreted by the Supreme Court, and on U.S. law, and not on foreign countries' laws or on allegations of what international law requires?*

If confirmed, I would base my evaluation of the legality of counterterrorism actions based solely on U.S. law. Evaluations of the propriety of such actions would be based on U.S. standards and expectations though it could be informed by how other countries have addressed privacy concerns.

**Senator Chuck Grassley**
**Additional Questions for the Record**

**David Medine, Nominee, to be Chairman and Member of the Privacy and Civil Liberties Oversight Board**

**(1) Chairman Responsibilities:**

*The Board's authorizing statute provides for extremely broad, vaguely-defined purposes and functions. If it were to try to do everything the statute authorizes, it would be a large bureaucracy with intrusive powers that could become a serious impediment to effective counterterrorism efforts. For example, although nominally bipartisan, it is to be run primarily by one full-time chair (a Democrat) and four part-time commissioners. It is likely that the chairman will dominate selection of the staff. The statute provides very broad authority for the board's functions.*

*The Board is authorized to provide advice on, and oversight of, policy development and implementation, as well as laws and regulations, of Executive Branch agencies. The board is to "continuously review" any actions by the Executive Branch. They are allowed access to any information they want, may compel production of documents or testimony through subpoena power, hold public hearings, report and testify to Congress, and oversee other privacy and civil liberty offices within the Administration.*

A. *Please describe how you will accomplish the broad statutory mandate for the Board.*

In order for the Board to operate effectively, within its budget, and in a way that does not become an impediment to counterterrorism efforts, if confirmed, the Board members will have to carefully assess and prioritize the areas in which the Board can be most effective and add value. This will involve both oversight of targeted ongoing programs as well as providing feedback on new programs and legislative proposals. The Board will take advantage of information gathered by privacy and civil liberties officers and inspectors general so as not to duplicate their efforts.

B. Will you prioritize certain functions or subject-matter areas?

One of the first orders of business, if the Board nominees were confirmed, would be for the Board to meet and establish priorities for the types of programs it will review.

C. How large a staff do you expect to hire? What types of backgrounds will they have?

It is not possible to anticipate the size of the Board's staff until its budget is established. A critical first hire will be an Executive Director to handle the administrative aspects of starting a new independent agency. It will also be important to have staff to handle legal and ethics issues the make sure they are properly addressed. There will be professional staff to assist the Board with its oversight and advice functions. The authorizing statute provides for the Board to make use of detailees who are Federal employees. This will provide an opportunity to have the benefit of employees with extensive experience on

counterterrorism efforts and privacy and civil liberties issues from various agencies and offices. Staff hires will be made in consultation with Board members and without regard to political affiliation.

## RESPONSES BY DAVID MEDINE TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

### ANSWERS TO SENATOR KLOBUCHAR'S QUESTIONS FOR DAVID MEDINE

**QUESTIONS FOR THE RECORD**

**From Senator Amy Klobuchar**

***"Nominations to the Privacy and Civil Liberties Oversight Board"***

**April 18, 2012**

**Questions for all witnesses**

*Question No. 1: Career Experience*

*You have all established very impressive careers with experience working in both public service and private legal practice.*

- *Can you describe any experiences you have had in your career in balancing civil liberties with national security or other priorities?*
- *How did you go about analyzing such conflicts?*

While in private practice, I supervised two pro bono projects for the bipartisan Constitution Project that presented the opportunity to balance national security and criminal enforcement with civil liberties concerns.

In 2007, American cities had begun to install networks of video cameras in public places to address the increased terrorism threat as well as other concerns about public safety. The cameras could be equipped with technologies such as high resolution and magnification, motion detection, infrared vision, and facial recognition—all linked to a powerful network capable of automated tracking, archiving, and identifying suspect behavior. The cameras could track a person's movements throughout the city, capturing where they went, what they did, and with whom they associated, thus raising concerns about privacy, free speech and association, and equal protection. A report was prepared for the Constitution Project that balanced constitutional rights and values with legitimate law enforcement and anti-terrorism goals, by proposing guidelines for the proper management of video surveillance programs. The guidelines included requiring a clear statement of purpose for the program, conducting a civil liberties impact assessment, restricting tracking of individuals, providing public notice, and establishing safeguards to prevent abuse. This balance would permit use of video surveillance for legitimate purposes while respecting civil liberties values.

Two years later, I assisted the Constitution Project in developing a response to numerous federal agencies' use of over 100 types of labels to designate information, which did not qualify for national security classification, as sensitive but unclassified (SBU) or controlled unclassified information (CUI). There were valid reasons for some documents that did not qualify for classification to, nonetheless, be treated as sensitive with controlled access. However, the SBU or CUI systems lacked any clear standards or accountability with the counterproductive effect of limiting the ability to share such information, which could be put to use in combatting terrorism, with other agencies. The Project's report proposed that a balance be struck between openness in government and protecting sensitive information by creating common government standards and a presumption of openness, increasing access to information by other

federal agencies and the Congress, de-linking CUI identification from responding to FOIA requests, and having these requirements extend beyond terrorist-related information. This approach respected the need to protect certain sensitive information while promoting public accountability and access.

Both of these cases involved government programs with legitimate goals where the methods chosen raised civil liberties concerns. After analyzing the programs, it became clear that changes could be made and guidelines adopted that would permit the programs to proceed consistent with protecting civil liberties.

*Question No. 2: Privacy Concerns in the Commercial Arena*

*Privacy concerns are not just present in the national security context, but also in the commercial arena and with respect to the government's regulation of commerce.*

- *Can you talk about how the dynamics or considerations of privacy might be different in commercial contexts as opposed to security contexts?*
- *Specifically, how can industry, including telecommunications firms, and the government work together to improve our approach to privacy issues?*

Whenever information is collected about individuals, privacy concerns can arise, whether it is collection by the government for national security purposes or by private firms for marketing purposes. In the commercial context, there is a tension between companies' wanting as much information as possible about their customers, often to improve their ability to market new products and services, and some customers' discomfort with the collection practices employed. By contrast, in the national security context, the government seeks to collect information with the goal of detecting and thwarting potential attacks on this country and locating and bringing to justice anyone who attempts or carries out such attacks. While protecting our national security is a shared goal, there are legitimate concerns about how much information is collected by the government that could prevent or chill the exercise of civil liberties and also could be subject to abuse.

While these very disparate contexts give rise to privacy concerns, there are common approaches that can be used to address them. One effective approach is "privacy by design." The best, most efficient time to address privacy is during the design process, whether it involves a counterterrorism program or a commercial website that wants to better understand its visitors. It is possible in program design to achieve governmental or commercial goals while respecting privacy concerns. However, it is far harder to make changes to an existing program to address privacy concerns.

Another tool for protecting privacy the national security and commercial contexts is accountability. The Privacy and Civil Liberties Oversight Board is designed to serve as a check on certain governmental information collection and use practices to make sure they strike the right privacy balance by exercising its oversight authority, including gathering data on what information is being collected and how it is being used. In the commercial context, accountability can be accomplished by providing consumers the opportunity to access information collected about them. The Federal Trade Commission and other government agencies can also use their investigative and enforcement powers to conduct oversight. Self-regulatory organizations can also play an important role.

In addition to working on parallel tracks, there are opportunities for government and the industry to better protect individuals' privacy. Fair information practices (FIPs) have been developed in the private and public spheres. Industry and government could share their approaches to effectively addressing FIPs. For

instance, the Privacy and Civil Liberties Oversight Board is authorized to hold public hearings at which industry and government could collaborate on effective ways to address privacy issues.

## RESPONSES BY JAMES DEMPSEY TO QUESTIONS SUBMITTED BY SENATORS LEAHY, GRASSLEY, AND KLOBUCHAR

**Questions for the Record – Responses of James X. Dempsey**

**Question from Chairman Leahy**

*Data Retention*

On March 22, the Director of National Intelligence and the Attorney General jointly released new guidelines governing the acquisition and retention of data by the National Counterterrorism Center (NCTC). Under these new guidelines, it is now conceivable that the NCTC could retain vast amounts of data regarding U.S. citizens for up to five years – well beyond the six months that was allowed under the previous guidelines. The new guidelines specifically state that the Privacy and Civil Liberties Oversight Board shall have "access" to all relevant NCTC records, reports, and other material relevant to its oversight of NCTC. However, the guidelines do not require any of the oversight and compliance reporting to go to the Privacy and Civil Liberties Oversight Board.

Mr. Dempsey, as a member of the Privacy and Civil Liberties Oversight Board, how would you view the Board's role in reviewing this new policy and other emerging policy issues that involve the collection and retention of Americans' personal data?

A: If confirmed, I would recommend to the Chairman of the Board and fellow Board members that the Board view this issue within the broader context of the role and activities of the NCTC. In particular, I believe that the new guidelines on retention should be examined within the context of the full range of data that agencies share with the NCTC and how the NCTC uses that data. If confirmed, I would want to explore what other checks and balances, in addition to any specified time limit on data retention, are in place, or would be appropriate, to protect civil liberties while ensuing that the NCTC is able to fulfill its mission. On these questions, I would want to consult closely with the responsible officials at DHS, at the NCTC, and at other agencies.

**Questions for the Record – Responses of James X. Dempsey**

**Senator Chuck Grassley Questions for the Record**

**(1) Scope of the Board's Authority and Responsibilities of its Members**

Following the terrorist attacks on 9/11, Congress made a number of reforms in order to protect the nation from further terrorist attacks. These reforms included tearing down the artificial "wall" between law enforcement and national security cases that the Justice Department had created; passage of the USA PATRIOT Act; reforming the intelligence community; and updating the Foreign Intelligence Surveillance Act (FISA).

All told, the various reforms, recommended by the 9/11 Commission and then implemented, have strengthened our national security and have helped to prevent another major terrorist attack on U.S. soil. However, we must remain vigilant against terrorist threats and not let down our guard. That said, some have argued that all these reforms to our intelligence, law enforcement, and national security agencies have been at the cost of civil liberties and individual rights. Recognizing this concern, the 9/11 Commission recommended that Congress create the Privacy and Civil Liberties Oversight Board to oversee the new authorities granted to these agencies.

Congress also acted by passing and signing into law the Intelligence Reform and Terrorism Prevention Act of 2004, which included provisions creating the Privacy and Civil Liberties Oversight Board in statute. In 2007, legislation updated the board's statute, reestablishing it as an independent agency in the executive branch.

As President Obama waited until December 2010 to nominate two of the five Board members and other three were not nominated by President Obama until December 2011, the role of the PCLOB has yet to be fleshed out and many details of the scope of its authority remain unclear. Thus, the philosophical perspectives of the board members of the utmost importance, and your thorough answers are appreciated.

A. What is your philosophy about privacy and civil liberties, especially when considered in the context of national security, law enforcement and cybersecurity efforts?

A: My philosophy on this matter is the same as that expressed in the findings of Congress in Section 1061(b) of the National Security Intelligence Reform Act of 2004, as amended by Section 801(a) of the 9/11 Commission Act:

> "(1) In conducting the war on terrorism, the Government may need additional powers and may need to enhance the use of its existing powers.
> "(2) This shift of power and authority to the Government calls for an enhanced

system of checks and balances to protect the precious liberties that are vital to our way of life and to ensure that the Government uses its powers for the purposes for which the powers were given.
"(3) The National Commission on Terrorist Attacks Upon the United States correctly concluded that 'The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.'"

B. Describe how you would view your role as a member of this Board. Specifically, do you see the position as akin to that of a judge, an advocate, an investigator or something else? And if you see yourself as having the role of an advocate, which groups or interests will you be advocating on behalf of, if confirmed?

A: If confirmed, I would view my role as defined in the statute establishing the Board: to provide independent advice and counsel on policy development and implementation related to efforts to protect the Nation from terrorism and oversight of regulations, policies, and procedures of the Executive Branch relating to efforts to protect the Nation from terrorism, to ensure that privacy and civil liberties are protected, as further delineated in the statute, recognizing that the Board would have to prioritize its activities and would want to avoid duplication of effort with existing privacy and civil liberties processes and offices.

C. Do you believe that your work on the Board must be impartial and neutral? Or do you believe that in carrying out your work, you would be free to have empathy for certain positions or groups?

A. I believe that my work on the Board, if confirmed, must be impartial and neutral.

D. In the area of privacy and civil liberties, do you have any heroes or role models? And if you do, who are they and why are they your heroes or role models?

A. My hero and role model in the area of privacy and civil liberties is now-retired Congressman Don Edwards, former FBI agent and long-time chairman of the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights. Chairman Edwards exercised oversight of the FBI with the highest respect for the men and women who risk their lives to keep us safe, displaying in all his actions his dedication to the Constitution and his love for this country. If confirmed, I would strive to do the same.

**(2) <u>Views on Duplication Existing Government Privacy and Civil Liberties Efforts</u>**

The Board was created in the Intelligence Reform and Terrorism Prevention Act of 2004, as amended in 2007. The same legislation also created the Office of the Director of National Intelligence (ODNI). And consistent with the provisions of the Act, within ODNI there is an Office of Privacy and Civil Liberties. And the Department of Justice, as required by its 2005 reauthorization, has a Chief Privacy and Civil Liberties Officer with a supporting office. The Department of Homeland Security has a statutorily created Office of Civil Rights and Civil Liberties and a separate Office of Privacy. And the Department of Defense has a Privacy and

Civil Liberties Office, as well as the State Department, and other departments and agencies. The Board's authorizing legislation provides that the Board will "receive reports from" other similar offices in the Executive Branch, "make recommendations" to those other offices, and "coordinate" their activities. It's not clear what the unique contribution of the Board is to this arrangement.

Although the Board has been on the books for many years, it has yet to actually function. Meanwhile, each of the relevant agencies in the war on terrorism—the Director of National Intelligence (DNI), Department of Justice (DOJ), Department of Defense (DOD), Department of Homeland Security (DHS), and others—have their own similar office. In fact, Homeland Security actually has two separate offices, one just for privacy, and one for civil rights and civil liberties - both created by the Homeland Security Act. Depending on how it is implemented, the Board is in danger of becoming another layer of bureaucracy.

I am interested in your views on what you envision your unique contribution might be, considering the vast number of privacy offices that currently exist. How do you plan to coordinate with these offices?

A: If confirmed, I will adhere to the directions in the statute creating the Board, which addresses relationships with the existing privacy offices in Section 1061(d)(3). If confirmed, I will strive to coordinate, collaborate and consult regularly with the privacy officers and all other relevant oversight bodies and mechanisms, to avoid duplication, including in setting the priorities of the Board.

A. Can you describe what the privacy and civil liberties office does at the Office of the Director of National Intelligence (ODNI)?

A: My understanding of the work of all of the privacy and civil liberties officers is grounded in the statutory description of their functions, section 803 of the 9/11 Commission Act, which amended Section 1062 of the National Security Intelligence Reform Act of 2004.

The responsibilities of the privacy and civil liberties officers at the Office of the Director of National Intelligence include ensuring that the protection of privacy and civil liberties is appropriately incorporated in Intelligence Community policies and procedures, overseeing compliance by the ODNI with privacy and civil liberties laws, reviewing complaints of possible abuses of privacy and civil liberties in programs and operations administered by the ODNI, and ensuring that the use of technology sustains, and does not erode, privacy. Further statutory direction specific to this office is found in 50 U.S.C. 403-3d.

B. Can you describe what the privacy and civil liberties office does at the Department of Homeland Security (DHS)?

A: The Department of Homeland Security has an Office for Civil Rights and Civil Liberties and a Chief Privacy Officer. The DHS Privacy Office works with every Department component and program to ensure that privacy considerations are addressed when planning or updating any program, system or initiative. It strives to ensure that technologies used at the Department

sustain, and do not erode, privacy protections. Responsibilities of the Chief Privacy Officer are further described in Section 222 of the Homeland Security Act of 2002, as amended, 6 U.S.C. 142. The responsibilities of the Office for Civil Rights and Civil Liberties are further described in Section 705 of the Homeland Security Act, 6 U.S.C. 345.

C. Can you describe what the privacy and civil liberties office does at the Department of Justice (DOJ)?

A: The Department of Justice has a Chief Privacy Officer and an Office of Privacy and Civil Liberties (OPCL). The principal mission of OPCL is to protect the privacy and civil liberties of the American people through review, oversight, and coordination of the Department's privacy operations. OPCL provides legal advice and guidance to Departmental components; ensures the Department's privacy compliance, including compliance with the Privacy Act of 1974, the privacy provisions of both the E-Government Act of 2002 and the Federal Information Security Management Act, as well as administration policy directives issued in furtherance of those Acts; develops and provides Departmental privacy training; assists the CPCLO in developing Departmental privacy policy; prepares privacy-related reporting to the President and Congress; and reviews the information handling practices of the Department to ensure that such practices are consistent with the protection of privacy and civil liberties. The responsibiliites of the Chief Privacy Officer are described in section 1174 of Pub. L. 109-162.

D. Can you describe what the privacy and civil liberties office does at the Department of Defense (DOD)?

A: The Department of Defense privacy and civil liberties office oversees programs and develops policy to protect privacy and civil liberties of more than 2.3 million U.S. Military service members (Active, Reserve and Guard), 700,000 Civilian employees, military installations, hospitals, and schools, as well as the private citizens and organizations with whom DOD interacts.

E. How will the Board's work differ from these offices?

A. In contrast to these offices, the Board will be an independent entity, it will have a government-wide perspective, and it will focus on policies, programs and powers relating to efforts to protect the Nation from terrorism (and other matter specifically assigned to it by Congress), while those offices have a purview and responsibilities extending beyond counter-terrorism programs

F. How will you ensure that you do not duplicate the efforts of these offices?

A: If confirmed, I will work with the Chairman of the Board to ensure that the Board coordinates closely with these offices to avoid duplication. Among other steps that will promote coordination, the statute establishing the Board specifies that the Board will receive and review reports and other information from privacy officers and civil liberties officers. If confirmed, I expect that among our first activities will be to meet with these offices, and I further expect that we will meet or communicate with them on an ongoing basis, seeking their guidance on priorities

and the avoidance of duplication.

The war on terrorism requires a careful balance between aggressive counter-terrorism policies and the protection of privacy and civil liberties. We can't be so aggressive that U.S. citizens rights' are violated, but we also can't ignore effective policies that will deter and prevent terrorist acts. Most relevant agencies have a civil liberties or privacy office now, that have been debating this balance for years. So, in many ways, this Board is late to the debate.

G. If an agency, or the President himself, disagrees with input the Board provides on a particular action or policy, what will you do?

A: If confirmed, in the situation described I would work with the Chairman and the other members of the Board to fulfill the directions of section 1061(e)(2)(D).

H. Do you plan to make recommendations to Congress on legislation? If so, please describe how you will approach that effort.

A: The statute creating the board states that the Board shall review proposed legislation related to efforts to protect the Nation from terrorism and advise the President and the departments, agencies, and elements of the Executive Branch to ensure that privacy and civil liberties are appropriately considered in the development of such legislation. The statute does not expressly require the Board to make recommendations to Congress on legislation. However, the statute does require the members of the Board to appear and testify before Congress upon request. In addition, the statute requires the Board to periodically submit, not less than semi-annually, reports to Congress that shall include information on the findings, conclusions and recommendations of the Board.

**(3) <u>Preventing the Rebuilding of the "Wall" Between National Security and Law Enforcement.</u>**

One of the failures of the pre-9/11 mind-set was the strict separation between law enforcement and intelligence operations. The 9/11 Commission found that the "wall" created in the 1990s in the FBI and DOJ between collection of information for foreign intelligence purposes and the use of information to prevent terrorist acts inhibited crucial information sharing. Breaking down that wall has been one of the great successes of the post-9/11 reorientation of DOJ and the FBI to terrorism-prevention, not just post-hoc crime solving. In addition, the 9/11 Commission found that the "stove-piping" of information among national security agencies was harmful to finding, tracking, and [illegible] terrorists. It was this "stove-piping" that prevented anyone from fully "connecting the dots" to find the 9/11 terrorists.

However, many privacy and civil liberties advocates oppose widespread sharing of information across agencies because of the fear that it allows the government to aggregate too much information about individuals. Without such capabilities, however, full pictures of terrorists will not be possible, connections among them will be missed, and terrorist networks will go undetected.

When asked about how you will ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence, you seemed to agree that the wall should remain down, and that you would find ways to protect both the interests of law enforcement and civil liberties. There also appeared to be agreement among the panel of nominees that you should be involved at the design stage in creating law enforcement tools that implicate privacy or civil liberties concerns.

A. Based on your previous responses, please explain in greater detail how you plan to accomplish "finding ways to protect the interest of law enforcement and civil liberties," and "being involved at the design stage?"

A: If confirmed, I will seek ways to protect the interests of law enforcement (and national security) and civil liberties by listening carefully to law enforcement, intelligence and national security officials to understand the threats and challenges they face and the approaches that are available to them (or could be developed). I will discuss with them the full range of alternatives and work with them to determine what approach, if any, is most likely to achieve the counterterrorism objective while also protecting civil liberties. One of the best ways to achieve that balance is when a program is being designed, when the range of options is often widest. That is often the best time to build in the controls and other features that would make a program successful but also protective of civil liberties.

B. How will you ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence?

A: If confirmed, I expect to closely consult, along with other members of the Board, with both law enforcement and intelligence agencies that have a need for information from each other, to understand their needs and to directly ask them if any of our recommendations would contribute to a new wall.

C. What is your view of the relationship between law enforcement and intelligence gathering?

A: Our lead federal law enforcement agency, the FBI, is also an intelligence agency, and the guidelines for FBI domestic operations promulgated by Attorney General Mukasey correctly recognize that in exercising its law enforcement, national security and foreign intelligence authorities, the FBI collects "information," which should not be stovepiped. As the guidelines state, "The major subject areas of information gathering activities under these Guidelines - federal crimes, threats to the national security, and foreign intelligence - are not distinct, but rather overlap extensively."

D. What is your view of the importance of information sharing between all Executive Branch agencies in order to ensure that someone can "connect the dots" to find terrorists?

A: It is critical that Executive Branch agencies share information in order to ensure that someone can "connect the dots" to find terrorists. The statute establishing the Board states that the Board shall review proposed legislation, regulations, and policies related to the development and

adoption of information sharing guidelines and to review the implementation of those guidelines.

E. Do you oppose "stove-piping" of information by Executive Branch agencies, in order to ensure that someone can "connect the dots" to find terrorists? Please explain.

A: I oppose "stovepiping" of counter-terrorism information by Executive Branch agencies (recognizing that security concerns must be addressed). I believe that it is possible to promote information sharing within a framework that protects the security of the information as well as privacy and civil liberties.

**(4) Opinions on Patriot Act & FISA Provisions**

The PATRIOT Act provides tools in the fight against violent acts of terrorism and was reauthorized last year. It provides authority to a court to authorize a roving wiretap to obtain foreign intelligence information not concerning a U.S. person, under Section 206. It provides authority to a court to authorize obtaining records and information under Section 215, like a grand jury subpoena. And National Security Letters can be used like administrative subpoenas, but with high-level approvals.

The FISA Amendments Act (FAA) will expire at the end of 2012. The Intelligence Committee and the Judiciary Committee will have to address reauthorization of this highly classified national security tool soon. I am interested in your opinions about the national security and anti-terrorism tools in current law.

A. Would you vote to reauthorize the PATRIOT Act, as it now reads? If not, why not? What would you change?

A: The statute establishing the Board specifies that, in providing advice on proposals to retain or enhance a particular governmental power, the Board shall consider whether the department, agency, or element of the executive branch has established (i) that the need for the power is balanced with the need to protect privacy and civil liberties; (ii) that there is adequate supervision of the use by the executive branch of the power to ensure protection of privacy and civil liberties; and (iii) that there are adequate guidelines and oversight to properly confine its use. If confirmed, and if any question concerning the PATRIOT Act were to be considered by the Board, I would make my assessment based on all the facts, within the framework laid out by the statute establishing the Board.

B. Are there any tools authorized by the Patriot Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

A: At this point, it is impossible for me to say whether, as a member of the Board, I would have any concerns about any of the tools authorized by the Patriot Act. I would note that the FBI's implementation of the authority to issue National Security Letters, amended by the Patriot Act, has been examined by the Inspector General in several reports, and the FBI has adopted further procedures for NSLs in response to the findings of the IG. Depending on any current or planned work by the IG or other offices, implementation of the NSL authority might or might not be an

appropriate subject for the Board to examine. If confirmed, and if the Board were to examine any of the tools authorized by the Patriot Act, I would proceed as described in response to question A.

C. What about the Foreign Intelligence Surveillance Act (FISA) – would you vote to reauthorize it, as it now reads? If not, why not? What would you change?

A: At this point, it is impossible for me to say whether, as a member of the Board, I would have any concerns about FISA. If confirmed, and if the Board were to examine any aspect of FISA, I would proceed as described in response to question A.

D. Are there any tools authorized by the FISA Amendments Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

A: At this point, it is impossible for me to say whether, as a member of the Board, I would have any concerns about the FAA. If confirmed, and if the Board were to examine any aspect of the FAA, I would proceed as described in response to question A.

E. Please describe when or how you have dealt with the FISA law?

A: I have dealt with FISA as an outsider. I have written about FISA, most recently for a volume entitled "A Journalist's Guide to National Security Law," being compiled as a joint project of the American Bar Association Standing Committee on Law and National Security and the Medill School of Journalism National Security Initiative. Between 2005 and 2008, I testified on several occasions before Congressional committees on proposed changes to FISA.

**(5) <u>Views on the Use of the Traditional Law Enforcement Model or Military Commissions in Counterterrorism</u>**

We've been fighting the war on terrorism for more than 10 years. One of the key debates in the public has been the difference between war and law enforcement. For example, the creation and operation of military commissions has been very controversial, with many people opposing their use, even for terrorists captured abroad. Some want them to be tried only in civilian courts in the United States. Other controversial topics have included detention authority, enhanced interrogation, surveillance, and drone strikes. Some people want all of these to be subject to court review and constitutional and other legal restrictions. But how one approaches these problems may be determined by whether one believes we are at war or only engaged in law enforcement. Please explain your views on the following.

A. Do you believe that we are engaged in a war on terrorism?

A: I believe that Congress has authorized the use of military force against Al Qaeda and its allies and that it is appropriate to use military force against foreign terrorists in other circumstances.

B. Do you think that there are times when a law-of-war paradigm is appropriate, or should every action by the Executive Branch be governed by standard law enforcement models?

A: Yes, there are times when a law-of-war paradigm is appropriate.

C. If the law enforcement model is appropriate, please give some examples of why it is superior to a law-of-war model.

A: The law enforcement and intelligence models are appropriate in most circumstances inside the United States. For example, the grand jury is a very powerful information gathering tool that is not available to the military. Overseas, when cooperating with allies, especially when operating in democratic countries, a law enforcement or intelligence model may be appropriate. For example, authorities in the UK, when they have arrested a terrorism suspect, may prefer to share information and coordinate responses on both sides of the Atlantic with U.S. law enforcement or intelligence officials rather than with military officials.

D. Specifically, do you think military commissions have a place in the war on terrorism? Do you think that Miranda warnings must always be given to terrorist suspects? Do you think military operations conducted abroad should be reviewed by federal courts?

A: I have no opinion on military commissions – it is simply not a subject I have studied. In terms of the application of Miranda warnings in the context of terrorism, I also have not studied it and do not have an opinion about what must always happen. I am not familiar with any theories under which military operations conducted abroad should be reviewed by federal courts. If I am confirmed, and if any of these issues comes before the Board, I will give it full and fair consideration, carefully studying the relevant law and consulting closely with relevant entities.

**(6) Views on Race and Ethnicity Relating to Terrorism Cases**

On April 17, 2012, the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights, held a hearing entitled "Ending Racial Profiling in America."

A. Do you believe that focusing the limited resources of an investigative agency where they are most likely to make an impact is the best method for combating terrorism?

A: Yes.

B. How do you address the homegrown terrorism threat, and the appropriate response to it, while completely ignoring race, religion, or ethnicity as a factor in the investigation?

B: I do not have a theory on how to address the homegrown terrorist threat, except to say that the response must be guided by relevant intelligence. I understand that the homegrown threat is diverse, ranging from Major Nidal Hassan to the 5 anarchists arrested recently in an alleged plot to blow up a bridge near Cleveland. As a general matter, it seems to me that, since terrorism is often carried out by those motivated by religious or other ideology, it is impossible to completely ignore ideology in responding to it.

C. While most, including me, agree that racial profiling is unacceptable, is the same true for profiling foreign nationals coming to the U.S. from certain high-risk foreign nations?

A: I agree that racial profiling is unacceptable. That being said, I would not say that it is "profiling" to consider, for purposes of screening at the border, arrival from or transit through a high-risk foreign nation.

**(7) Targeted Killing of Anwar Al Awlaki**

On March 5, 2012, Attorney General Holder gave a speech on national security matters to students at Northwestern University School of Law. In his speech, Attorney General Holder discussed a number of national security issues, including the Authorization for Use of Military Force (AUMF), the Foreign Intelligence Surveillance Act (FISA), adjudication of al Qaeda terrorists via civilian courts or military commissions, and the authority to kill American citizens working for al Qaeda abroad. Specifically, in discussing the President's unilateral authority to kill an American citizen abroad, Attorney General Holder stated, "'Due Process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."

Attorney General Holder further argued that "[t]he Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen." The Attorney General thus argued that the President has the constitutional power to authorize the targeted killing of an American citizen without judicial process.

The Board has broad jurisdiction to "review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties."

When asked if you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process, you all responded that you did not have enough information about the al Awlaki scenario to make a judgment call. Regardless of the White House's failure to make its legal reasoning public, please respond to the following question based on your own opinions or beliefs.

A. Do you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process? Why or why not?

A: This is not an issue I have studied or carefully considered before. The power referred to is an extraordinary power, but I always hesitate to offer opinions about momentous matters that I have not carefully considered. My assumption is that many factors would come into play in determining what process is due.

When asked if you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties, most of you responded that you viewed your role as providing oversight and advice, and reporting to Congress. Mr. Dempsey stated that he believed the Board probably does not have the power to make "declarations." Please respond in greater detail than in your testimony to the following question, and also indicate whether or not you subscribe to Mr. Dempsey's belief that the Board does not have power to make "declarations."

B. Do you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties?

A: Just reiterating what I said at the hearing, I do not believe that Board has the power to make "declarations" about the constitutionality of any Presidential action.

C. Do you support Attorney General Holder's public statement that due process does not necessarily include judicial process when it comes to national security? Which national security matters require judicial process and which ones do not?

A: I generally agree, but it is not possible for me – and I suspect that it would be impossible for anyone - to draw a general or comprehensive line between which national security matters require judicial process and which ones do not. In some areas, the line is well-established: For example, security clearance determinations are not subject to judicial process.

D. If confirmed, would you request a copy of the legal reasoning used to justify the al Awlaki killing? Would you support Congress having a copy? As this legal reasoning implicates important constitutional rights, would you support the memo being made public, with appropriate security redactions?

A: I am not sure whether the killing of al Awlaki is a matter upon which the Board should focus its limited resources. Before forming an opinion on that, I would want to hear the views of relevant Executive branch officials, as well as of Members of this and other committees that have an interest in the matter. If the Board were to take up the matter, and if I were confirmed as a member of the Board, I would expect the Board to request a copy of the legal reasoning used to justify the killing. Regardless of the role of the Board, I support Congress having a copy of that opinion. Generally, I believe that the Executive Branch's legal reasoning regarding its powers should be made public, with appropriate security redactions.

**(8) Classified Information**

To carry out its duties, the Board is authorized to have access to information from any Department or agency within the executive branch, including classified information. To manage that classified information appropriately, the Board shall adopt "rules, procedures . . . and other security" "after consultation with the Secretary of Defense, the Attorney General, and the Director of National Intelligence." Please elaborate on background and experience in dealing with classified information.

A. Do you currently have a security clearance?

A: No.

B. How do you plan to hold classified information without a SCIF? Do you anticipate asking Congress to give you funds to build one?

A: The Board will have limited resources, and, if confirmed, I will work with the Chairman and the other members of the Board to ensure that they are wisely spent. If confirmed, I would urge that the Board consider a full range of cost-effective possibilities, including occupying secure space previously used by another entity, if any becomes available, or to co-locate in a facility where the security costs would be reduced.

C. As a Board, how much time do you expect to spend reviewing classified information?

A: I expect that a large percentage of the work of the Board will require access to classified information or discussion with officials about matters that are classified.

D. If it's a close call in determining whether to publish sensitive national security information, on which side do you err – the side of national security or public disclosure?

A: The statute establishing the Board requires it to prepare, at least twice a year, a report "which shall be in unclassified form to the greatest extent possible." In addition, the statute specifies that the Board "shall—(1) make its reports, including its reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law; and (2) hold public hearings and otherwise inform the public of its activities, as appropriate and in a manner consistent with the protection of classified information and applicable law." It is my assumption, however, that the Board will not have the ability to publish any previously classified information without the approval of the Executive Branch. I expect that, like other oversight bodies, the Board would engage in discussions with the Executive Branch about what could and could not be published.

**(9) <u>Scope of Constitutional Protections</u>**

Currently, national security law defines a U.S person as a U.S. citizen (USC), a Lawful Permanent Resident (LPR), a U.S. corporation, or a group whose members are substantially USCs or LPRs. FISA, 50 U.S.C. 1801. Some argue that all persons found in the United States should receive the same protections under the Constitution that U.S. citizens possess.

A. Who should be entitled to protection as a U.S. person?

A: As you describe, U.S person is defined in FISA.

B. Do you believe that the definition of U.S. person should be broader, to include persons in the process of applying for permanent residence, or do you believe it should it be restricted to the traditional statutory definition in FISA?

A: I have not studied this question, but based on what I know now, I do not believe that the definition of U.S. person should be broader.

C. If the definition of U.S. person is defined broadly, can it create problems for quickly sharing terrorism information? If not, why not?

A: Already, the concept of U.S. person causes problems for quickly sharing terrorism information, so expanding the definition would logically expand the problem.

**(10) Scope of Authority to File Amicus Briefs**

The Board is given very broad duties and authorities. The statute clarifies that this Board is to be treated as an agency and not an advisory committee.

A. Do you believe it is within the Board's authority and power to file an amicus brief in a case?

A: There is no express authority for the Board to file amicus briefs, and I do not believe that the filing of amicus briefs would be a wise use of the Board's resources.

B. If the answer to the above question is yes, and if it takes only three Board members to make a quorum, can the Board file an amicus brief if two members don't agree?

N/A

C. If the answer to the above question is yes, could the two disagreeing members file a brief outlining their opposing view?

N/A

D. Where in the statute do you find the authority that allows the Board to file an amicus brief?

N/A

**(11) Cybersecurity Legislation**

Many of the Cybersecurity bills include language rebuilding the wall, by limiting the use of cyber-threat information for purposes outside Cybersecurity—including national security and counter intelligence.

(1) Do you support recreating the wall as part of cybersecurity legislation?

A: I do not support recreating the wall as part of cybersecurity legislation. One aspect of the wall pre-9/11 was that information collected under surveillance statutes – in compliance with applicable rules for judicial authorization - for counter-terrorism purposes could not be shared with and used by other units *for counter-terrorism purposes* if the units were operating under different legal categories (law enforcement vs. intelligence). For example, FBI agents conducting the criminal investigation of the African embassy bombings by al Qaeda were prohibited from sharing the information they obtained under the powers of the grand jury with FBI agents investigating al Qaeda under the FBI's foreign counter-intelligence authorities, while FBI agents conducting court-ordered FISA surveillance of terrorism targets in the US were prohibited from sharing that information with FBI agents conducting criminal investigations of the same group. By bringing down the wall, Congress ensured that all counter-terrorism information could be shared with all counter-terrorism agencies. The issue currently under discussion in the context of cybersecurity legislation is in some ways different: Should information collected for cybersecurity purposes be used by non-cybersecurity agencies for non-cybersecurity purposes? In particular, should information collected "notwithstanding any other law," including the content of domestic communications collected inside the US without a court order, be shared with agencies not involved in cybersecurity and used for other purposes unrelated to cybersecurity? I believe that a balanced solution to that question can be achieved.

(2) Regardless of what Congress does, do you think that a wall should exist between cybersecurity information sharing to prevent cyber-attacks and law enforcement?

A: I believe that information obtained obtained by the government from the private sector without a court order for cybersecurity purposes should be able to be shared with law enforcement to be used for investigating and prosecuting cybersecurity crimes. For example, if a private company uncovers information indicating that a person has hacked into the company's network in an effort to steal its intellectual property, the company should be able to share information about this cyber attack with other companies and with the federal government to help prevent such attacks on others, and the information shared could be used to investigate and prosecute both a violation of the Computer Fraud and Abuse Act as well as attempted theft.

(3) At the hearing, many of you stated you have not studied this issue. Mr. Dempsey stated that, if confirmed, the Board would look closely at this issue. However, Mr. Dempsey added, "Congress is going to have a say on that issue, I think, before this board comes into creation, and we will work with the authorities and decisions that Congress makes on that cybersecurity legislation." While I appreciate your willingness to study the issue and your deference to Congress, I want to know your position on certain cybersecurity related topics.

1. Do you support private networks, service providers, and private industry sharing customer information with the Federal Government if that information evinces a cybersecurity threat or vulnerability to public or private systems? If not, why not?

A: Yes.

2. What restrictions should be placed on information shared with the Federal Government? Should information be limited to metadata only or should it include contents of communications?

A: As I said at the hearing, I would, if confirmed, work in my capacity as a member of the Board within whatever structure Congress enacts. I have argued that information shared for cybersecurity purposes should generally be used only for cybersecurity purposes, including for the investigation and prosecution of cybercrimes and crimes committed by cyber means and for national security purposes related to cyber (such as responding with other appropriate foreign policy, intelligence and national security options to China's efforts to steal government and commercial data). S. 2105, the Cybersecurity Act, introduced by Senators Lieberman and Collins, would place some reasonable limits on the use of information that is shared with the federal government for cybersecurity purposes. In addition, all of the leading cybersecurity bills limit or prohibit the use of cybersecurity information for regulatory purposes. Placing limits on the use of information shared for cybersecurity purposes could help make the information sharing program a success. Under all pending cybersecurity legislation, information sharing would be voluntary. ISPs and others would share very little or they would share useful information based on their perception – and their customers' perceptions – of how the information is being used. Companies might be more willing to share, and the national cybersecurity posture would be improved, if companies and their customers were assured that information was not being used broadly for non-cybersecurity purposes. A failure to specify how the information may be used could make it less likely that companies would voluntarily share in the first place.

I believe that information shared with the government under a cybersecurity exception may properly include the content of communications, since it is often the content that constitutes the malicious code or the attack signature.

3. What restrictions should be placed upon cybersecurity threat information shared with the Federal Government? For example, should personally identifiable information (PII) be minimized or redacted? Should the use of this information be limited to merely address cybersecurity threats or could it be used for national security, intelligence, counterintelligence, national security, or criminal matters? If you believe it can be shared, what categories of the aforementioned purposes can it be shared?

A: Please see my response to question #2, above. Additionally, in terms of the minimization or redaction of PII, there should only be, at most, redaction of non-relevant PII. Some PII will be directly relevant to the utility of the information for permitted purposes.

4. How long should any shared information be retained?

A: Retention should be based on the utility of the information for cybersecurity purposes and for other permitted uses that have been identified.

**(12) United States v. Jones**

In her concurrence in the recent case, *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., *concurring),* Justice Sotomayor agreed with Justice Alito that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"

Her concurrence then elaborated that even with short-term monitoring, "some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention." Justice Sotomayor stated that GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." She further indicated that she "would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements."

A. With respect to Justice Sotomayor's discussion of the temporal elements of the 4th Amendment, please explain your interpretation of her statements and whether or not you support her position.

A: Justice Sotomayor's discussion of the length of time that monitoring occurred was quite limited, and the question essentially quotes all of the relevant text: Justice Sotomayor was agreeing with Justice Alito that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy,'" and she went on to say that in cases involving "short-term monitoring, some unique aspects of GPS surveillance relevant to the *Katz* analysis will require particular attention." I agree with Justice Sotomayor both in her reading of Justice Alito's opinion and in her statement that, in determining what is a "search" under *Katz's* reasonable expectation of privacy test, the unique attributes of GPS surveillance merit attention.

B. Do you believe the 4th Amendment has a temporal restriction? Do you believe that information that is initially acquired lawfully may become subject to 4th Amendment restrictions over time?

A: I do not believe that is possible to say in the abstract whether the Fourth Amendment has a temporal restriction. Time may have some relevance to determining whether a search or seizure is reasonable. See *Terry v. Ohio.* In addition, in *Jones*, Justice Alito said that time was relevant to determining whether a search had occurred: "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. See *Knotts,* 460 U.S., at 281-282. But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."

**(13) Agency Authority**

The statute establishes the Board as "an independent agency within the executive branch". And the Board "shall" analyze and review actions taken by the executive branch. The Executive Office of the President is obviously part of the executive branch, and nowhere is the President excluded from the Board's review and purview.

A. Do you believe that the Board will have the duty to review and analyze actions of the President and the Executive Office of the President?

A: The statute creating the Board states that the Board "shall … analyze and review actions the executive branch takes to protect the Nation from terrorism." It also states that the Board "shall continually review … the procedures, and the implementation of the regulations, policies, and procedures, of the departments, agencies, and elements of the executive branch relating to efforts to protect the Nation from terrorism to ensure that privacy and civil liberties are protected."

B. Do you believe that the Board will have the duty to review and analyze actions of the Vice President and the Office of the Vice President?

A: To the extent that the Vice President and the Office of the Vice President are involved in actions that are "actions taken by the executive branch," please see my response to question A, above.

C. If the Board disagrees with the actions taken by the President, Vice President, or either of their offices, after the Board has fulfilled its duty to "advise the President… and executive branch", what options does the Board have?

A: In the situation you describe, the Board is required to act under subsection (e)(2)(D) of the stature establishing the Board. If confirmed, and if confronted with such a situation, I would urge the Board to fulfill that requirement with the utmost care and discretion.

C. What is your understanding of the term, "independent agency within the Executive Branch"? How would you compare your authority to that of other, fully independent boards outside the Executive Branch, such as the Securities and Exchange Commission?

A: I think the term means that the President and other members of the Executive Branch cannot control the reports of the Board or direct its activities. I have not studied the authority of other, fully independent boards outside the Executive Branch.

The Board is given authorization for access to any Department, any information, any document, or any person to carry out its duties. And if that access is denied, the Board can ask the Attorney General to issue a subpoena.

E. What recourse will the Board have if the Department of Justice is the executive branch component that is denying access to information?

A: The statute establishing the Board provides that, whenever information or assistance requested is, in the judgment of the Board, unreasonably refused or not provided, the Board shall report the circumstances to the head of the department, agency, or element concerned without delay, and the head of the department, agency, or element concerned shall ensure that the Board is given access to the information, assistance, material, or personnel the Board determines to be necessary to carry out its functions. Such a report to the Attorney General would probably be something that the Board would be required to describe to Congress as a "major activity" in its semi-annual report to Congress.

F. If it is the Office of the President that is denying the Board access to information, do you believe it is realistic that the Board will seek a subpoena from the Attorney General, who reports to the President?

A: I think it would be more likely for the Board to report the situation to Congress.

**(14) Use of International and Foreign Law in Interpreting Privacy and Civil Liberties Issues**

At the hearing, Judge Wald noted her experience with international law, citing her time as a judge on the International Criminal Tribunal for Yugoslavia. This raises the disturbing problem of judges in the United States relying on international and foreign law in interpreting the U.S. Constitution and statutes. In a number of cases, justices of the Supreme Court have cited non-U.S. laws as support for overturning U.S. laws, such as those on execution of juveniles and of the mentally handicapped. Separate and apart from the ultimate wisdom of those decisions, the fact that justices had to rely on other countries' and international organizations' opinions on legal matters, and not on the text, history, and structure of the Constitution and on American legal traditions, is concerning. In addition, as Justice Scalia has pointed out, those justices and the advocates of the use of international and foreign law only selectively cite it as relevant. They typically cherry-pick foreign and international legal decisions that support their favored policy positions, such as abolition of the death penalty, but ignore those that disagree with their positions, such as restrictions on the availability of abortion in most countries around the world.

The problem of selective use of international and foreign law in interpreting U.S. law would seem to be equally at issue for the members of the Privacy and Civil Liberties Oversight Board. Protections for privacy and civil liberties vary widely from one country to another. For example, the United States provides far more rights to the accused than most other countries. In much of Europe, defendants accused of terrorist crimes can be held for up to a week without charge or without seeing a neutral magistrate, rather than the Constitutionally required 48 hours in the United States. Likewise, virtually all European countries, as well as others around the world, require citizens to possess and carry a national identification card that must be presented to authorities upon demand. Such a requirement would be denounced in the United States, and proposals for such a card have never been successful. Laws on surveillance, leaks of classified information, and racial profiling are also far more lenient in much of the rest of the world.

At the same time, human rights advocates have greatly expanded the notion of international human rights law to cover areas of privacy and civil liberties, and they are fond of citing to international treaties, such as the International Covenant on Civil and Political Rights, as support for their attacks on U.S. law and appropriate interpretations of the U.S. Constitution. Like-minded members of international bodies, mainly law professors from around the world, such as the U.N.'s "special rapporteurs," parrot these arguments. Meanwhile, the non-democratic majority of the U.N. General Assembly passes resolutions against the United States motivated by dislike of our foreign policy and tradition of freedom and capitalism. Then human rights advocates claim that "international law" supports their positions.

A. If confirmed, do you commit that your evaluations of the legality and propriety of U.S. government actions to fight terrorism, as they relate to the protection of privacy and

civil rights, will be based exclusively on the requirements of the U.S. Constitution, as interpreted by the Supreme Court, and on U.S. law, and not on foreign countries' laws or on allegations of what international law requires?

A: If confirmed, as sources of law for evaluating the legality and propriety of U.S. government actions to fight terrorism, I will rely exclusively on the requirements of the U.S. Constitution, as interpreted by the Supreme Court, and on U.S. law, including treaties to which the U.S. is a party and other international law to which the U.S. is subject and not on foreign countries' laws or on allegations of what international law requires.

**Questions for the Record – Responses of James X. Dempsey**

**Questions from Senator Klobuchar**

*Question No. 1: Career Experience*

You have all established very impressive careers with experience working in both public service and private legal practice.

- Can you describe any experiences you have had in your career in balancing civil liberties with national security or other priorities?
- How did you go about analyzing such conflicts?

A: For the past 27 years, my career has focused specifically on the need to balance civil liberties with national security and other priorities.

From 1985-1995, I was Assistant Counsel to the House Judiciary Subcommittee on Civil and Constitutional Rights, working on issues involving national security, law enforcement, government surveillance, death penalty procedures, and government databases and information systems, among others. During that period, one example of balancing civil liberties with national security and law enforcement interests was my work as a Congressional staffer in connection with legislation that became the Communications Assistance for Law Enforcement Act of 1994. In the early 1990s, the FBI brought to the attention of Congress concerns that its ability to carry out electronic surveillance was being eroded by factors associated with the transition to digital technology in the nation's telephone networks, the growing importance of mobile telephone, and other technological developments. The FBI urged Congress to adopt legislation requiring telecommunications service providers to design their networks to ensure that the government could readily tap them. The issue presented a need to balance three interests: the government's interest in being able to expeditiously conduct electronic surveillance in criminal and national security investigations, the interests of industry in being able to continue to innovate and offer new features and services, and the values associated with privacy. Working on behalf of the Chairman of the Subcommittee on Civil and Constitutional Rights, I developed and managed a process of consultation with all affected stakeholders. In this effort, I coordinated with minority counsel for the Subcommittee and with staff for the Senate Judiciary Committee. We met multiple times with officials of the FBI, the telecommunications industry, academic experts in network operations and security, and privacy advocates. We convened a series of consultations bringing the parties together for dialogue, seeking to develop a better understanding of the technology, of law enforcement's needs, and of the implications for innovation and privacy. The resulting legislation, CALEA, passed the House on suspension in 1994.

Another example of my work balancing civil liberties and national security was my participation on the Markle Foundation's Task Force on National Security in the Information Age. After the attacks of 9/11, and after it became clear that the failure to share information contributed to the government's failure to identify and prevent the plot, the Markle Foundation convened a bi-partisan task force of former government officials, business leaders, technologists and civil

liberties advocates. I was privileged to serve first as participant in the task force's discussions, then as a member of the Task Force, and then as member of the Task Force steering group. The Task Force met over the course of 4 years, producing a series of reports that influenced and are reflected in the report of the 9/11 Commission, an executive order issued by President Bush, section 1016 of the ITRPA, the amendments to section 1016 in the 9/11 Commission Act, and ICD 501. In the course of that work, we met with officials of the NCTC, NSC, DHS, and FBI. We drew on the expertise of technology experts. The members of the Task Force engaged in extensive dialogue with each other, achieving the consensus reflected in the Task Force's reports and other work products.

Another example of seeking to balance civil liberties with national security was my work as a member of the TSA's Secure Flight Working Group, convened by the Transportation Security Administration in 2005. The small group of technology and privacy experts met with officials of the TSA responsible for passenger screening, reviewed documents relating to the development of Secure Flight, and engaged in extensive dialogue to develop a consensus report, which recommended a program very similar to that which was ultimately adopted by TSA.

Also in 2005, I was privileged to be a member of a bi-partisan group of former government officials who developed recommendations regarding the expiring provisions of the PATRIOT Act. The group included a retired 4 star general, a former deputy secretary of Homeland Security and a former White House chief of staff, as well as the current Attorney General and the current general counsel of the NCTC. The group met over a period of months and developed consensus recommendations for improving the expiring provisions of the Patriot Act.

More recently, in a related area, I worked on balancing privacy with the important energy management goals associated with the Smart Grid. In 2009, the California Public Utilities Commission commenced a set of proceedings designed to adopt rules to encourage deployment of the Smart Grid. I was intensively engaged in the proceedings. I met with other consumer advocates, with the utilities, and with companies developing Smart Grid technology. Working collaboratively with other privacy advocates, I helped lay out a comprehensive data privacy framework, which the PUC adopted. Based on that framework, I then helped draft a detailed privacy rule intended to provide both the clarity and the flexibility demanded of this still evolving field. Most importantly for purposes of your question, I worked with Pacific Gas & Electric to develop the proposed rule, which was presented to the PUC as a joint privacy-PG&E proposal. After extensive comment and some revisions, the PUC adopted a privacy and security rule based largely on the proposal I had helped craft.

*Question No. 2: Privacy Concerns in the Commercial Arena*

Privacy concerns are not just present in the national security context, but also in the commercial arena and with respect to the government's regulation of commerce.

- Can you talk about how the dynamics or considerations of privacy might be different in commercial contexts as opposed to security contexts?

- Specifically, how can industry, including telecommunications firms, and the government work together to improve our approach to privacy issues?

A: This is an important question, although, in my view, privacy concerns in the commercial arena are largely not within the jurisdiction of the PCLOB.

The dynamics of privacy are very different in commercial contexts as opposed to security contexts because the interests in the use of the data are very different. The rules that would be applicable in the commercial context are not the same as those that would be applicable in the commercial context. Nevertheless, the framework for identifying and addressing privacy questions is roughly the same, as the Department of Homeland Security explained in its 2008 Privacy Policy Guidance Memorandum.

I believe that industry, including telecommunications firms, and the government can work together to improve our approach to privacy issues. Already, advertising networks and browser developers are working together with consumer advocates and the government to implement Do Not Track (DNT) technology that makes it easier for users to control online tracking. One forum for cooperation where DNT is being developed is in the World Wide Web Consortium (W3C), where privacy advocates and companies are working together to develop the technical standard that will be used to implement DNT. Another example of industry-government-consumer cooperation is the Botnet Working Group, where industry, government and consumer advocates are working together to develop best practices for ISPs in responding to the botnet infection of their customers' computers, a problem that poses a serious risk to both privacy and security.

## RESPONSES BY ELISEBETH C. COOK TO QUESTIONS SUBMITTED BY SENATORS GRASSLEY AND KLOBUCHAR

**Senator Chuck Grassley**
**Questions for the Record: Responses of Elisebeth C. Cook**

**David Medine, Nominee, to be Chairman and Member of the Privacy and Civil Liberties Oversight Board**

**Rachel L. Brand, Elisebeth Collins Cook, James Xavier Dempsey, Patricia M. Wald Nominees to be a Member of the Privacy and Civil Liberties Oversight Board**

**(1) Scope of the Board's Authority and Responsibilities of its Members**

Following the terrorist attacks on 9/11, Congress made a number of reforms in order to protect the nation from further terrorist attacks. These reforms included tearing down the artificial "wall" between law enforcement and national security cases that the Justice Department had created; passage of the USA PATRIOT Act; reforming the intelligence community; and updating the Foreign Intelligence Surveillance Act (FISA).

All told, the various reforms, recommended by the 9/11 Commission and then implemented, have strengthened our national security and have helped to prevent another major terrorist attack on U.S. soil. However, we must remain vigilant against terrorist threats and not let down our guard. That said, some have argued that all these reforms to our intelligence, law enforcement, and national security agencies have been at the cost of civil liberties and individual rights. Recognizing this concern, the 9/11 Commission recommended that Congress create the Privacy and Civil Liberties Oversight Board to oversee the new authorities granted to these agencies.

Congress also acted by passing and signing into law the Intelligence Reform and Terrorism Prevention Act of 2004, which included provisions creating the Privacy and Civil Liberties Oversight Board in statute. In 2007, legislation updated the board's statute, reestablishing it as an independent agency in the executive branch.

As President Obama waited until December 2010 to nominate two of the five Board members and other three were not nominated by President Obama until December 2011, the role of the PCLOB has yet to be fleshed out and many details of the scope of its authority remain unclear. Thus, the philosophical perspectives of the board members of the utmost importance, and your thorough answers are appreciated.

A. What is your philosophy about privacy and civil liberties, especially when considered in the context of national security, law enforcement and cybersecurity efforts?

B. Describe how you would view your role as a member of this Board. Specifically, do you see the position as akin to that of a judge, an advocate, an investigator or

something else? And if you see yourself as having the role of an advocate, which groups or interests will you be advocating on behalf of, if confirmed?

C. Do you believe that your work on the Board must be impartial and neutral? Or do you believe that in carrying out your work, you would be free to have empathy for certain positions or groups?

D. In the area of privacy and civil liberties, do you have any heroes or role models? And if you do, who are they and why are they your heroes or role models?

*I believe that privacy and civil liberties are often best protected by providing clear, coherent, and rational guidelines, and ensuring that those authorized to act are informed of and trained to those guidelines. The statute authorizing this Board, 42 U.S.C. § 2000ee ("PCLOB statute"), assigns roles to Members of the Board: to provide advice and counsel, and to conduct oversight. If confirmed, I would not view myself as an advocate for any group or interest, and would approach questions with an open mind. There are many individuals I consider to be role models, and each shares one core quality that I seek to emulate: an unwillingness to form opinions or make decisions absent full information about both the threats faced and the potential impact on privacy and civil liberties.*

**(2) <u>Views on Duplication Existing Government Privacy and Civil Liberties Efforts</u>**

The Board was created in the Intelligence Reform and Terrorism Prevention Act of 2004, as amended in 2007. The same legislation also created the Office of the Director of National Intelligence (ODNI). And consistent with the provisions of the Act, within ODNI there is an Office of Privacy and Civil Liberties. And the Department of Justice, as required by its 2005 reauthorization, has a Chief Privacy and Civil Liberties Officer with a supporting office. The Department of Homeland Security has a statutorily created Office of Civil Rights and Civil Liberties and a separate Office of Privacy. And the Department of Defense has a Privacy and Civil Liberties Office, as well as the State Department, and other departments and agencies. The Board's authorizing legislation provides that the Board will "receive reports from" other similar offices in the Executive Branch, "make recommendations" to those other offices, and "coordinate" their activities. It's not clear what the unique contribution of the Board is to this arrangement.

Although the Board has been on the books for many years, it has yet to actually function. Meanwhile, each of the relevant agencies in the war on terrorism—the Director of National Intelligence (DNI), Department of Justice (DOJ), Department of Defense (DOD), Department of Homeland Security (DHS), and others—have their own similar office. In fact, Homeland Security actually has two separate offices, one just for privacy, and one for civil rights and civil liberties - both created by the Homeland Security Act. Depending on how it is implemented, the Board is in danger of becoming another layer of bureaucracy.

I am interested in your views on what you envision your unique contribution might be, considering the vast number of privacy offices that currently exist. How do you plan to coordinate with these offices?

A. Can you describe what the privacy and civil liberties office does at the Office of the Director of National Intelligence (ODNI)?

B. Can you describe what the privacy and civil liberties office does at the Department of Homeland Security (DHS)?

C. Can you describe what the privacy and civil liberties office does at the Department of Justice (DOJ)?

D. Can you describe what the privacy and civil liberties office does at the Department of Defense (DOD)?

E. How will the Board's work differ from these offices?

F. How will you ensure that you do not duplicate the efforts of these offices?

*The responsibilities and authorities of privacy and civil liberties offices vary by statute and otherwise, including by virtue of the missions of the various departments. 50 U.S.C. § 403-3d(b) (ODNI); 6 U.S.C. § 142(a), 6 U.S.C. § 113(d)(3), 6 U.S.C. § 345 (DHS); http://www.justice.gov/opcl/ (DOJ); http://dpclo.defense.gov/privacy/About_The_Office/about_the_office.html (DOD). For example, DHS, by statute, splits various functions between a privacy office on the one hand, and a civil liberties office on the other. In contrast, DOJ's privacy and civil liberties office was not created by statute. But the general role of these offices and officers is the same: to provide a mechanism for consideration of the impact of their department's actions on privacy and civil liberties. The Board, by contrast, is a creature entirely of statute, designed to work with all "departments, agencies, and elements of the executive branch relating to efforts to protect the Nation from terrorism." 42 U.S.C. § 2000ee(d)(1). The Board shall be provided, by statute, "reports and other information from privacy officers and civil liberties officers," 42 U.S.C. § 2000ee(d)(3)(A), and will work best when it builds on the work of those officers rather than duplicating or impeding it. Similarly, many if not all of the relevant agencies have Inspectors General who do important work in this area that should not be duplicated or impeded. The Board must assign its priorities and design its procedures in such a way as to promote collaboration and prevent duplication.*

The war on terrorism requires a careful balance between aggressive counter-terrorism policies and the protection of privacy and civil liberties. We can't be so aggressive that U.S. citizens rights' are violated, but we also can't ignore effective policies that will deter and prevent terrorist acts. Most relevant agencies have a civil liberties or privacy office now, that have been debating this balance for years. So, in many ways, this Board is late to the debate.

G. If an agency, or the President himself, disagrees with input the Board provides on a particular action or policy, what will you do?

H. Do you plan to make recommendations to Congress on legislation? If so, please describe how you will approach that effort.

*The PCLOB statute provides two primary mechanisms for the Board and its Members to inform Congress: reports to specified Committees of Congress submitted not less than semiannually, 42 U.S.C. § 2000ee(e), and testimony before Congress upon request. 42 U.S.C. § 2000ee(d)(4). The statute further directs that the Board "make its reports, including its reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law." 42 U.S.C. § 2000ee(f)(1). The PCLOB statute speaks in terms of "providing advice on proposals" and "review[ing] proposed legislation," and directs that "in providing advice on proposals to retain or enhance a particular governmental power, consider whether the department, agency, or element of the executive branch has established-(i) that the need for the power is balanced with the need to protect privacy and civil liberties; (ii) that there is adequate supervision of the use by the executive branch of the power to ensure protection of privacy and civil liberties; and (iii) that there are adequate guidelines and oversight to properly confine its use." 42 U.S.C. § 2000ee(d)(1)(D).*

**(3) <u>Preventing the Rebuilding of the "Wall" Between National Security and Law Enforcement.</u>**

One of the failures of the pre-9/11 mind-set was the strict separation between law enforcement and intelligence operations. The 9/11 Commission found that the "wall" created in the 1990s in the FBI and DOJ between collection of information for foreign intelligence purposes and the use of information to prevent terrorist acts inhibited crucial information sharing. Breaking down that wall has been one of the great successes of the post-9/11 reorientation of DOJ and the FBI to terrorism-prevention, not just post-hoc crime solving. In addition, the 9/11 Commission found that the "stove-piping" of information among national security agencies was harmful to finding, tracking, and capturing terrorists. It was this "stove-piping" that prevented anyone from fully "connecting the dots" to find the 9/11 terrorists.

However, many privacy and civil liberties advocates oppose widespread sharing of information across agencies because of the fear that it allows the government to aggregate too much information about individuals. Without such capabilities, however, full pictures of terrorists will not be possible, connections among them will be missed, and terrorist networks will go undetected.

When asked about how you will ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence, you seemed to agree that the wall should remain down, and that you would find ways to protect both the interests of law enforcement and civil liberties. There also appeared to be agreement among the panel of nominees that you should be involved at the design stage in creating law enforcement tools that implicate privacy or civil liberties concerns.

A. Based on your previous responses, please explain in greater detail how you plan to accomplish "finding ways to protect the interest of law enforcement and civil liberties," and "being involved at the design stage?"

B. How will you ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence?

C. What is your view of the relationship between law enforcement and intelligence gathering?

D. What is your view of the importance of information sharing between all Executive Branch agencies in order to ensure that someone can "connect the dots" to find terrorists?

E. Do you oppose "stove-piping" of information by Executive Branch agencies, in order to ensure that someone can "connect the dots" to find terrorists? Please explain.

*During our confirmation hearing, I agreed that "the wall is properly down, should remain down, that, as you say, it had become perverted. In my view, it served neither clearly national security nor did it really provide adequate or any protection, really, for civil liberties." I further agreed that "we need to keep it down and find the ways other than that wall to protect the interests at stake here." I believe strongly that information sharing is a critical action "taken to protect the Nation from terrorism," and that "stove-piping" can have fatal consequences. Traditional law enforcement can form an integral part of any information sharing environment, as exemplified by the fusion centers and task forces now operating across the country. We can and should share information effectively, while protecting privacy and civil liberties.*

**(4) <u>Opinions on Patriot Act & FISA Provisions</u>**

The PATRIOT Act provides tools in the fight against violent acts of terrorism and was reauthorized last year. It provides authority to a court to authorize a roving wiretap to obtain foreign intelligence information not concerning a U.S. person, under Section 206. It provides authority to a court to authorize obtaining records and information under Section 215, like a grand jury subpoena. And National Security Letters can be used like administrative subpoenas, but with high-level approvals.

The FISA Amendments Act (FAA) will expire at the end of 2012. The Intelligence Committee and the Judiciary Committee will have to address reauthorization of this highly classified national security tool soon. I am interested in your opinions about the national security and anti-terrorism tools in current law.

A. Would you vote to reauthorize the PATRIOT Act, as it now reads? If not, why not? What would you change?

B. Are there any tools authorized by the Patriot Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

C. What about the Foreign Intelligence Surveillance Act (FISA) – would you vote to reauthorize it, as it now reads? If not, why not? What would you change?

D. Are there any tools authorized by the FISA Amendments Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

E. Please describe when or how you have dealt with the FISA law?

*While at the Department of Justice, I viewed the authorities granted by the USA PATRIOT Act to have been effective and necessary to investigators and agents. In 2006, Congress reauthorized the sixteen expiring provisions of the USA PATRIOT Act, all but three of them permanently. At the same time, Congress added significant safeguards and oversight as to the use of the tools, ensuring that these important tools were used in a responsible manner. More recently, the current Administration also supported reauthorization of the expiring provisions. Similarly, while I was at the Department of Justice, I worked on the efforts to modernize FISA through the FISA Amendments Act (and various predecessor versions), and believed such modernization was necessary. However, I have not been in the government for several years, and no longer have access to classified information, so would be unable to opine with the same degree of certainty today.*

*If confirmed, as directed by the PCLOB statute, "in providing advice on proposals to retain or enhance a particular governmental power, [I would] consider whether the department, agency, or element of the executive branch has established-(i) that the need for the power is balanced with the need to protect privacy and civil liberties; (ii) that there is adequate supervision of the use by the executive branch of the power to ensure protection of privacy and civil liberties; and (iii) that there are adequate guidelines and oversight to properly confine its use." 42 U.S.C. § 2000ee(d)(1)(D).*

**(5) <u>Views on the Use of the Traditional Law Enforcement Model or Military Commissions in Counterterrorism</u>**

We've been fighting the war on terrorism for more than 10 years. One of the key debates in the public has been the difference between war and law enforcement. For example, the creation and operation of military commissions has been very controversial, with many people opposing their use, even for terrorists captured abroad. Some want them to be tried only in civilian courts in the United States. Other controversial topics have included detention authority, enhanced interrogation, surveillance, and drone strikes. Some people want all of these to be subject to court review and constitutional and other legal restrictions. But how one approaches these problems may be determined by whether one believes we are at war or only engaged in law enforcement. Please explain your views on the following:

A. Do you believe that we are engaged in a war on terrorism?

B. Do you think that there are times when a law-of-war paradigm is appropriate, or should every action by the Executive Branch be governed by standard law enforcement models?

C. If the law enforcement model is appropriate, please give some examples of why it is superior to a law-of-war model.

D. Specifically, do you think military commissions have a place in the war on terrorism? Do you think that Miranda warnings must always be given to terrorist suspects? Do you think military operations conducted abroad should be reviewed by federal courts?

*There are appropriate circumstances for applying the law of war on the one hand, and standard law enforcement models on the other. Similarly, some actions are appropriately assessed as national security or intelligence related. These distinctions are recognized in the law today, such as through Congress' 2001 Authorization for the Use of Military Force ("AUMF"), the availability of Title III surveillance and other criminal-focused tools, and FISA. In some circumstances, it may be lawful and preferable to utilize the traditional law enforcement model and pursue, for example, a terror financing prosecution. In others, it may be lawful and preferable to use national security authorities. In all circumstances, I believe we can and should comply with the Constitution and all applicable laws, including those designed to protect privacy and civil liberties.*

*I have not closely studied the law related to military commissions, although it is my understanding that they have historically been available and utilized. I could well imagine times when it is impracticable or unnecessary to provide* Miranda *warnings to terrorist suspects, such as during the heat of battle. Most military operations abroad traditionally have been undertaken as an exercise of the President's Commander-in-Chief authority, with Congressional authorization such as the AUMF. In this context, the judiciary itself typically declines to review those actions.*

**(6) Views on Race and Ethnicity Relating to Terrorism Cases**

On April 17, 2012, the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights, held a hearing entitled "Ending Racial Profiling in America."

A. Do you believe that focusing the limited resources of an investigative agency where they are most likely to make an impact is the best method for combating terrorism?

B. How do you address the homegrown terrorism threat, and the appropriate response to it, while completely ignoring race, religion, or ethnicity as a factor in the investigation?

C. While most, including me, agree that racial profiling is unacceptable, is the same true for profiling foreign nationals coming to the U.S. from certain high-risk foreign nations?

*The use of race, ethnicity, or other protected classes in national security or criminal investigations implicates serious constitutional, policy, and operational concerns. In addition to constitutional and legal restrictions imposed upon the use of protected classes in these circumstances, at the end of the day, investigators and agencies must work both in and with communities to be most effective.*

*As a general matter, yes, focusing the limited resources of an investigative agency where they are most likely to make an impact is a preferred method for combating terrorism. Nor is it generally viewed as necessary to completely ignore race, religion, or ethnicity as a factor in investigations: for example, certain groups (such as white supremacists) have membership criteria that explicitly encompass race and/or ethnicity. Similarly, to the extent that investigators have a suspect description that includes race or ethnicity, I am not aware of any requirement (constitutional or otherwise) that investigators completely ignore that piece of information. As to individuals entering from high-risk countries, our immigration system consistently (and lawfully) distinguishes amongst individuals by country of origin, such as through the Visa Waiver Program.*

**(7) <u>Targeted Killing of Anwar Al Awlaki</u>**

On March 5, 2012, Attorney General Holder gave a speech on national security matters to students at Northwestern University School of Law. In his speech, Attorney General Holder discussed a number of national security issues, including the Authorization for Use of Military Force (AUMF), the Foreign Intelligence Surveillance Act (FISA), adjudication of al Qaeda terrorists via civilian courts or military commissions, and the authority to kill American citizens working for al Qaeda abroad. Specifically, in discussing the President's unilateral authority to kill an American citizen abroad, Attorney General Holder stated, "'Due Process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."

Attorney General Holder further argued that "[t]he Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen." The Attorney General thus argued that the President has the constitutional power to authorize the targeted killing of an American citizen without judicial process.

The Board has broad jurisdiction to "review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties."

When asked if you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process, you all responded that you did not have enough information about the al Awlaki scenario to make a judgment call. Regardless of the White House's failure to make its legal reasoning public, please respond to the following question based on your own opinions or beliefs.

A. Do you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process? Why or why not?

*The question as to whether the President has the power to target, and kill, an American citizen based upon due process that does not include judicial process encompasses a very broad range of potential situations, including military actions. It is therefore difficult to say that the*

*President does not possess that authority in certain circumstances. However, when and under what circumstances that power or authority might be exercised, or what process exclusive of judicial process might be required or advisable, is not a question that I have studied.*

When asked if you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties, most of you responded that you viewed your role as providing oversight and advice, and reporting to Congress. Mr. Dempsey stated that he believed the Board probably does not have the power to make "declarations." Please respond in greater detail than in your testimony to the following question, and also indicate whether or not you subscribe to Mr. Dempsey's belief that the Board does not have power to make "declarations."

B. Do you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties?

*By statute, the Board has the authority to advise the President, but does not have the authority to "declare" an action constitutional or unconstitutional. The PCLOB statute provides that as part of its semi-annual report to Congress, the Board must identify "each proposal reviewed by the Board ... that (i) the Board advised against implementation; and (ii) notwithstanding such advice, actions were taken to implement." 42 U.S.C. § 2000ee(e). The statute further directs that the Board "make its reports, including its reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law." 42 U.S.C. § 2000ee(f).*

C. Do you support Attorney General Holder's public statement that due process does <u>not necessarily</u> include judicial process when it comes to national security? Which national security matters require judicial process and which ones do not?

*I agree with Attorney General Holder that due process does not necessarily include judicial process when it comes to national security. Moreover, Congress has made clear that judicial process is not always required; for example, specified agencies may issue National Security Letters without prior judicial process. Similarly, there may be a range of actions taken with respect to non-U.S. persons, or actions on a battlefield, that may not require judicial process. The precise line as to when due process requires judicial process, and what that judicial process might entail, is a fact-intensive fact-specific inquiry.*

D. If confirmed, would you request a copy of the legal reasoning used to justify the al Awlaki killing? Would you support Congress having a copy? As this legal reasoning implicates important constitutional rights, would you support the memo being made public, with appropriate security redactions?

*If confirmed, I will work with my colleagues to set priorities for our attention in addition to those set by statute. To the extent that we consider the issue you identified above, I would hope to understand the legal reasoning and factual context for any policy developed, and the implementation of that policy. There are strong reasons for publication and dissemination of such legal memoranda; however, any such decision must also take into account the significant*

*and appropriate justifications against publication and dissemination, including potential operational impacts, deliberative process concerns, and classification.*

**(8) Classified Information**

To carry out its duties, the Board is authorized to have access to information from any Department or agency within the executive branch, including classified information. To manage that classified information appropriately, the Board shall adopt "rules, procedures . . . and other security" "after consultation with the Secretary of Defense, the Attorney General, and the Director of National Intelligence." Please elaborate on background and experience in dealing with classified information.

A. Do you currently have a security clearance?

B. How do you plan to hold classified information without a SCIF? Do you anticipate asking Congress to give you funds to build one?

C. As a Board, how much time do you expect to spend reviewing classified information?

D. If it's a close call in determining whether to publish sensitive national security information, on which side do you err – the side of national security or public disclosure?

*I do not currently hold a security clearance, although I did hold various security clearances during my time at the Department of Justice. It is my understanding that depending on the level of classification, a SCIF is not always necessary to review or hold classified information. However, I would anticipate that the Board would be called upon to review information classified at a level requiring a SCIF, in which case one likely alternative to requesting funds to build a new SCIF would be to share one of the numerous SCIFs in the area. How much classified information we would review could depend on the priorities set by the Board, if and when we are confirmed.*

*It is unlawful to disclose classified information, and I would not do so.*

**(9) Scope of Constitutional Protections**

Currently, national security law defines a U.S person as a U.S. citizen (USC), a Lawful Permanent Resident (LPR), a U.S. corporation, or a group whose members are substantially USCs or LPRs. FISA, 50 U.S.C. 1801. Some argue that all persons found in the United States should receive the same protections under the Constitution that U.S. citizens possess.

A. Who should be entitled to protection as a U.S. person?

B. Do you believe that the definition of U.S. person should be broader, to include persons in the process of applying for permanent residence, or do you believe it should it be restricted to the traditional statutory definition in FISA?

C. If the definition of U.S. person is defined broadly, can it create problems for quickly sharing terrorism information? If not, why not?

*The Supreme Court and other courts have, from time to time, opined on this question (or variants thereof), and should this issue come before the Board, I would familiarize myself with that jurisprudence as a starting point to analyze any proposal to alter the current definition of U.S. Person. That said, designation as a U.S. person has fairly significant legal implications, such as triggering minimization requirements under FISA, which can have practical consequences related to the sharing of information.*

**(10) <u>Scope of Authority to File Amicus Briefs</u>**

The Board is given very broad duties and authorities. The statute clarifies that this Board is to be treated as an agency and not an advisory committee.

A. Do you believe it is within the Board's authority and power to file an amicus brief in a case?

B. If the answer to the above question is yes, and if it takes only three Board members to make a quorum, can the Board file an amicus brief if two members don't agree?

C. If the answer to the above question is yes, could the two disagreeing members file a brief outlining their opposing view?

D. Where in the statute do you find the authority that allows the Board to file an amicus brief?

*The PCLOB statute does not explicitly grant litigating authority to the Board, and I would not anticipate that the Board would file an amicus brief in a case.*

**(11) <u>Cybersecurity Legislation</u>**

Many of the Cybersecurity bills include language rebuilding the wall, by limiting the use of cyber-threat information for purposes outside Cybersecurity—including national security and counter intelligence.

(1) Do you support recreating the wall as part of cybersecurity legislation?

(2) Regardless of what Congress does, do you think that a wall should exist between cybersecurity information sharing to prevent cyber-attacks and law enforcement?

*The wall arose from a provision of FISA governing the dissemination of information acquired through FISA, and resulted in dangerously inadequate dissemination and sharing of intelligence. As recognized by the Foreign Intelligence Surveillance Court of Review, Congress removed the statutory basis for the wall, and much work has been done to change the legacy culture of the wall. I would not support recreating the wall. That said, not all information is shared or disseminated identically today, even in the information sharing environment. For*

*example, there are restrictions on the sharing of information acquired through a grand jury. Information acquired through FISA and relating to U.S. persons is subject to minimization requirements that can impact the collection, retention, and dissemination of that information. There may similarly be logical and appropriate guidelines for the dissemination and retention of information acquired through any new cybersecurity authority, although under no circumstances should the wall be recreated.*

(3) At the hearing, many of you stated you have not studied this issue. Mr. Dempsey stated that, if confirmed, the Board would look closely at this issue. However, Mr. Dempsey added, "Congress is going to have a say on that issue, I think, before this board comes into creation, and we will work with the authorities and decisions that Congress makes on that cybersecurity legislation." While I appreciate your willingness to study the issue and your deference to Congress, I want to know your position on certain cybersecurity related topics.

1. Do you support private networks, service providers, and private industry sharing customer information with the Federal Government if that information evinces a cybersecurity threat or vulnerability to public or private systems? If not, why not?

2. What restrictions should be placed on information shared with the Federal Government? Should information be limited to metadata only or should it include contents of communications?

3. What restrictions should be placed upon cybersecurity threat information shared with the Federal Government? For example, should personally identifiable information (PII) be minimized or redacted? Should the use of this information be limited to merely address cybersecurity threats or could it be used for national security, intelligence, counterintelligence, national security, or criminal matters? If you believe it can be shared, what categories of the aforementioned purposes can it be shared?

4. How long should any shared information be retained?

*I think it is always legitimate to ask questions about whether government should have access to information and what the government does with that information once the government has it. However, a truly informed opinion as to what information the government should have, how long it should keep it, how it might be used or shared, or what other restrictions might be appropriate, is dependent on a full understanding of the threats we face today. I would seek to develop such a full understanding before offering an opinion as to the questions above.*

**(12) <u>United States v. Jones</u>**

In her concurrence in the recent case, *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., *concurring),* Justice Sotomayor agreed with Justice Alito that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"

Her concurrence then elaborated that even with short-term monitoring, "some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention." Justice Sotomayor stated that GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." She further indicated that she "would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements."

A. With respect to Justice Sotomayor's discussion of the temporal elements of the 4th Amendment, please explain your interpretation of her statements and whether or not you support her position.

B. Do you believe the 4th Amendment has a temporal restriction? Do you believe that information that is initially acquired lawfully may become subject to 4th Amendment restrictions over time?

*As I understand the opinions of* United States v. Jones, *132 S. Ct. 945 (2012), the Justices looked to various strands of Fourth Amendment jurisprudence to assess the constitutional implications of GPS monitoring. I understand Justice Sotomayor's statements as to "familial, political, professional, religious and sexual associations," as well as the reference to "longer term GPS monitoring" to be an application of a traditional "reasonable societal expectation of privacy" test. Whether a technique that would not otherwise raise constitutional concerns may implicate those concerns solely by virtue of prolonged or sustained use is an open question.*

**(13) <u>Agency Authority</u>**

The statute establishes the Board as "an independent agency within the executive branch". And the Board "shall" analyze and review actions taken by the executive branch. The Executive Office of the President is obviously part of the executive branch, and nowhere is the President excluded from the Board's review and purview.

A. Do you believe that the Board will have the duty to review and analyze actions of the President and the Executive Office of the President?

B. Do you believe that the Board will have the duty to review and analyze actions of the Vice President and the Office of the Vice President?

C. If the Board disagrees with the actions taken by the President, Vice President, or either of their offices, <u>after</u> the Board has fulfilled its duty to "advise the President… and executive branch", what options does the Board have?

D. What is your understanding of the term, "independent agency within the Executive Branch"? How would you compare your authority to that of other, fully independent boards outside the Executive Branch, such as the Securities and Exchange Commission?

*The PCLOB statute uses the phrase "the President and the departments, agencies and elements of the executive branch," which by its terms encompasses the President, and can be read to encompass the actions of the Executive Office of the President and the Office of the Vice President ("elements of the executive branch"). 42 U.S.C. § 2000ee(d)(1)(C). Similarly, to the extent that the Vice President is acting in his or her capacity as Vice President rather than in his or her capacity as President of the Senate, those actions could also fall within the statutory language. To the extent that the Board disagrees with actions taken by the President, Vice President, or either of their offices, the PCLOB statute provides that as part of its semi-annual report to Congress, the Board must identify "each proposal reviewed by the Board ... that (i) the Board advised against implementation; and (ii) notwithstanding such advice, actions were taken to implement." 42 U.S.C. § 2000ee(e)(2)(D). The statute further directs that the Board "make its reports, including its reports to Congress, available to the public to the greatest extent that is consistent with the protection of classified information and applicable law." 42 U.S.C. § 2000ee(f)(1). The term "independent agency within the Executive Branch" is not one that I have studied, but the scope of any agency (be it PCLOB or the SEC) created by statute is defined by its authorizing statute.*

The Board is given authorization for access to any Department, any information, any document, or any person to carry out its duties. And if that access is denied, the Board can ask the Attorney General to issue a subpoena.

E. What recourse will the Board have if the Department of Justice is the executive branch component that is denying access to information?

F. If it is the Office of the President that is denying the Board access to information, do you believe it is realistic that the Board will seek a subpoena from the Attorney General, who reports to the President?

*The PCLOB statute provides that the "Board is authorized to (A) have access from any department, agency, or element of the executive branch, or any Federal officer or employee of any such department, agency, or element," information "necessary to carry out its responsibilities." 42 U.S.C. § 2000ee(g)(1). In the event a "department, agency, or element" of the executive branch is, "in the judgment of the Board, unreasonably refused or not provided, the Board shall report the circumstances to the head of the department, agency, or element concerned without delay." 42 U.S.C. § 2000ee(g)(4). The statutory authority to "submit a written request to the Attorney General that the Attorney General require, by subpoena," information, is limited to "persons (other than departments, agencies, and elements of the executive branch) to produce...." 42 U.S.C. § 2000ee(g)(1)(D). I would therefore not anticipate that the Board would request a subpoena directed at the Office of the President.*

**(14) <u>Use of International and Foreign Law in Interpreting Privacy and Civil Liberties Issues</u>**

At the hearing, Judge Wald noted her experience with international law, citing her time as a judge on the International Criminal Tribunal for Yugoslavia. This raises the disturbing problem of judges in the United States relying on international and foreign law in interpreting the U.S. Constitution and statutes. In a number of cases, justices of the Supreme Court have cited

non-U.S. laws as support for overturning U.S. laws, such as those on execution of juveniles and of the mentally handicapped. Separate and apart from the ultimate wisdom of those decisions, the fact that justices had to rely on other countries' and international organizations' opinions on legal matters, and not on the text, history, and structure of the Constitution and on American legal traditions, is concerning. In addition, as Justice Scalia has pointed out, those justices and the advocates of the use of international and foreign law only selectively cite it as relevant. They typically cherry-pick foreign and international legal decisions that support their favored policy positions, such as abolition of the death penalty, but ignore those that disagree with their positions, such as restrictions on the availability of abortion in most countries around the world.

The problem of selective use of international and foreign law in interpreting U.S. law would seem to be equally at issue for the members of the Privacy and Civil Liberties Oversight Board. Protections for privacy and civil liberties vary widely from one country to another. For example, the United States provides far more rights to the accused than most other countries. In much of Europe, defendants accused of terrorist crimes can be held for up to a week without charge or without seeing a neutral magistrate, rather than the Constitutionally required 48 hours in the United States. Likewise, virtually all European countries, as well as others around the world, require citizens to possess and carry a national identification card that must be presented to authorities upon demand. Such a requirement would be denounced in the United States, and proposals for such a card have never been successful. Laws on surveillance, leaks of classified information, and racial profiling are also far more lenient in much of the rest of the world.

At the same time, human rights advocates have greatly expanded the notion of international human rights law to cover areas of privacy and civil liberties, and they are fond of citing to international treaties, such as the International Covenant on Civil and Political Rights, as support for their attacks on U.S. law and appropriate interpretations of the U.S. Constitution. Like-minded members of international bodies, mainly law professors from around the world, such as the U.N.'s "special rapporteurs," parrot these arguments. Meanwhile, the non-democratic majority of the U.N. General Assembly passes resolutions against the United States motivated by dislike of our foreign policy and tradition of freedom and capitalism. Then human rights advocates claim that "international law" supports their positions.

A. If confirmed, do you commit that your evaluations of the legality and propriety of U.S. government actions to fight terrorism, as they relate to the protection of privacy and civil rights, will be based exclusively on the requirements of the U.S. Constitution, as interpreted by the Supreme Court, and on U.S. law, and not on foreign countries' laws or on allegations of what international law requires?

*Yes.*

**QUESTIONS FOR THE RECORD: Responses of Elisebeth C. Cook**

**From Senator Amy Klobuchar**

***"Nominations to the Privacy and Civil Liberties Oversight Board"***

**April 18, 2012**

**Questions for all witnesses**

*Question No. 1: Career Experience*

You have all established very impressive careers with experience working in both public service and private legal practice.

- Can you describe any experiences you have had in your career in balancing civil liberties with national security or other priorities?
- How did you go about analyzing such conflicts?

*During my time at the Department of Justice (2005-09), I had many experiences balancing civil liberties with national security and other priorities. For example, I was involved in the effort that resulted in the Attorney General Guidelines for Domestic FBI Operations, which reflect a balance of civil liberties protections with national security and criminal investigative needs. These guidelines provided an opportunity to provide clear and consistent guidelines across national security and criminal investigations, while at the same time increasing oversight of domestic operations through a combination of approval, notice, and audit requirements.*

*Question No. 2: Privacy Concerns in the Commercial Arena*

Privacy concerns are not just present in the national security context, but also in the commercial arena and with respect to the government's regulation of commerce.

- Can you talk about how the dynamics or considerations of privacy might be different in commercial contexts as opposed to security contexts?
- Specifically, how can industry, including telecommunications firms, and the government work together to improve our approach to privacy issues?

*As an initial matter, the legal framework for private companies to obtain and retain information is different from that applying to government acquisition, retention, and dissemination of information. Moreover, imperatives for which government collects and uses information, such as national security and criminal investigations, may be largely absent for private actors. In the end, industry, including telecommunications firms, and the government can each benefit from clear and consistent frameworks for protecting privacy.*

# RESPONSES BY RACHEL L. BRAND TO QUESTIONS SUBMITTED BY SENATORS GRASSLEY AND KLOBUCHAR

**Senator Chuck Grassley**
**Questions for the Record**

**David Medine, Nominee, to be Chairman and Member of the Privacy and Civil Liberties Oversight Board**

**Rachel L. Brand, Elisebeth Collins Cook, James Xavier Dempsey, Patricia M. Wald Nominees to be a Member of the Privacy and Civil Liberties Oversight Board**

**RESPONSES OF RACHEL L. BRAND**

**(1) Scope of the Board's Authority and Responsibilities of its Members**

Following the terrorist attacks on 9/11, Congress made a number of reforms in order to protect the nation from further terrorist attacks. These reforms included tearing down the artificial "wall" between law enforcement and national security cases that the Justice Department had created; passage of the USA PATRIOT Act; reforming the intelligence community; and updating the Foreign Intelligence Surveillance Act (FISA).

All told, the various reforms, recommended by the 9/11 Commission and then implemented, have strengthened our national security and have helped to prevent another major terrorist attack on U.S. soil. However, we must remain vigilant against terrorist threats and not let down our guard. That said, some have argued that all these reforms to our intelligence, law enforcement, and national security agencies have been at the cost of civil liberties and individual rights. Recognizing this concern, the 9/11 Commission recommended that Congress create the Privacy and Civil Liberties Oversight Board to oversee the new authorities granted to these agencies.

Congress also acted by passing and signing into law the Intelligence Reform and Terrorism Prevention Act of 2004, which included provisions creating the Privacy and Civil Liberties Oversight Board in statute. In 2007, legislation updated the board's statute, reestablishing it as an independent agency in the executive branch.

As President Obama waited until December 2010 to nominate two of the five Board members and other three were not nominated by President Obama until December 2011, the role of the PCLOB has yet to be fleshed out and many details of the scope of its authority remain unclear. Thus, the philosophical perspectives of the board members of the utmost importance, and your thorough answers are appreciated.

A. What is your philosophy about privacy and civil liberties, especially when considered in the context of national security, law enforcement and cybersecurity efforts?

*It is hard to improve on the notion espoused by the 9/11 Commission that protection of privacy and civil liberties in the counter-terrorism context involves a*

*careful and continual balancing. There will be no civil liberties or privacy to protect if our country is crippled by terrorist attacks. At the same time, our democratic and open society cannot continue to function if security concerns are allowed to override constitutionally protected freedoms. How to preserve that balance is never a simple question and depends on the circumstances. In general, of course, the more intrusive the power the government seeks, the more scrutiny it should receive, both before and after the fact. This is reflected in existing statutes and constitutional jurisprudence and would guide me in providing advice and recommendations if I am confirmed to the Board.*

B. Describe how you would view your role as a member of this Board. Specifically, do you see the position as akin to that of a judge, an advocate, an investigator or something else? And if you see yourself as having the role of an advocate, which groups or interests will you be advocating on behalf of, if confirmed?

C. Do you believe that your work on the Board must be impartial and neutral? Or do you believe that in carrying out your work, you would be free to have empathy for certain positions or groups?

D. In the area of privacy and civil liberties, do you have any heroes or role models? And if you do, who are they and why are they your heroes or role models?

*Responses to B. through D.:*

*The Board's organic statute gives the Board two primary purposes: to "review and analyze" agency actions after the fact; and to "ensure that liberty concerns are appropriately considered" during the policy development process. 42 U.S.C. 2000ee(c).*

*If confirmed, I intend to provide my independent advice and judgment, not advocate for the views of any person, group, or interest.*

**(2) <u>Views on Duplication Existing Government Privacy and Civil Liberties Efforts</u>**

The Board was created in the Intelligence Reform and Terrorism Prevention Act of 2004, as amended in 2007. The same legislation also created the Office of the Director of National Intelligence (ODNI). And consistent with the provisions of the Act, within ODNI there is an Office of Privacy and Civil Liberties. And the Department of Justice, as required by its 2005 reauthorization, has a Chief Privacy and Civil Liberties Officer with a supporting office. The Department of Homeland Security has a statutorily created Office of Civil Rights and Civil Liberties and a separate Office of Privacy. And the Department of Defense has a Privacy and Civil Liberties Office, as well as the State Department, and other departments and agencies. The Board's authorizing legislation provides that the Board will "receive reports from" other similar offices in the Executive Branch, "make recommendations" to those other offices, and "coordinate" their activities. It's not clear what the unique contribution of the Board is to this arrangement.

Although the Board has been on the books for many years, it has yet to actually function. Meanwhile, each of the relevant agencies in the war on terrorism—the Director of National Intelligence (DNI), Department of Justice (DOJ), Department of Defense (DOD), Department of Homeland Security (DHS), and others—have their own similar office. In fact, Homeland Security actually has two separate offices, one just for privacy, and one for civil rights and civil liberties - both created by the Homeland Security Act. Depending on how it is implemented, the Board is in danger of becoming another layer of bureaucracy.

I am interested in your views on what you envision your unique contribution might be, considering the vast number of privacy offices that currently exist. How do you plan to coordinate with these offices?

A. Can you describe what the privacy and civil liberties office does at the Office of the Director of National Intelligence (ODNI)?

*Pursuant to 50 U.S.C. 403-3d(b), ODNI's Civil Liberties Protection Officer has the following duties:*

*"The Civil Liberties Protection Officer shall—*
***(1)** ensure that the protection of civil liberties and privacy is appropriately incorporated in the policies and procedures developed for and implemented by the Office of the Director of National Intelligence and the elements of the intelligence community within the National Intelligence Program;*
***(2)** oversee compliance by the Office and the Director of National Intelligence with requirements under the Constitution and all laws, regulations, Executive orders, and implementing guidelines relating to civil liberties and privacy;*
***(3)** review and assess complaints and other information indicating possible abuses of civil liberties and privacy in the administration of the programs and operations of the Office and the Director of National Intelligence and, as appropriate, investigate any such complaint or information;*
***(4)** ensure that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information;*
***(5)** ensure that personal information contained in a system of records subject to section 552a of title 5 (popularly referred to as the "Privacy Act") is handled in full compliance with fair information practices as set out in that section;*
***(6)** conduct privacy impact assessments when appropriate or as required by law; and*
***(7)** perform such other duties as may be prescribed by the Director of National Intelligence or specified by law."*

B. Can you describe what the privacy and civil liberties office does at the Department of Homeland Security (DHS)?

*DHS has two separate offices: one for privacy and one for civil rights and civil liberties. The chief privacy officer's responsibilities are set forth in section 222 of the Homeland Security Act of 2002 (6 U.S.C. 142(a). They include:*

*"**(1)** assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information;*
*__(2)__ assuring that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974;*
*__(3)__ evaluating legislative and regulatory proposals involving collection, use, and disclosure of personal information by the Federal Government;*
*__(4)__ conducting a privacy impact assessment of proposed rules of the Department or that of the Department on the privacy of personal information, including the type of personal information collected and the number of people affected;*
*__(5)__ coordinating with the Officer for Civil Rights and Civil Liberties to ensure that—*
*__(A)__ programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and*
*__(B)__ Congress receives appropriate reports on such programs, policies, and procedures; and*
*__(6)__ preparing a report to Congress on an annual basis on activities of the Department that affect privacy, including complaints of privacy violations, implementation of the Privacy Act of 1974, internal controls, and other matters."*

*DHS's Officer for Civil Rights and Civil Liberties was also established by the Homeland Security Act.* See *6 U.S.C. 113(d)(3). Pursuant to 6 U.S.C. 345, the Officer's general responsibilities are as follows, in addition to an annual report to Congress:*

*"1. review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of the Department;*
*2. make public through the Internet, radio, television, or newspaper advertisements information on the responsibilities and functions of, and how to contact, the Officer;*
*3. assist the Secretary, directorates, and offices of the Department to develop, implement, and periodically review Department policies and procedures to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities;*
*4. oversee compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department;*
*5. coordinate with the Privacy Officer to ensure that—*
   *a. programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations are addressed in an integrated and comprehensive manner; and*

*b. Congress receives appropriate reports regarding such programs, policies, and procedures; and,*

*6. investigate complaints and information indicating possible abuses of civil rights or civil liberties, unless the Inspector General of the Department determines that any such complaint or information should be investigated by the Inspector General."*

C. Can you describe what the privacy and civil liberties office does at the Department of Justice (DOJ)?

*The Department's Office of Privacy and Civil Liberties "provides legal advice and guidance to Departmental components; ensures the Department's privacy compliance, including compliance with the Privacy Act of 1974, the privacy provisions of both the E-Government Act of 2002 and the Federal Information Security Management Act, as well as administration policy directives issued in furtherance of those Acts; develops and provides Departmental privacy training; assists the CPCLO in developing Departmental privacy policy; prepares privacy-related reporting to the President and Congress; and reviews the information handling practices of the Department to ensure that such practices are consistent with the protection of privacy and civil liberties."* See http://www.justice.gov/opcl/.

D. Can you describe what the privacy and civil liberties office does at the Department of Defense (DOD)?

*According to DOD's website, the Defense Privacy and Civil Liberties Office's functions include:*

*"Developing policy, providing program oversight, and serving as the DoD focal point for Defense Privacy matters.*

*Providing day-to-day policy guidance and assistance to the DoD Components in their implementation and execution of their Privacy Programs.*

*Reviewing new and existing DoD policies which impact on the personal privacy of the individual.*

*Reviewing, coordinating, and submitting for publication in the Federal Register Privacy Act system of records notices and Privacy Act rulemaking by the DoD Components.*

*Developing and coordinating Privacy Act computer matching programs within the DoD Components and between the DoD Components and other Federal and State agencies.*

*Providing administrative and operational support to the Defense Privacy Board, the Defense Data Integrity Board, and the Defense Privacy Board Legal Committee."*

See http://dpclo.defense.gov/privacy/About_The_Office/about_the_office.html.

E. How will the Board's work differ from these offices?

F. How will you ensure that you do not duplicate the efforts of these offices?

*Responses to E. and F.:*

*To some extent, the relationship between the agency privacy offices and the Board is prescribed by the Board's organic statute.* See *42 U.S.C. 2000ee-(d)(3).*

*The Board should not duplicate the work of the existing agency privacy and civil liberties offices. Functioning simply as a redundant level of oversight would not be feasible, given the Board's limited budget and largely part-time membership, and would not be a good use of taxpayer funds.*

*There are a variety of possible approaches the Board could take to fulfill its statutory mandates within the constraints of its size and budget. If confirmed, I will consult with my colleagues on the Board to find the best approach.*

*One approach might be to consider the Board's work to fall into two main categories. First, the Board must carry out certain tasks that the statute specifically requires it to perform. For example, it must submit reports to Congress at least twice a year.* See *42 U.S.C. 2000ee(e). Second, to fulfill the Board's more general oversight and advice functions (*see *42 U.S.C. 2000ee(d)(1),(2)) the Board might focus on a small number of the most important privacy and civil liberties issues raised by the government's efforts to combat terrorism. On the policy side, the Board might focus only on emerging issues. In the oversight context, the Board might focus on significant or systemic civil liberties violations that come to light, rather than attempting to serve as another Inspector General.*

The war on terrorism requires a careful balance between aggressive counter-terrorism policies and the protection of privacy and civil liberties. We can't be so aggressive that U.S. citizens rights' are violated, but we also can't ignore effective policies that will deter and prevent terrorist acts. Most relevant agencies have a civil liberties or privacy office now, that have been debating this balance for years. So, in many ways, this Board is late to the debate.

G. If an agency, or the President himself, disagrees with input the Board provides on a particular action or policy, what will you do?

*The Board, pursuant to its organic statute, may provide advice and recommendations to the President, but the President is not bound to accept them. However, the Board's organic statute does require the Board to periodically submit to Congress reports listing any "proposal reviewed by the Board...that-(i) the Board advised against implementation; and (ii) notwithstanding such advice, actions were taken to implement..." 42 U.S.C. 2000ee(e)(2)(D).*

H. Do you plan to make recommendations to Congress on legislation? If so, please describe how you will approach that effort.

*I do not have any specific plans to recommend legislation if I am confirmed. If confirmed, I will consult with my colleagues on the Board about whether this is appropriate or necessary.*

**(3) <u>Preventing the Rebuilding of the "Wall" Between National Security and Law Enforcement.</u>**

One of the failures of the pre-9/11 mind-set was the strict separation between law enforcement and intelligence operations. The 9/11 Commission found that the "wall" created in the 1990s in the FBI and DOJ between collection of information for foreign intelligence purposes and the use of information to prevent terrorist acts inhibited crucial information sharing. Breaking down that wall has been one of the great successes of the post-9/11 reorientation of DOJ and the FBI to terrorism-prevention, not just post-hoc crime solving. In addition, the 9/11 Commission found that the "stove-piping" of information among national security agencies was harmful to finding, tracking, and capturing terrorists. It was this "stove-piping" that prevented anyone from fully "connecting the dots" to find the 9/11 terrorists.

However, many privacy and civil liberties advocates oppose widespread sharing of information across agencies because of the fear that it allows the government to aggregate too much information about individuals. Without such capabilities, however, full pictures of terrorists will not be possible, connections among them will be missed, and terrorist networks will go undetected.

When asked about how you will ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence, you seemed to agree that the wall should remain down, and that you would find ways to protect both the interests of law enforcement and civil liberties. There also appeared to be agreement among the panel of nominees that you should be involved at the design stage in creating law enforcement tools that implicate privacy or civil liberties concerns.

A. Based on your previous responses, please explain in greater detail how you plan to accomplish "finding ways to protect the interest of law enforcement and civil liberties," and "being involved at the design stage?"

*I believe this question quotes from another nominee's responses at our confirmation hearing.*

*In general, however, the fact that the Board's organic statute lists as one of the Board's two main purposes to "ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism" suggests that Congress intended the Board to be involved in the policy development process before policies are finalized. How that is done will depend upon the circumstances. Whether it can be accomplished will depend largely on whether the agencies view the Board as a*

*trusted partner that desires to help them fulfill their counter-terrorism missions while also protecting privacy and civil liberties. If confirmed, my goal will be to forge such relationships with the relevant agencies.*

B. How will you ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence?

C. What is your view of the relationship between law enforcement and intelligence gathering?

D. What is your view of the importance of information sharing between all Executive Branch agencies in order to ensure that someone can "connect the dots" to find terrorists?

E. Do you oppose "stove-piping" of information by Executive Branch agencies, in order to ensure that someone can "connect the dots" to find terrorists? Please explain.

*Responses to B. through E.:*

*Information sharing is critical to preventing terrorist attacks. The 9/11 Commission described some of the deficiencies in agencies' information sharing prior to the attacks of September 11, 2001. It took a massive effort throughout the executive branch to address cultural and technological barriers to information sharing, and many changes to the governing legal framework, to get where we are today. The counter-terrorism agencies must continue their efforts to promote information sharing and prevent stovepiping.*

*If confirmed, I will be mindful of the barriers to information sharing that, at least in part, prevented the counter-terrorism agencies from detecting and preventing the terrorist attacks of September 11, 2001. The Board must ensure that its advice and recommendations promote privacy and civil liberties without pushing agencies back to pre-9/11 stovepiping.*

**(4) <u>Opinions on Patriot Act & FISA Provisions</u>**

The PATRIOT Act provides tools in the fight against violent acts of terrorism and was reauthorized last year. It provides authority to a court to authorize a roving wiretap to obtain foreign intelligence information not concerning a U.S. person, under Section 206. It provides authority to a court to authorize obtaining records and information under Section 215, like a grand jury subpoena. And National Security Letters can be used like administrative subpoenas, but with high-level approvals.

The FISA Amendments Act (FAA) will expire at the end of 2012. The Intelligence Committee and the Judiciary Committee will have to address reauthorization of this highly

classified national security tool soon. I am interested in your opinions about the national security and anti-terrorism tools in current law.

A. Would you vote to reauthorize the PATRIOT Act, as it now reads? If not, why not? What would you change?

B. Are there any tools authorized by the Patriot Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

*Responses to A. and B.:*

*The USA PATRIOT Act was a very large piece of legislation touching on a broad array of subject matters. Of the hundreds of sections in the Act, only 16 were originally scheduled to sunset. Of those, all but three were made permanent, with some amendments, in the first reauthorization legislation. The three remaining provisions have been reauthorized by Congress, with additional amendments, several times since then. As I have not had access to classified information since leaving government service, I cannot speak to how the Act's effectiveness has or has not changed in the last few years. However, based upon my experience in the executive branch, I believe that many of the amendments effected by the USA PATRIOT Act have been instrumental in preventing further terrorist attacks on U.S. soil. In addition, many of the amendments to the Act enacted in the reauthorizing bills included additional protections for privacy and civil liberties. If I am confirmed, and if amendments to the Act come before the Board for consideration, I will review them with the benefit of full and timely information, including classified information, and will approach them with an open mind.*

C. What about the Foreign Intelligence Surveillance Act (FISA) – would you vote to reauthorize it, as it now reads? If not, why not? What would you change?

D. Are there any tools authorized by the FISA Amendments Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

E. Please describe when or how you have dealt with the FISA law?

*Responses to C. through E.:*

*While working in the Justice Department's Office of Legal Policy, I was involved in various policy questions concerning FISA. Based on that experience, I believe the investigative tools authorized under FISA are critical to ensuring our national security. It is important to remember that the statute includes several levels of pre- and post-operational oversight – including prior judicial approval of surveillance in most circumstances – and other protections for privacy and civil liberties. That said, I am not familiar with every provision of FISA and am unfamiliar with the details of the FISA Amendments Act, which was not enacted during my government service. If I am confirmed, and if amendments to FISA come before the Board for consideration, I will*

*review them with the benefit of full and timely information, including classified information, and will approach them with an open mind.*

**(5) <u>Views on the Use of the Traditional Law Enforcement Model or Military Commissions in Counterterrorism</u>**

We've been fighting the war on terrorism for more than 10 years. One of the key debates in the public has been the difference between war and law enforcement. For example, the creation and operation of military commissions has been very controversial, with many people opposing their use, even for terrorists captured abroad. Some want them to be tried only in civilian courts in the United States. Other controversial topics have included detention authority, enhanced interrogation, surveillance, and drone strikes. Some people want all of these to be subject to court review and constitutional and other legal restrictions. But how one approaches these problems may be determined by whether one believes we are at war or only engaged in law enforcement. Please explain your views on the following:

A. Do you believe that we are engaged in a war on terrorism?

B. Do you think that there are times when a law-of-war paradigm is appropriate, or should every action by the Executive Branch be governed by standard law enforcement models?

C. If the law enforcement model is appropriate, please give some examples of why it is superior to a law-of-war model.

D. Specifically, do you think military commissions have a place in the war on terrorism? Do you think that <u>Miranda</u> warnings must always be given to terrorist suspects? Do you think military operations conducted abroad should be reviewed by federal courts?

*There are certain aspects of the government's efforts to counter terrorism that constitute "war" as most people understand that term. Congress authorized the use of military force, and American troops continue to serve abroad under that authorization.*

*There are certain counter-terrorism functions of the executive branch that require application of a law of war framework and others that should be governed by standard law enforcement rules and procedures. Which should apply depends upon which government action is at issue. For example, actions on the battlefield are subject to different rules than those applied when a U.S. Attorney's office brings a prosecution under the material support statutes.*

*Military commissions have had a place in the war on terrorism, as they have been used in the last two Administrations and earlier in our nation's history. I have not had occasion to study legal questions concerning military commissions and am not in a position to opine on them here.*

**(6) Views on Race and Ethnicity Relating to Terrorism Cases**

On April 17, 2012, the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights, held a hearing entitled "Ending Racial Profiling in America."

A. Do you believe that focusing the limited resources of an investigative agency where they are most likely to make an impact is the best method for combating terrorism?

B. How do you address the homegrown terrorism threat, and the appropriate response to it, while completely ignoring race, religion, or ethnicity as a factor in the investigation?

C. While most, including me, agree that racial profiling is unacceptable, is the same true for profiling foreign nationals coming to the U.S. from certain high-risk foreign nations?

*All law enforcement agencies constantly engage in triage, placing their limited resources where they can have the most impact. However, those agencies must do so while also observing constitutional and other protections for civil liberties. Basing investigative actions solely on race or ethnicity raises serious constitutional problems, may not be effective as a practical matter, and may in fact be detrimental to law enforcement efforts by, among other things, chilling open communication between communities and law enforcement.*

*With respect to the question of foreign nationals coming into the United States, the government may consider national origin in the immigration and border contexts to a greater extent than it may in many other situations.*

**(7) Targeted Killing of Anwar Al Awlaki**

On March 5, 2012, Attorney General Holder gave a speech on national security matters to students at Northwestern University School of Law. In his speech, Attorney General Holder discussed a number of national security issues, including the Authorization for Use of Military Force (AUMF), the Foreign Intelligence Surveillance Act (FISA), adjudication of al Qaeda terrorists via civilian courts or military commissions, and the authority to kill American citizens working for al Qaeda abroad. Specifically, in discussing the President's unilateral authority to kill an American citizen abroad, Attorney General Holder stated, "'Due Process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."

Attorney General Holder further argued that "[t]he Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen." The Attorney General thus argued that the President has the

constitutional power to authorize the targeted killing of an American citizen without judicial process.

The Board has broad jurisdiction to "review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties."

When asked if you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process, you all responded that you did not have enough information about the al Awlaki scenario to make a judgment call. Regardless of the White House's failure to make its legal reasoning public, please respond to the following question based on your own opinions or beliefs.

A. Do you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process? Why or why not?

*The government's authority to target U.S. citizens abroad is an important and complex question that I have never had occasion to address. That being said, given the wide range of battlefield and other scenarios in which this question might arise, it is hard for me to imagine that it is never lawful for the government to kill an American citizen abroad.*

*With respect to the particular case of Mr. al Awlaki, I do not believe it would be possible to make a legal judgment without knowledge of the particular facts and circumstances of that case, many of which likely are classified.*

When asked if you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties, most of you responded that you viewed your role as providing oversight and advice, and reporting to Congress. Mr. Dempsey stated that he believed the Board probably does not have the power to make "declarations." Please respond in greater detail than in your testimony to the following question, and also indicate whether or not you subscribe to Mr. Dempsey's belief that the Board does not have power to make "declarations."

B. Do you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties?

*The power to "declare" the President's acts constitutional or unconstitutional is reserved for the courts.* See, e.g., *Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.). I do not understand this to be the Board's role.*

C. Do you support Attorney General Holder's public statement that due process does not necessarily include judicial process when it comes to national security? Which national security matters require judicial process and which ones do not?

*As I stated in my confirmation hearing, and as Supreme Court caselaw makes clear, what "process" is "due" as a constitutional matter is heavily dependent upon the circumstances. Under current law, judicial involvement in the use of national security authorities varies. For example, national security letters do not require prior judicial approval (though they can be challenged by the recipient in court), in contrast to FISA's general requirement of prior judicial approval of surveillance.*

D. If confirmed, would you request a copy of the legal reasoning used to justify the al Awlaki killing? Would you support Congress having a copy? As this legal reasoning implicates important constitutional rights, would you support the memo being made public, with appropriate security redactions?

*Because I do not know whether this question is one that the Board will consider, I cannot predict whether the Board will seek to review the government's legal reasoning. It will not fall to the Board to decide whether other agencies should provide Congress with any written legal reasoning that may have been provided. It may be helpful for Congress to review that reasoning in order to carry out its oversight functions. At the same time, the executive branch may have privilege or security concerns. The legislative and executive branches continually engage in dialogue to ensure that the interests and needs of each are accommodated.*

**(8) Classified Information**

To carry out its duties, the Board is authorized to have access to information from any Department or agency within the executive branch, including classified information. To manage that classified information appropriately, the Board shall adopt "rules, procedures . . . and other security" "after consultation with the Secretary of Defense, the Attorney General, and the Director of National Intelligence." Please elaborate on background and experience in dealing with classified information.

A. Do you currently have a security clearance?

*No. I have had national security clearances during various periods of prior federal service.*

B. How do you plan to hold classified information without a SCIF? Do you anticipate asking Congress to give you funds to build one?

*Not all classified documents must be held in a SCIF. However, the Board's work will almost certainly require use of a SCIF. Where the Board finds SCIF space is an*

*administrative question for the Chairman, but I would expect the Board to use space in another agency's SCIF if possible.*

C. As a Board, how much time do you expect to spend reviewing classified information?

*I cannot quantify the percentage my time that will be spent reviewing classified information if I am confirmed. However, it is clear that much of the Board's work will require the review of classified information.*

D. If it's a close call in determining whether to publish sensitive national security information, on which side do you err – the side of national security or public disclosure?

*It is illegal to publicly disseminate classified information. The Board will not be in a position to publish classified information obtained from another agency unless it is first declassified by the relevant agency.*

**(9) <u>Scope of Constitutional Protections</u>**

Currently, national security law defines a U.S person as a U.S. citizen (USC), a Lawful Permanent Resident (LPR), a U.S. corporation, or a group whose members are substantially USCs or LPRs. FISA, 50 U.S.C. 1801. Some argue that all persons found in the United States should receive the same protections under the Constitution that U.S. citizens possess.

A. Who should be entitled to protection as a U.S. person?

B. Do you believe that the definition of U.S. person should be broader, to include persons in the process of applying for permanent residence, or do you believe it should it be restricted to the traditional statutory definition in FISA?

C. If the definition of U.S. person is defined broadly, can it create problems for quickly sharing terrorism information? If not, why not?

*Which constitutional protections are provided to which categories of persons within the borders of the United States is already the subject of a great deal of caselaw that will guide me if I am confirmed and if such questions become relevant to the Board's work.*

*I am not familiar with proposals to broaden FISA's statutory definition of U.S. Person. If I am confirmed, and if such an amendment is presented to the Board for review, I will consider the rationale provided for the change, whether it would truly improve protections for privacy and civil liberties, and how it would impact the effectiveness of the government's counter-terrorism efforts. Changes to definitional provisions of FISA such as this one could have far-reaching operational*

*consequences, some of which might not be immediately obvious, and therefore should receive careful scrutiny.*

**(10) Scope of Authority to File Amicus Briefs**

The Board is given very broad duties and authorities. The statute clarifies that this Board is to be treated as an agency and not an advisory committee.

A. Do you believe it is within the Board's authority and power to file an amicus brief in a case?

B. If the answer to the above question is yes, and if it takes only three Board members to make a quorum, can the Board file an amicus brief if two members don't agree?

C. If the answer to the above question is yes, could the two disagreeing members file a brief outlining their opposing view?

D. Where in the statute do you find the authority that allows the Board to file an amicus brief?

*The Board's organic statute is silent on the question of amicus briefs. This does not necessarily mean the Board has authority to file amicus briefs, as there are other limitations on which agencies -- other than the Department of Justice -- may litigate. Whether or not the Board is authorized to file amicus briefs, I do not anticipate filing amicus briefs on behalf of the Board if I am confirmed.*

**(11) Cybersecurity Legislation**

Many of the Cybersecurity bills include language rebuilding the wall, by limiting the use of cyber-threat information for purposes outside Cybersecurity—including national security and counter intelligence.

(1) Do you support recreating the wall as part of cybersecurity legislation?

(2) Regardless of what Congress does, do you think that a wall should exist between cybersecurity information sharing to prevent cyber-attacks and law enforcement?

*Responses to (1) and (2):*

*I would not support recreating the "wall" discussed by the 9/11 Commission and dismantled by Section 218 of the USA PATRIOT Act.*

(3) At the hearing, many of you stated you have not studied this issue. Mr. Dempsey stated that, if confirmed, the Board would look closely at this issue. However, Mr. Dempsey added, "Congress is going to have a say on that issue, I think, before this board comes into creation, and we will work with the authorities and decisions that Congress makes on that cybersecurity legislation." While I appreciate your willingness to study the issue and your deference to Congress, I want to know your position on certain cybersecurity related topics.

1. Do you support private networks, service providers, and private industry sharing customer information with the Federal Government if that information evinces a cybersecurity threat or vulnerability to public or private systems? If not, why not?

2. What restrictions should be placed on information shared with the Federal Government? Should information be limited to metadata only or should it include contents of communications?

3. What restrictions should be placed upon cybersecurity threat information shared with the Federal Government? For example, should personally identifiable information (PII) be minimized or redacted? Should the use of this information be limited to merely address cybersecurity threats or could it be used for national security, intelligence, counterintelligence, national security, or criminal matters? If you believe it can be shared, what categories of the aforementioned purposes can it be shared?

4. How long should any shared information be retained?

*Although I have not dealt with cybersecurity issues in any depth, it is obvious from public sources that cyber attacks are a serious national security threat.*

*In general, information sharing from the private sector to some part of the federal government would appear to be central to a comprehensive response to cyber threats.*

*Which information should be shared, with which agencies it should be shared, what privacy protections should be embedded into the framework, and whether there should be limits on the time that such information may be retained are complex questions, as the various cybersecurity bills pending before Congress reflect. Although I am not familiar with the details of the pending bills, there are undoubtedly many ways to draft cybersecurity legislation that would facilitate sharing with and within the government and ensure that it did not unduly burden individual privacy. Existing national security laws and frameworks provide several models for facilitating intake of information important to national security and sharing of that information within the government while minimizing any imposition on privacy and otherwise protecting civil liberties.*

**(12) United States v. Jones**

In her concurrence in the recent case, *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., *concurring),* Justice Sotomayor agreed with Justice Alito that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"

Her concurrence then elaborated that even with short-term monitoring, "some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention." Justice Sotomayor stated that GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." She further indicated that she "would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements."

A. With respect to Justice Sotomayor's discussion of the temporal elements of the 4th Amendment, please explain your interpretation of her statements and whether or not you support her position.

B. Do you believe the 4th Amendment has a temporal restriction? Do you believe that information that is initially acquired lawfully may become subject to 4th Amendment restrictions over time?

*The majority opinion in* Jones *essentially applied trespass principles to determine whether installation of a GPS device violated the Fourth Amendment. Justice Alito's opinion concurring in the judgment criticized this approach and instead would have asked whether installation of the GPS device violated reasonable expectations of privacy. I understand the portion of Justice Sotomayor's concurring opinion quoted in the question to be pointing out that attributes of GPS monitoring besides the length of the monitoring may have an effect on societal expectations of privacy.*

*I do not read the majority opinion in* Jones *to resolve the question of whether the Fourth Amendment embodies a temporal restriction. It will not fall to the Board to define the limits of the Fourth Amendment. Any advice or recommendations I provide on constitutional questions, if confirmed, will reflect the then-current state of Supreme Court caselaw.*

**(13) Agency Authority**

The statute establishes the Board as "an independent agency within the executive branch". And the Board "shall" analyze and review actions taken by the executive branch. The

Executive Office of the President is obviously part of the executive branch, and nowhere is the President excluded from the Board's review and purview.

A. Do you believe that the Board will have the duty to review and analyze actions of the President and the Executive Office of the President?

B. Do you believe that the Board will have the duty to review and analyze actions of the Vice President and the Office of the Vice President?

C. If the Board disagrees with the actions taken by the President, Vice President, or either of their offices, after the Board has fulfilled its duty to "advise the President… and executive branch", what options does the Board have?

*Responses to A. through C.:*

*If confirmed, my first point of reference will be the Board's organic statute. It states, at 42 U.S.C. 2000ee(c), that the "Board shall – (1) analyze and review actions the executive branch takes to protect the Nation against terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties." The executive branch includes the Executive Office of the President and the Vice President (except when the Vice President is acting as President of the Senate). As I noted in my response to question 2(G), the President is not required to accept any advice or recommendations of the Board. However, the Board's organic statute, at 42 U.S.C. 2000ee(e)(2)(D), requires the Board to report to Congress instances when the executive branch implements proposals over the objection of the Board.*

D. What is your understanding of the term, "independent agency within the Executive Branch"? How would you compare your authority to that of other, fully independent boards outside the Executive Branch, such as the Securities and Exchange Commission?

*In the context of this Board, particularly in light of its history, I understand the term "independent agency within the Executive Branch" to simply mean that the Board is not part of any larger federal agency. The Board's authorities and functions are limited to those set forth in its organic statute.*

The Board is given authorization for access to any Department, any information, any document, or any person to carry out its duties. And if that access is denied, the Board can ask the Attorney General to issue a subpoena.

E. What recourse will the Board have if the Department of Justice is the executive branch component that is denying access to information?

F. If it is the Office of the President that is denying the Board access to information, do you believe it is realistic that the Board will seek a subpoena from the Attorney General, who reports to the President?

*Responses to E. and F.:*

*As I read the Board's organic statute, the Board may not request a subpoena for information from executive branch entities.* See *42 U.S.C. 2000ee(g)(1)(D) (the Board may "submit a written request to the Attorney General of the United states that the Attorney General require, by subpoena, persons (*other than departments, agencies, and elements of the executive branch*) to produce any relevant information...") (emphasis added).*

**(14) <u>Use of International and Foreign Law in Interpreting Privacy and Civil Liberties Issues</u>**

At the hearing, Judge Wald noted her experience with international law, citing her time as a judge on the International Criminal Tribunal for Yugoslavia. This raises the disturbing problem of judges in the United States relying on international and foreign law in interpreting the U.S. Constitution and statutes. In a number of cases, justices of the Supreme Court have cited non-U.S. laws as support for overturning U.S. laws, such as those on execution of juveniles and of the mentally handicapped. Separate and apart from the ultimate wisdom of those decisions, the fact that justices had to rely on other countries' and international organizations' opinions on legal matters, and not on the text, history, and structure of the Constitution and on American legal traditions, is concerning. In addition, as Justice Scalia has pointed out, those justices and the advocates of the use of international and foreign law only selectively cite it as relevant. They typically cherry-pick foreign and international legal decisions that support their favored policy positions, such as abolition of the death penalty, but ignore those that disagree with their positions, such as restrictions on the availability of abortion in most countries around the world.

The problem of selective use of international and foreign law in interpreting U.S. law would seem to be equally at issue for the members of the Privacy and Civil Liberties Oversight Board. Protections for privacy and civil liberties vary widely from one country to another. For example, the United States provides far more rights to the accused than most other countries. In much of Europe, defendants accused of terrorist crimes can be held for up to a week without charge or without seeing a neutral magistrate, rather than the Constitutionally required 48 hours in the United States. Likewise, virtually all European countries, as well as others around the world, require citizens to possess and carry a national identification card that must be presented to authorities upon demand. Such a requirement would be denounced in the United States, and proposals for such a card have never been successful. Laws on surveillance, leaks of classified information, and racial profiling are also far more lenient in much of the rest of the world.

At the same time, human rights advocates have greatly expanded the notion of international human rights law to cover areas of privacy and civil liberties, and they are fond of citing to international treaties, such as the International Covenant on Civil and Political Rights, as support for their attacks on U.S. law and appropriate interpretations of the U.S. Constitution. Like-minded members of international bodies, mainly law professors from around the world,

such as the U.N.'s "special rapporteurs," parrot these arguments. Meanwhile, the non-democratic majority of the U.N. General Assembly passes resolutions against the United States motivated by dislike of our foreign policy and tradition of freedom and capitalism. Then human rights advocates claim that "international law" supports their positions.

A. If confirmed, do you commit that your evaluations of the legality and propriety of U.S. government actions to fight terrorism, as they relate to the protection of privacy and civil rights, will be based exclusively on the requirements of the U.S. Constitution, as interpreted by the Supreme Court, and on U.S. law, and not on foreign countries' laws or on allegations of what international law requires?

*Yes.*

**QUESTIONS FOR THE RECORD**

**From Senator Amy Klobuchar**

***"Nominations to the Privacy and Civil Liberties Oversight Board"***

**April 18, 2012**

**RESPONSES OF RACHEL L. BRAND**

**Questions for all witnesses**

*Question No. 1: Career Experience*

You have all established very impressive careers with experience working in both public service and private legal practice.

- Can you describe any experiences you have had in your career in balancing civil liberties with national security or other priorities?
- How did you go about analyzing such conflicts?

*While working in the U.S. Department of Justice's Office of Legal Policy, I was involved in developing and considering a variety of counter-terrorism-related policy proposals. As with any public policy proposal, policies related to the government's counter-terrorism efforts are developed with many considerations in mind, including the potential benefit of the proposal to the fight against terrorism, the effect of the proposal on government resources, and, importantly, its effects on individual rights. National security and civil liberties need not be thought of as being in "conflict." There is virtually always a way to ensure that the government can obtain the information that it needs to prevent terrorist attacks and bring offenders to justice without unnecessarily intruding upon individual privacy and liberty.*

*Question No. 2: Privacy Concerns in the Commercial Arena*

Privacy concerns are not just present in the national security context, but also in the commercial arena and with respect to the government's regulation of commerce.

- Can you talk about how the dynamics or considerations of privacy might be different in commercial contexts as opposed to security contexts?
- Specifically, how can industry, including telecommunications firms, and the government work together to improve our approach to privacy issues?

*The Board's organic statute tasks it with considering a fairly narrow set of privacy issues – those implicated by the government's counter-terrorism activities.* See *42 U.S.C. 2000ee. As such, if confirmed, commercial privacy issues would not be within the Board's bailiwick. That said, there are some clear differences between privacy concerns arising from*

*governmental actions and privacy concerns in the purely commercial context. For example, the government's actions implicate constitutional concerns that a commercial party's actions do not. And even beyond constitutional boundaries, the government's coercive power should subject its actions to deeper scrutiny and more rigorous controls, in general, than actions by private parties.*

*It is often mutually beneficial for private parties and the government to collaborate; each can benefit from understanding the other's concerns. Of course, the Board's work is statutorily limited to reviewing the actions of government agencies engaged in counter-terrorism work.* See id.

## RESPONSES BY PATRICIA M. WALD TO QUESTIONS SUBMITTED BY SENATORS GRASSLEY AND KLOBUCHAR

**Senator Chuck Grassley**
**Questions for the Record**

**Patricia M. Wald, Nominee to be a Member of the Privacy and Civil Liberties Oversight Board**

**(1) Scope of the Board's Authority and Responsibilities of its Members**

Following the terrorist attacks on 9/11, Congress made a number of reforms in order to protect the nation from further terrorist attacks. These reforms included tearing down the artificial "wall" between law enforcement and national security cases that the Justice Department had created; passage of the USA PATRIOT Act; reforming the intelligence community; and updating the Foreign Intelligence Surveillance Act (FISA).

All told, the various reforms, recommended by the 9/11 Commission and then implemented, have strengthened our national security and have helped to prevent another major terrorist attack on U.S. soil. However, we must remain vigilant against terrorist threats and not let down our guard. That said, some have argued that all these reforms to our intelligence, law enforcement, and national security agencies have been at the cost of civil liberties and individual rights. Recognizing this concern, the 9/11 Commission recommended that Congress create the Privacy and Civil Liberties Oversight Board to oversee the new authorities granted to these agencies.

Congress also acted by passing and signing into law the Intelligence Reform and Terrorism Prevention Act of 2004, which included provisions creating the Privacy and Civil Liberties Oversight Board in statute. In 2007, legislation updated the board's statute, reestablishing it as an independent agency in the executive branch.

As President Obama waited until December 2010 to nominate two of the five Board members and other three were not nominated by President Obama until December 2011, the role of the PCLOB has yet to be fleshed out and many details of the scope of its authority remain unclear. Thus, the philosophical perspectives of the board members of the utmost importance, and your thorough answers are appreciated.

A. What is your philosophy about privacy and civil liberties, especially when considered in the context of national security, law enforcement and cybersecurity efforts?

**I believe that generally privacy and established civil liberties can be accommodated with national security protections. There is sufficient flexibility in privacy doctrines to adjust to the realities of technological developments and still maintain the essential core of privacy and liberties. However, it will take much attention to detail to arrive at the desirable accommodation.**

B. Describe how you would view your role as a member of this Board. Specifically, do you see the position as akin to that of a judge, an advocate, an investigator or something else? And if you see yourself as having the role of an advocate, which groups or interests will you be advocating on behalf of, if confirmed?

**(1) Having served as a judge for 22 years I would, if confirmed, initially view policies impartially to assess whether privacy and civil liberties had been appropriately balanced; however as a Board member I would be free to offer my best advice on accommodating them if I did not think the balance had been reached, something judges do not do.**

**(2). As a member of the Board, if confirmed, I would not see myself as an advocate for any special group or interest. I would view my role as an even-handed and dispassionate protector of basic liberties and privacy, surveying proposed and existing governmental policies to assure their compliance with those basic liberties. Where I perceived problems, I would discuss them with the other Board members and the relevant agencies to seek a workable solution.**

C. Do you believe that your work on the Board must be impartial and neutral? Or do you believe that in carrying out your work, you would be free to have empathy for certain positions or groups?

**Yes, if confirmed, I believe my work on the Board should be impartial. While I do not perceive my role would be to "empathize" with any group, I would foresee listening as a Board to relevant input from advocacy groups on their views and information.**

D. In the area of privacy and civil liberties, do you have any heroes or role models? And if you do, who are they and why are they your heroes or role models?

**No.**

**(2) <u>Views on Duplication Existing Government Privacy and Civil Liberties Efforts</u>**

The Board was created in the Intelligence Reform and Terrorism Prevention Act of 2004, as amended in 2007. The same legislation also created the Office of the Director of National Intelligence (ODNI). And consistent with the provisions of the Act, within ODNI there is an Office of Privacy and Civil Liberties. And the Department of Justice, as required by its 2005 reauthorization, has a Chief Privacy and Civil Liberties Officer with a supporting office. The Department of Homeland Security has a statutorily created Office of Civil Rights and Civil Liberties and a separate Office of Privacy. And the Department of Defense has a Privacy and Civil Liberties Office, as well as the State Department, and other departments and agencies. The Board's authorizing legislation provides that the Board will "receive reports from" other similar offices in the Executive Branch, "make recommendations" to those other offices, and

"coordinate" their activities. It's not clear what the unique contribution of the Board is to this arrangement.

Although the Board has been on the books for many years, it has yet to actually function. Meanwhile, each of the relevant agencies in the war on terrorism—the Director of National Intelligence (DNI), Department of Justice (DOJ), Department of Defense (DOD), Department of Homeland Security (DHS), and others—have their own similar office. In fact, Homeland Security actually has two separate offices, one just for privacy, and one for civil rights and civil liberties - both created by the Homeland Security Act. Depending on how it is implemented, the Board is in danger of becoming another layer of bureaucracy.

I am interested in your views on what you envision your unique contribution might be, considering the vast number of privacy offices that currently exist. How do you plan to coordinate with these offices?

A. Can you describe what the privacy and civil liberties office does at the Office of the Director of National Intelligence (ODNI)?

B. Can you describe what the privacy and civil liberties office does at the Department of Homeland Security (DHS)?

C. Can you describe what the privacy and civil liberties office does at the Department of Justice (DOJ)?

D. Can you describe what the privacy and civil liberties office does at the Department of Defense (DOD)?

**It is my understanding that the functions of the Privacy Offices at DNI, DHS, DOJ and DOD are to insure that privacy and civil liberties are protected in the policies and procedures of their respective Departments, including reviewing complaints of alleged abuse and insuring that utilized technology does not erode privacy or civil liberties. I understand that at DHS the Offices of Privacy and Civil Liberties are separate, the latter performing FOIA oversight as well. At the DOJ I understand that the Office of Privacy and Civil Liberties provides legal advice on these issues to all Departmental components and specifically oversees compliance with the Privacy Act of 1974, the privacy parts of the E-Government Act of 2002 and the Federal Information Security Management Act and policy directives issued thereunder. It also provides privacy training and prepares privacy reports for the President and Congress. Finally, it is my understanding that the DOD Privacy and Civil Liberties Office oversees privacy and civil liberties protection for members of the Armed Forces and DOD civilian employees and others with whom the DOD interacts.**

E. How will the Board's work differ from these offices?

**If the Board Members are confirmed and the Board is reconstituted, the Board's principle responsibilities will entail oversight and review of all agencies in the government rather than one and insure coordination among the various privacy offices. It will be independent and not responsible to any agency head. Because the Board members will come from a variety of careers both outside and inside the Government, they will add new viewpoints to the consideration of privacy and civil liberties issues.**

F. How will you ensure that you do not duplicate the efforts of these offices?

**The Board's specific coordination responsibilities under its statute over agency privacy offices include receiving reports from these privacy offices, making recommendations to them and, as appropriate, coordinating their activities in related matters. One of the Board's main tasks will be to develop early trust relationships with these offices to avoid unnecessary duplication.**

The war on terrorism requires a careful balance between aggressive counter-terrorism policies and the protection of privacy and civil liberties. We can't be so aggressive that U.S. citizens rights' are violated, but we also can't ignore effective policies that will deter and prevent terrorist acts. Most relevant agencies have a civil liberties or privacy office now, that have been debating this balance for years. So, in many ways, this Board is late to the debate.

G. If an agency, or the President himself, disagrees with input the Board provides on a particular action or policy, what will you do?

**If an agency disagrees with the Board's input on a particular proposed policy, which falls under 42 U.S. C. 2000ee (d) of the statute, the Board must include a report on that disagreement to the President and Congress. If the President disagrees with the Board on a matter falling within (d)(1) it must report on the matter to Congress.**

H. Do you plan to make recommendations to Congress on legislation? If so, please describe how you will approach that effort.

**I do not foresee the Board's initiating legislative proposals or conducting active lobbying efforts with Congress. If it appeared that a change in proposed legislation were necessary to protect privacy or civil liberty concerns, I expect the Board would discuss its concerns with the appropriate agencies and officials in the Executive Branch, and would draw the issue to Congress' attention.**

**(3) <u>Preventing the Rebuilding of the "Wall" Between National Security and Law Enforcement.</u>**

One of the failures of the pre-9/11 mind-set was the strict separation between law enforcement and intelligence operations. The 9/11 Commission found that the "wall" created in the 1990s in the FBI and DOJ between collection of information for foreign intelligence purposes and the use of information to prevent terrorist acts inhibited crucial information sharing. Breaking down that wall has been one of the great successes of the post-9/11 reorientation of DOJ and the FBI to terrorism-prevention, not just post-hoc crime solving. In addition, the 9/11 Commission found that the "stove-piping" of information among national security agencies was harmful to finding, tracking, and capturing terrorists. It was this "stove-piping" that prevented anyone from fully "connecting the dots" to find the 9/11 terrorists.

However, many privacy and civil liberties advocates oppose widespread sharing of information across agencies because of the fear that it allows the government to aggregate too much information about individuals. Without such capabilities, however, full pictures of terrorists will not be possible, connections among them will be missed, and terrorist networks will go undetected.

When asked about how you will ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence, you seemed to agree that the wall should remain down, and that you would find ways to protect both the interests of law enforcement and civil liberties. There also appeared to be agreement among the panel of nominees that you should be involved at the design stage in creating law enforcement tools that implicate privacy or civil liberties concerns.

A. Based on your previous responses, please explain in greater detail how you plan to accomplish "finding ways to protect the interest of law enforcement and civil liberties," and "being involved at the design stage?"

B. How will you ensure that none of your work contributes to the creation of a new "wall" between law enforcement and intelligence?

**Chapter 9 of the Report of the President's Commission on the Intelligence Capabilities of the United States)(2005) of which I was a member sets out a series of recommendations for information sharing to which I subscribe and some of which – though not all- have since been adopted. They include centralized risk management of all intelligence information, including that received by law enforcement agencies, establishment of uniform standards across the agencies for sharing information, which would encompass keeping down any artificial "walls." There do need to be guidelines on what use can be made of the information so transmitted beyond its intelligence value, who has access to it and how long it is retained so as not to circumvent long established rules for investigating law enforcement cases. The Board's enabling statute specifically calls for the Board to review proposed laws, regulations and policies for privacy and civil liberties concerns and certainly it would have to establish the requisite contacts with affected agencies to insure that it was apprised of their needs and given access to proposed policies and guidelines in order to build in the requisite protections from the earliest stage.**

C. What is your view of the relationship between law enforcement and intelligence gathering?

**Inevitably collection of information primarily for either intelligence or law enforcement purposes will on occasion unearth information that is relevant to both. If law enforcement surfaces intelligence information, that information should go to the appropriate centralized entity for analyzing. However there must be guidelines that take into account law enforcement's legitimate interests in prosecution as well as rights of potential targets of criminal enforcement. Conversely if intelligence gathering surfaces information relevant to domestic crimes some version of the "plain sight" rule should be heeded; in short, care must be taken to insure one side or the other must not be tasked to collect a certain kind of information that will benefit the other or to drive its own investigation beyond the point of its own mission in order to facilitate the other's.**

D. What is your view of the importance of information sharing between all Executive Branch agencies in order to ensure that someone can "connect the dots" to find terrorists?

**I believe information sharing with the proper safeguards for privacy and civil liberties protection must replace the old "need to know" philosophy that undergirded information sharing inside and between intelligence agencies in the past and led to the tragic inability to "connect the dots" culminating in 9/11. As the 2005 Intelligence Commission Report pointed out, new advances in technology (i.e. audit, authentication and access controls) can aid in preserving accountability at every stage of dissemination. The Report quoted the Markle Foundation's conclusion that "without trust, no one will share"; one of the Board's most important tasks early on will be to build that trust with existing agencies that they are engaged with in a mutual effort to accommodate each other's respective mandates. The Board Statue highlights specifically the Board's duty to "continually review" the information sharing practices of the Executive Branch to ensure its adherence to the ISE guidelines issued under 6 U.S.C. 485.**

E. Do you oppose "stove-piping" of information by Executive Branch agencies, in order to ensure that someone can "connect the dots" to find terrorists? Please explain.

**The goal of the ISE is to prevent "stove-piping.". Uniform standards for access and dissemination in the intelligence community and across agency lines, overseen by a central unit in DNI and in the Executive Branch, should advance that goal.**

**(4) <u>Opinions on Patriot Act & FISA Provisions</u>**

The PATRIOT Act provides tools in the fight against violent acts of terrorism and was reauthorized last year. It provides authority to a court to authorize a roving wiretap to obtain

foreign intelligence information not concerning a U.S. person, under Section 206. It provides authority to a court to authorize obtaining records and information under Section 215, like a grand jury subpoena. And National Security Letters can be used like administrative subpoenas, but with high-level approvals.

The FISA Amendments Act (FAA) will expire at the end of 2012. The Intelligence Committee and the Judiciary Committee will have to address reauthorization of this highly classified national security tool soon. I am interested in your opinions about the national security and anti-terrorism tools in current law.

A. Would you vote to reauthorize the PATRIOT Act, as it now reads? If not, why not? What would you change?

B. Are there any tools authorized by the Patriot Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

**If confirmed, and required to advise on the reauthorization of the Patriot Act I n its current form I would base my evaluation on the criteria set out in the Board statute: balancing the need for the governmental powers involved versus protection of privacy and civil liberties, as well as the existence of adequate supervision, oversight and guidelines for the use of those powers. I would consider especially any new information that may become available as to the use of national security letters which has been the subject of continued controversy on issues such as the standards for their use, adherence in practice to the guidelines issued for their use, lack of judicial review and the requirement that the recipient of such a letter keep silent about receiving it.**

C. What about the Foreign Intelligence Surveillance Act (FISA) – would you vote to reauthorize it, as it now reads? If not, why not? What would you change?

D. Are there any tools authorized by the FISA Amendments Act that you have concerns about? If so, please list those provisions and why you have concerns with them.

**Again, if confirmed to be a Member of PCLOB, and asked to advise on the reauthorization of FISA I would use the criteria in the Board Statute. FISA is an essential part of our intelligence and counterintelligence program and most parts of the law have proven workable and balanced. The latest revisions in 2008, however, followed an intense national debate over whether they would permit too broad a swath for incidental wiretapping of U.S. persons. If confirmed, I would wish to obtain information on how the new powers granted by the recent amendments have been used and to what effect as well as any alleged violations of privacy or civil liberties entailed in their use.**

E. Please describe when or how you have dealt with the FISA law?

**My only direct contact with FISA was in 1978 when it was being considered at the DOJ where I was the Assistant Attorney General for Legislative Affairs and my contacts with Congress at that time in support of its passage. FISA came up only peripherally in cases before the D.C. Circuit while I was a judge. I participated in a FISA panel discussion a few years ago, a transcript of which was submitted in my answers to the main Senate questionnaire. As I recall, the bulk of my remarks were addressed to the issue of DOJ and Congress' intent on the exclusivity of FISA as the source of Executive power in the field.**

**(5) <u>Views on the Use of the Traditional Law Enforcement Model or Military Commissions in Counterterrorism</u>**

We've been fighting the war on terrorism for more than 10 years. One of the key debates in the public has been the difference between war and law enforcement. For example, the creation and operation of military commissions has been very controversial, with many people opposing their use, even for terrorists captured abroad. Some want them to be tried only in civilian courts in the United States. Other controversial topics have included detention authority, enhanced interrogation, surveillance, and drone strikes. Some people want all of these to be subject to court review and constitutional and other legal restrictions. But how one approaches these problems may be determined by whether one believes we are at war or only engaged in law enforcement. Please explain your views on the following:

A. Do you believe that we are engaged in a war on terrorism?

**Whether or not it is called a "war," attacks upon the United States around the world by non-State organizations justify military force responses in many situations.**

B. Do you think that there are times when a law-of-war paradigm is appropriate, or should every action by the Executive Branch be governed by standard law enforcement models?

**I do not think every action by the Executive Branch need be governed by strict law enforcement models. The U.S. is entitled to protect its security by taking affirmative steps including military action apart from arrest and trial when it has reason to believe a terrorist attack against its territory or personnel is imminent.**

C. If the law enforcement model is appropriate, please give some examples of why it is superior to a law-of-war model.

**In cases other than those discussed above, I think a law enforcement model is generally preferable because it allows the subject to demonstrate that a mistake, particularly as to identity or involvement in a terrorist operation, has been made according to time-honored rules of the adversary process (albeit with certain limits to accommodate national security concerns) and because the decision maker will be impartial. Thus the process will be perceived as more neutral both domestically and**

**abroad. U.S Courts before and after 9/11 have proven their ability to handle these cases efficiently, transparency, and without attendant violence.**

D. Specifically, do you think military commissions have a place in the war on terrorism? Do you think that Miranda warnings must always be given to terrorist suspects? Do you think military operations conducted abroad should be reviewed by federal courts?

**Military Commissions do have a place in counterterrorism efforts; they are clearly appropriate where the subject has been captured at or near the battlefield. At the same time, there should be sufficient transparency and protection of rights in the process to meet minimum due process standards. Miranda warnings are not necessary in all circumstances surrounding the capture of terrorist suspects, partieularly if they are seized on the scene of terrorist episodes. I do think that captured subjects from military operations abroad should have habeas corpus rights after they have been removed from the theatre of war, though I recognize and would abide by Supreme Conrt rulings which so far have only recognized that right in the case of Guantanamo detainees.**

**(6) Views on Race and Ethnicity Relating to Terrorism Cases**

On April 17, 2012, the Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights, held a hearing entitled "Ending Racial Profiling in America."

A. Do you believe that focusing the limited resources of an investigative agency where they are most likely to make an impact is the best method for combating terrorism?

**Yes, I do believe in impact related priorities for an investigative agency if pursued in a non-discriminatory way.**

B. How do you address the homegrown terrorism threat, and the appropriate response to it, while completely ignoring race, religion, or ethnicity as a factor in the investigation?

**I do not believe that race, ethnicity or religion need be ignored in individual cases where credible evidence points to their relevance but without such indicia those factors by themselves should not provide the initial justification for targeting or conducting special surveillance of groups or individuals in those cases.**

C. While most, including me, agree that racial profiling is unacceptable, is the same true for profiling foreign nationals coming to the U.S. from certain high-risk foreign nations?

**Foreign nationals do not have all the same constitutional or statutory rights as U.S. persons to nondiscriminatory treatment. If there is credible evidence that individuals or even members of a special group may pose a national security risk, U.S. officials should be able**

**to take special precautions to insure that those individuals or group members do not have an opportunity to commit violent acts on our soil. Labeling all persons coming from a particular country high security risks per se, however, so as to justify their exclusion or heightened surveillance, is likely to be counterproductive, as some post-9/11 nationality-based investigative efforts in the U.S. have showed.**

**(7) Targeted Killing of Anwar Al Awlaki**

On March 5, 2012, Attorney General Holder gave a speech on national security matters to students at Northwestern University School of Law. In his speech, Attorney General Holder discussed a number of national security issues, including the Authorization for Use of Military Force (AUMF), the Foreign Intelligence Surveillance Act (FISA), adjudication of al Qaeda terrorists via civilian courts or military commissions, and the authority to kill American citizens working for al Qaeda abroad. Specifically, in discussing the President's unilateral authority to kill an American citizen abroad, Attorney General Holder stated, "'Due Process' and 'judicial process' are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process."

Attorney General Holder further argued that "[t]he Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen." The Attorney General thus argued that the President has the constitutional power to authorize the targeted killing of an American citizen without judicial process.

The Board has broad jurisdiction to "review actions the executive branch takes to protect the Nation from terrorism, ensuring that the need for such actions is balanced with the need to protect privacy and civil liberties."

When asked if you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process, you all responded that you did not have enough information about the al Awlaki scenario to make a judgment call. Regardless of the White House's failure to make its legal reasoning public, please respond to the following question based on your own opinions or beliefs.

A. Do you believe the President has the power to target, and kill, an American citizen abroad based upon due process that does not include judicial process? Why or why not?

**I believe the President has the power as Commander in Chief to authorize the targeting and killing of an American citizen abroad on the basis of reliable information careful deliberation and review to insure that the subject is engaged in a terrorist operation against the United States by a group identified as Al Qaeda or an ally and it is clearly impracticable to arrest or capture him. These appear to be the criteria in use as described by John Brennan, the President's chief counterterrorism adviser.**

When asked if you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties, most of you responded that you viewed your role as providing oversight and advice, and reporting to Congress. Mr. Dempsey stated that he believed the Board probably does not have the power to make "declarations." Please respond in greater detail than in your testimony to the following question, and also indicate whether or not you subscribe to Mr. Dempsey's belief that the Board does not have power to make "declarations."

B. Do you believe the Board would have the power to declare the President's actions, in targeting American citizens abroad, a violation of constitutional civil liberties?

**The statute empowers the Board to "advise" the President to insure that privacy and civil liberties are appropriately considered in implementation of his policies. "Declaring" constitutional violations is more appropriately the function of courts.**

C. Do you support Attorney General Holder's public statement that due process does not necessarily include judicial process when it comes to national security? Which national security matters require judicial process and which ones do not?

**In my view, due process does not necessarily require judicial process in all matters involving national security. Battlefield screening such as Geneva Convention Article V screening hearings held by the military to eliminate those not involved in the conflict or those that are POWs as opposed to those who cannot qualify as such have been used in most wars before the current Afghanistan conflict. Those field hearings utilize military personnel only but require adequate if minimal due process guarantees. The Supreme Court has held in the *Boumediene* case that Guantanamo detainees require judicial habeas type hearings, as the non-judicial CSRT hearings held by the military at the base did not provide adequate due process guarantees. Without knowing any details about the evidentiary foundations for current drone type operations, it is impossible for me to give an opinion as to whether they meet any due process test**

D. If confirmed, would you request a copy of the legal reasoning used to justify the al Awlaki killing? Would you support Congress having a copy? As this legal reasoning implicates important constitutional rights, would you support the memo being made public, with appropriate security redactions?

**If the Board determined that targeted killings were a priority area for its consideration, then such a request should be seriously considered. I cannot envision circumstances under which we would be asked to opine on Congress' right to a copy. I am inclined to support the public being informed to the degree consistent with national security on the legal reasoning supporting the policy.**

**(8) Classified Information**

To carry out its duties, the Board is authorized to have access to information from any Department or agency within the executive branch, including classified information. To manage that classified information appropriately, the Board shall adopt "rules, procedures . . . and other

security" "after consultation with the Secretary of Defense, the Attorney General, and the Director of National Intelligence." Please elaborate on background and experience in dealing with classified information.

A. Do you currently have a security clearance?

**I had security clearances both in my judicial work (1979-1999) and in my work on the President's Intelligence Commission (2004-5) I assume both have lapsed and I have had no occasion to view classified information since 2005.**

B. How do you plan to hold classified information without a SCIF? Do you anticipate asking Congress to give you funds to build one?

**It would seem almost impossible to handle classified information without access to a SCIF whether built or on loan. If confirmed, the Board and Chair will have to give immediate attention to the problem.**

C. As a Board, how much time do you expect to spend reviewing classified information?

**If confirmed, I expect a considerable amount of time will be spent with classified information depending on the priorities selected by the Board.**

D. If it's a close call in determining whether to publish sensitive national security information, on which side do you err – the side of national security or public disclosure?

**I along with many others, including former SOD Rumsfeld, have felt that too much material is unnecessarily classified. However, the Board has no authority to make classified information public, although it might make recommendations to the appropriate authorities including the President or Congress that the information be declassified.**

**(9) <u>Scope of Constitutional Protections</u>**

Currently, national security law defines a U.S person as a U.S. citizen (USC), a Lawful Permanent Resident (LPR), a U.S. corporation, or a group whose members are substantially USCs or LPRs. FISA, 50 U.S.C. 1801. Some argue that all persons found in the United States should receive the same protections under the Constitution that U.S. citizens possess.

A. Who should be entitled to protection as a U.S. person?

**The current FISA definition appears a fair and workable one; it is the same one applicable to all intelligence agencies under Executive Order 12333.**

B. Do you believe that the definition of U.S. person should be broader, to include persons in the process of applying for permanent residence, or do you believe it should it be restricted to the traditional statutory definition in FISA?

**I am not familiar with the arguments for a broader definition.**

C. If the definition of U.S. person is defined broadly, can it create problems for quickly sharing terrorism information? If not, why not?

**A broader definition of U.S. persons would obviously place somewhat greater restrictions on intelligence surveillance, but before deciding whether it was warranted I would need to know more specific information about the alleged need for it by way of current risks to law-abiding citizens or residents of the U.S. as well as the seriousness of the impediments it would bring to information collection.**

**(10) Scope of Authority to File Amicus Briefs**

The Board is given very broad duties and authorities. The statute clarifies that this Board is to be treated as an agency and not an advisory committee.

A. Do you believe it is within the Board's authority and power to file an amicus brief in a case?

**I do not believe that the Board has authority to file amicus briefs. There is no apparent grant of "litigating authority" in the Board's statute. If a court were to ask or invite the Board to file an amicus, we would have to consult the Attorney General who might be able to file it on our behalf.**

B. If the answer to the above question is yes, and if it takes only three Board members to make a quorum, can the Board file an amicus brief if two members don't agree?

**Not applicable.**

C. If the answer to the above question is yes, could the two disagreeing members file a brief outlining their opposing view?

**Not applicable.**

D. Where in the statute do you find the authority that allows the Board to file an amicus brief?

**Not applicable.**

**(11) Cybersecurity Legislation**

Many of the Cybersecurity bills include language rebuilding the wall, by limiting the use of cyber-threat information for purposes outside Cybersecurity—including national security and counter intelligence.

(1) Do you support recreating the wall as part of cybersecurity legislation?

**I would not "rebuild" the former wall between sharing information collected in criminal investigations and national security investigations.**

(2) Regardless of what Congress does, do you think that a wall should exist between cybersecurity information sharing to prevent cyber-attacks and law enforcement?

**I do not think a wall should exist as it pertains to sharing information between the two types of investigations, but conditions should attach as to the accessibility to, and further dissemination of, such shared information where necessary in the interests of protecting privacy and civil liberties.**

(3) At the hearing, many of you stated you have not studied this issue. Mr. Dempsey stated that, if confirmed, the Board would look closely at this issue. However, Mr. Dempsey added, "Congress is going to have a say on that issue, I think, before this board comes into creation, and we will work with the authorities and decisions that Congress makes on that cybersecurity legislation." While I appreciate your willingness to study the issue and your deference to Congress, I want to know your position on certain cybersecurity related topics.

1. Do you support private networks, service providers, and private industry sharing customer information with the Federal Government if that information evinces a cybersecurity threat or vulnerability to public or private systems? If not, why not?

**Yes I do support private networks sharing defined threat/vulnerability information with the government with appropriate privacy restrictions where the information is of a confidential nature and has been given to the private entity with an expectation of privacy. Consideration might be given to requiring FISA-like judicial warrants in the case of contents of such communications (with exceptions for exigent circumstances). There are also serious questions as to whether the sharing should be voluntary or mandatory on the part of the private entities, and if mandatory what kind of enforcement regime should be created.**

2. What restrictions should be placed on information shared with the Federal Government? Should information be limited to metadata only or should it include contents of communications?

**Where content information is credible and relevant to a potential threat or vulnerability, it should be shared but conditions should attach as to the degree if any to which it can be further disseminated outside of the purpose for which it was transmitted. There are arguable Fourth Amendment problems when the government secures personal information from third parties without consent of the individuals and personally identifiable information PII is involved.**

3. What restrictions should be placed upon cybersecurity threat information shared with the Federal Government? For example, should personally identifiable information (PII) be minimized or redacted? Should the use of this information be limited to merely address cybersecurity threats or could it be used for national security, intelligence, counterintelligence, national security, or criminal matters? If you believe it can be shared, what categories of the aforementioned purposes can it be shared?

**I believe in the case of PII and communications content (as opposed to "flow" information) minimization or redaction should take place to the greatest feasible degree consistent with the usefulness of the information. Greatest care should be used in allowing crossover use of such private-sourced information for criminal enforcement purposes as it would provide an alternate route to traditional restrictions placed on obtaining personal material in criminal investigations from third party providers to whom it has been given in confidentiality.**

4. How long should any shared information be retained?

**Retention limits of the material so provided should be clearly set and enforced. Obviously retention times would vary with the nature of the material but where the threat has been resolved the material, especially if it includes contents of communications or PII should in the absence of compelling reasons be promptly destroyed.**

**(12) <u>United States v. Jones</u>**

In her concurrence in the recent case, *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., *concurring*), Justice Sotomayor agreed with Justice Alito that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"

Her concurrence then elaborated that even with short-term monitoring, "some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention." Justice Sotomayor stated that GPS monitoring "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." She further indicated that she "would take these

attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements."

A. With respect to Justice Sotomayor's discussion of the temporal elements of the 4th Amendment, please explain your interpretation of her statements and whether or not you support her position.

**I understand Justice Sotomayor's concurrence to mean that extended GPS monitoring does impinge on the expectation of privacy. As Judge Douglas Ginsburg's *Jones* opinion in the D.C. Circuit explained; this kind of detailed surveillance of the subject's actions and movements over an extended time is both qualitatively and quantitatively different from the traditional police technique of a police car or undercover agent following a subject. It reveals a "way of life" rather than a "slice of life" that an ordinary person would not expect to be revealed, without probable cause to believe he had committed a crime.**

B. Do you believe the 4th Amendment has a temporal restriction? Do you believe that information that is initially acquired lawfully may become subject to 4th Amendment restrictions over time?

**The Fourth Amendment speaks in terms of an "unreasonable search "and the extended duration of an intensive search like a GPS can enter into the reasonableness decision. I would not think material initially seized lawfully would lose its status because the subsequent search lasted too long**

**(13) <u>Agency Authority</u>**

The statute establishes the Board as "an independent agency within the executive branch". And the Board "shall" analyze and review actions taken by the executive branch. The Executive Office of the President is obviously part of the executive branch, and nowhere is the President excluded from the Board's review and purview.

A. Do you believe that the Board will have the duty to review and analyze actions of the President and the Executive Office of the President?

B. Do you believe that the Board will have the duty to review and analyze actions of the Vice President and the Office of the Vice President?

**The statute tells the Board to review the actions of both the President and Vice President and their Offices insofar as they implicate the subject matter of our jurisdiction.**

C. If the Board disagrees with the actions taken by the President, Vice President, or either of their offices, after the Board has fulfilled its duty to "advise the President… and executive branch", what options does the Board have?

**The Board must report to the Congress on its "findings, conclusions and recommendations" resulting from its advice and oversight functions which would include any disagreement with the President or other Executive Branch official The statute also requires a similar report of those persons who disregard the Board's objections to the implementation of a proposal on privacy or civil liberties grounds.**

D. What is your understanding of the term, "independent agency within the Executive Branch"? How would you compare your authority to that of other, fully independent boards outside the Executive Branch, such as the Securities and Exchange Commission?

**The Board's authority and independence is in many ways similar to that of other independent agencies not in the Executive Branch such as the Securities and Exchange Commission. The Board however does not have its own enforcement authority such as the SEC or FTC has to initiate civil suits or enforce subpoenas. Article II of the Constitution reposes the Executive Power in the President; thus he would have power to assure that the Board conducted its activities in conformity with certain Executive Branch administrative requirements, unless the Board's statute indicated otherwise. The statute provides for the President's appointive power and presumably his removal power for cause would also be in line with that of other independent agencies pursuant to Myers v United States, though removal power is not explicit in the Board statute. As an independent agency the Board may take and report substantive positions that are not subject to control by the President. The Board statute imposes staffing and compensation requirements that are sometimes but not always in conformity with those governing Executive Department agencies.**

The Board is given authorization for access to any Department, any information, any document, or any person to carry out its duties. And if that access is denied, the Board can ask the Attorney General to issue a subpoena.

E. What recourse will the Board have if the Department of Justice is the executive branch component that is denying access to information?

**The Board's recourse in the case of a DOJ official who will not grant requested access to information would be to report the refusal to the Attorney General. The statute says that the head of the agency "shall insure access" to the information. If**

**denied access by the A/G, the Board can report on the denial in its reports to Congress and the President.**

F. If it is the Office of the President that is denying the Board access to information, do you believe it is realistic that the Board will seek a subpoena from the Attorney General, who reports to the President?

**The statute does not grant authority to request a subpoena from an Executive Branch component.**

**(14) <u>Use of International and Foreign Law in Interpreting Privacy and Civil Liberties Issues</u>**

At the hearing, Judge Wald noted her experience with international law, citing her time as a judge on the International Criminal Tribunal for Yugoslavia. This raises the disturbing problem of judges in the United States relying on international and foreign law in interpreting the U.S. Constitution and statutes. In a number of cases, justices of the Supreme Court have cited non-U.S. laws as support for overturning U.S. laws, such as those on execution of juveniles and of the mentally handicapped. Separate and apart from the ultimate wisdom of those decisions, the fact that justices had to rely on other countries' and international organizations' opinions on legal matters, and not on the text, history, and structure of the Constitution and on American legal traditions, is concerning. In addition, as Justice Scalia has pointed out, those justices and the advocates of the use of international and foreign law only selectively cite it as relevant. They typically cherry-pick foreign and international legal decisions that support their favored policy positions, such as abolition of the death penalty, but ignore those that disagree with their positions, such as restrictions on the availability of abortion in most countries around the world.

The problem of selective use of international and foreign law in interpreting U.S. law would seem to be equally at issue for the members of the Privacy and Civil Liberties Oversight Board. Protections for privacy and civil liberties vary widely from one country to another. For example, the United States provides far more rights to the accused than most other countries. In much of Europe, defendants accused of terrorist crimes can be held for up to a week without charge or without seeing a neutral magistrate, rather than the Constitutionally required 48 hours in the United States. Likewise, virtually all European countries, as well as others around the world, require citizens to possess and carry a national identification card that must be presented to authorities upon demand. Such a requirement would be denounced in the United States, and proposals for such a card have never been successful. Laws on surveillance, leaks of classified information, and racial profiling are also far more lenient in much of the rest of the world.

At the same time, human rights advocates have greatly expanded the notion of international human rights law to cover areas of privacy and civil liberties, and they are fond of citing to international treaties, such as the International Covenant on Civil and Political Rights, as support for their attacks on U.S. law and appropriate interpretations of the U.S. Constitution. Like-minded members of international bodies, mainly law professors from around the world, such as the U.N.'s "special rapporteurs," parrot these arguments. Meanwhile, the non-

democratic majority of the U.N. General Assembly passes resolutions against the United States motivated by dislike of our foreign policy and tradition of freedom and capitalism. Then human rights advocates claim that "international law" supports their positions.

A. If confirmed, do you commit that your evaluations of the legality and propriety of U.S. government actions to fight terrorism, as they relate to the protection of privacy and civil rights, will be based exclusively on the requirements of the U.S. Constitution, as interpreted by the Supreme Court, and on U.S. law, and not on foreign countries' laws or on allegations of what international law requires?

**I would not utilize "foreign" sources to evaluate the legality of U.S. efforts to combat terrorism. Were the Board to review the propriety of new proposals not covered by existing law, it might prove useful to look at sources or practices outside the U.S., but that would not involve reliance on foreign or international law as such.**

## ANSWERS TO SENATOR KLOBUCHAR'S QUESTIONS FROM PATRICIA WALD

**QUESTIONS FOR THE RECORD**

**From Senator Amy Klobuchar**

***"Nominations to the Privacy and Civil Liberties Oversight Board"***

**April 18, 2012**

*Question No. 1: Career Experience*

*You have all established very impressive careers with experience working in both public service and private legal practice.*

- *Can you describe any experiences you have had in your career in balancing civil liberties with national security or other priorities?*
- *How did you go about analyzing such conflicts?*

**During my 20 years on the D.C. Circuit I had to rule on many cases in which national security concerns were arguably in tension with civil liberties or privacy interests. The contexts of the cases were different but in general however my procedure was to examine the factual allegations underlying the claim, as well as the defendant's legal and factual justification for their actions; after that to proceed to parse the relevant constitutional or statutory basis for both sides' positions. Of course in the judicial realm, there are governing presumptions, i.e. deference to the lower court or Congress and in some cases to the agency. Nonetheless as my decisions, which are listed in the questionnaire I submitted to the Committee illustrate, the Court often ruled in favor of the claimant or even if not so ruling, remanded for the lower court or agency to establish a more rational framework for making the decision.**

*Question No. 2: Privacy Concerns in the Commercial Arena*

*Privacy concerns are not just present in the national security context, but also in the commercial arena and with respect to the government's regulation of commerce.*

- *Can you talk about how the dynamics or considerations of privacy might be different in commercial contexts as opposed to security contexts?*
- *Specifically, how can industry, including telecommunications firms, and the government work together to improve our approach to privacy issues?*

**I see differences in the dynamics and considerations in privacy issues between national security and commercial contexts along the following lines. The imperative to assure national security is a predominant one for the national government in the Constitution and in the public mind. Although in regulating under the national security mantle the government must comply with individual rights**

including privacy tne balancing test gives substantial weight to the government's documented need for the information it seeks.

In the commercial sphere where legislation may be based on the commerce power the constitutional test may be somewhat stricter; there is also the so-called third party doctrine to contend with in commercial cases, a doctrine which is being increasingly questioned (see Justice Sotomayor's concurrence in US v Jones). That doctrine says that when a private person enters into a contract with a private entity to allow surveillance or monitor conversations or communications (ie cellphones) the person gives up privacy rights to the use made of the information unless the contract covers it. Of course Congress can intervene to regulate third party contracts but in many cases has not done so. Additionally, private surveillance of buildings, cargos, malls and entertainment places is widespread without regulation as to what use is made of the information obtained. Although some courts have recognized "expectations of privacy" in some parts of public life, e.g. public phone booths, the privacy rights of individuals against private entities is hazy at best. Constitutionally protected rights such as the Fourth Amendment's guarantee against unreasonable searches and seizures do not apply to private entities, so privacy in this sphere may be a legislative responsibility. On the other hand in balancing need against right to privacy, the commercial entity's interest is likely less compelling than in national security cases.

I think one way to facilitate cooperation between private industry and government on national security and privacy issues is to make as transparent as possible the way information will be collected, used, stored, and accessed by both government and industry including transmittal from private industry to government. In that way people will not feel deceived and any objections can be debated in the political process.

# MISCELLANEOUS ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

## JOINT LETTER TO SENATORS LEAHY AND GRASSLEY FROM SEVERAL ORGANIZATIONS; DATED APRIL 17, 2012

April 17, 2012

The Honorable Patrick Leahy
The Honorable Chuck Grassley
Senate Judiciary Committee
226 Dirksen Senate Office Building
Washington, DC

Dear Senators Leahy and Grassley,

The undersigned organizations welcome the confirmation hearing that the Senate Judiciary Committee is holding tomorrow, April 18th, on President Obama's nominees to the Privacy and Civil Liberties Oversight Board (PCLOB): Rachel Brand, Elizabeth Cook, James Dempsey, David Medine and Patricia Wald. As you know, many of us had repeatedly pressed the administration to make such nominations, and we had written to you on March 13th urging a prompt hearing. As we noted in March, while many of our organizations do not take positions endorsing or opposing any specific candidates, we all agree it is critical that this Committee and the full Senate act quickly to move forward with the confirmation process and allow the PCLOB to begin its important work.

As you are aware, the 9/11 Commission recommended creating a privacy and civil liberties oversight board and Congress formed the original Board as part of the Intelligence Reform Act of 2004. In 2007, Congress enacted legislation to strengthen the Board, including making it an independent agency and giving it subpoena power. The goal was to create an entity that plays a vital, independent role in oversight of privacy and civil liberties for national security programs and policies. Sadly, although Congress took the important step of creating an independent body tasked with both advising the executive branch on policy, and overseeing its implementation, the PCLOB has remained an unfulfilled promise. Since the 2007 legislation was enacted, not a single member has been confirmed to the PCLOB, and the newly-empowered independent Board has never come into existence.

Our intelligence community needs tools to ensure our nation's safety, but that power must be balanced with the need to protect privacy and civil liberties. In recent years, our nation has adopted a variety of new programs and policies designed to combat terrorism. However, without the Board, there is no built-in mechanism to ensure *independent* review of these programs. Indeed, in a report assessing the government's response to the 9/11 Commission's recommendations, the 9/11 Commission Co-Chairs, Thomas Kean and Lee Hamilton, listed the PCLOB as one of the nine major unfinished 9/11 Commission Recommendations. Speaking about the report, Congressman Hamilton said the unimplemented recommendations "require urgent attention" and Governor Kean added that political leaders from both parties and at all levels of government should renew their focus on implementing the remaining 9/11 commission recommendations.

Our organizations have long advocated that the President and the Senate nominate and confirm members to the PCLOB so that the Board can begin to serve this critical oversight role. This need has become even more urgent as Congress considers cybersecurity legislation that raises new issues for safeguarding privacy and civil liberties. As we noted in our March letter, both the Obama Administration's cybersecurity proposal from May 2011 and S. 2105, the Cybersecurity Act of 2012, include an oversight role for the PCLOB. Such oversight provisions will remain ineffective, of course, unless and until the members of the PCLOB have been confirmed and the Board is constituted.

The PCLOB is needed to provide critical oversight as the government develops and relies on new national security programs, including cybersecurity and reliance on powerful new technologies and information collection systems. The Board must be a watchdog for the American public in assuring that national security programs, including data collection capabilities and cybersecurity measures, do not infringe on their privacy rights and civil liberties. With his December nominations President Obama has finally offered a full bipartisan slate of candidates to serve on this essential oversight board. It is now time for the Senate to carry out its duties. We urge the Senate Judiciary Committee to move forward quickly with the confirmation process so that the PCLOB is finally able to begin its important work.

Sincerely,

American Association of Law Libraries
American Civil Liberties Union
American Library Association
Association of Research Libraries
Bill of Rights Defense Committee
Center for Financial Privacy and Human Rights
The Constitution Project
Consumer Action
Consumer Watchdog
Defending Dissent Foundation
Liberty Coalition
Muslim Public Affairs Council
National Association of Criminal Defense Lawyers
OpenTheGovernment.org
Patient Privacy Rights
Privacy Times
Remar Sutton; Founder, Privacy Rights Now Coalition

cc:
Sen. Herb Kohl
Sen. Dianne Feinstein
Sen. Chuck Schumer
Sen. Dick Durbin
Sen. Sheldon Whitehouse
Sen. Amy Klobuchar
Sen. Al Franken
Sen. Christopher Coons
Sen. Richard Blumenthal
Sen. Orrin Hatch
Sen. Jon Kyl
Sen. Jeff Sessions
Sen. Lindsey Graham
Sen. John Cornyn
Sen. Michael Lee
Sen. Tom Coburn

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