UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

NOMINEE FOR THE SUPREME COURT OF THE UNITED STATES

GENERAL (PUBLIC)

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

   Samuel Anthony Alito, Jr.

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

   Associate Justice of the Supreme Court of the United States

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

   Frank R. Lautenberg United States Courthouse & Post Office Building
   50 Walnut Street
   Newark, NJ 07101

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

   April 1, 1950. Trenton, New Jersey

5. **Marital Status: List spouse's name, occupation, employer's name and business address(es). Please also indicate the number of dependent children.**

   Martha-Ann (Bomgardner) Alito. Librarian, substitute teacher, Caldwell-West Caldwell Board of Education, Harrison Building, 104 Gray Street, West Caldwell, NJ 07006. Two dependent children.

6. **Education: List in reverse chronological order any college, law school, and other institutions of higher education attended. Please include dates of attendance, whether a degree was received, and the date each degree was received.**

   1972-1975: Yale Law School, J.D. June 1975
   1968-1972: Princeton University, A.B. June 1972

7. **Employment Record: List in reverse chronological order, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, elected official or employee since graduation from college, and if you received payment for your services. Include the name and address of the employer and job**

title or job description, or the name and address of the institution or organization and your title and responsibilities, where appropriate.

June 1990 – Present: Judge, U.S. Court of Appeals for the Third Circuit. Chambers address: Frank R. Lautenberg United States Courthouse & Post Office Building, 50 Walnut Street, Newark, NJ 07101. Court headquarters: United States Courthouse, 601 Market Street, Philadelphia, PA 19106-1790. Paid.

March 1987 – June 1990: United States Attorney for the District of New Jersey. Peter J. Rodino Federal Building, 970 Broad Street, Suite 700, Newark, NJ 07102. Paid.

December 1985 – March 1987: Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice. 950 Pennsylvania Ave., NW, Washington, DC 20530-0001. Paid.

August 1981 – December 1985: Assistant to the Solicitor General, U.S. Department of Justice. 950 Pennsylvania Ave., NW, Washington, DC 20530-0001. Paid.

November 1977 – August 1981: Assistant U.S. Attorney, District of New Jersey. Peter J. Rodino Federal Building, 970 Broad Street, Suite 700, Newark, NJ 07102. Paid.

July 1976 – August 1977: Law clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit. Martin Luther King, Jr. Courthouse & Federal Building, Newark, NJ 07102. Paid.

January – June 1976: Law clerk, Warren, Goldberg & Berman. 210 East Hanover Street, Trenton, NJ 08608. Paid.

September – December 1975: Active duty, United States Army, Fort Gordon, GA. Paid.

June – August 1974: Summer Associate, Pitney Hardin Kipp & Szuch. 163 Madison Avenue, Morristown, NJ 07960. Paid.

June – August 1973: Intern, New Jersey Public Defender. 216 South Broad Street, Trenton, NJ 08608. Paid.

July – August 1972: Summer Clerk, Mercer County Counsel. 209 South Broad Street, Trenton, NJ 08650. Paid.

June – July 1972: Summer Clerk, Pemberton Township. 500 Pemberton-Browns Mills Road, Pemberton, NJ 08068. Paid.

8. **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 and type of discharge received. Please list, by approximate date, Selective Service classifications you have held, and state briefly the reasons for any classification other than I-A.**

I was given Selective Service Classification I-A in approximately April 1968. I was enrolled in the Army Reserve Officer Training Corps from September 24, 1970, until I was commissioned as a second lieutenant in the Army Reserves upon graduation from college on June 5, 1972. After law school, I was on active duty for training as a first lieutenant for training from September 13, 1975, to December 12, 1975. I was in the Army Reserves (inactive) from 1972 to June 30, 1980, when I was honorably discharged as a captain. My serial number was my Social Security number.

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

Princeton University: Phi Beta Kappa; selected Scholar of Woodrow Wilson School of Public and International Affairs; McConnell Foundation Scholarship for summer thesis research; debating awards.

Yale Law School: Awards for best moot court argument and best contribution to Yale Law Journal.

Since Law School:

Department of Justice Awards, 1978-85;

Selected for membership in American Bar Foundation, 1991;

St. Thomas More Award, 1995, given by the St. Thomas More Association of Seton Hall University and Law School;

Peter J. Rodino Award, 1999, given by the Peter J. Rodino Law Society of Seton Hall Law School for embracing and carrying on the legacy of Peter J. Rodino;

Family Research Council Golden Gavel Award, 2001, for Saxe v. State College Area School Distr., 240 F.3d 200 (3d Cir. 2001);

N.J. Law Journal Award, 1999, for commitment to the bench, bar, and people of the Third Circuit;

Honorary membership, Phi Alpha Delta Law Fraternity International, April 2003;

Selected for membership in the American Law Institute, 2003.

10. <u>Bar Associations</u>: 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. Also, if any such association, committee, or conference of which you were or are a member issued any reports, memoranda, or policy statements prepared or produced with your participation, please furnish the committee with four (4) copies of these materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee, or conference which produced a report, memorandum, or policy statement, even where you did not contribute to it.

Advisory Committee on Appellate Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States: Chair, October 2001 – October 2005; member, October 1997 – September 2001. I have attached several reports that were issued during the period when I served as the Chair of the Advisory Committee on Appellate Rules of the Committee on Rules of Practice and Procedure.

Association of the Federal Bar of New Jersey: Member, Advisory Board, 1988 – present.

New Jersey State Bar Association, Executive Board of Federal Practice and Procedure Committee: Member, 1987 – 1989.

New Jersey State Bar Association. I have no records of membership dates. I have requested information from the New Jersey State Bar Association but have not yet received a response.

Essex County Bar Association: Member, 1975 – present.

American Bar Foundation: Fellow, June 1991 – October 2000; Lifetime Fellow, October 2000 – present.

Lawyers' Advisory Committee for the United States District Court for the District of New Jersey: Member, Executive Committee, 1987 – 1990.

American Law Institute: Member, 2003 – present.

American Judicature Society: Member, 2002 – present.

Federalist Society for Law and Public Policy Studies: Member, 1983– present.

<u>Yale Law Journal</u> Advisory Board: Advisory Board Member, 2004 – present.

<u>Federal Sentencing Reporter</u> (Vera Institute for Justice): Advisory Board Member, 1988 – 1993.

National Environmental Enforcement Council: Member. I was a member of this organization while I served as the United States Attorney for the District of New Jersey. While I do not recall the exact dates, it was between March 1987 and June 1990.

Phi Alpha Delta Law Fraternity International: Honorary Member, April 2003 – present.

Constitution Project Sentencing Initiative: Member, 2004 – present.

National Italian American Foundation International Law Institute: Member, 2005-present.

11. <u>Bar and Court Admission</u>:

a. **List the date(s) you took the examination and date you passed for all states where you sat for a bar examination. List any state in which you applied for reciprocal admission without taking the bar examination and the date of such admission or refusal of such admission.**

New Jersey: exam taken July 31, 1975, admitted December 9, 1975

New York: reciprocal admission on July 13, 1982

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 of membership. Give the same information for administrative bodies which require special admission to practice.

U.S. Court of Appeals for the District of Columbia Circuit, November 30, 1987

New York State courts, July 13, 1982

U.S. Court of Appeals for the Second Circuit, June 11, 1981

U.S. Supreme Court, March 26, 1979

U.S. Court of Appeals for the Third Circuit, March 29, 1977

New Jersey State courts, December 9, 1975

United States District Court for the District of New Jersey, December 9, 1975

I am aware of no lapses in membership.

12. <u>Memberships</u>:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11, to which you belong, or to which you have belonged, or in which you have participated 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. Please describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, and identify an officer or other person from whom more detailed information may be obtained.

Yale Law School Alumni Association of New Jersey: This is a regional alumni association for Yale Law School graduates. The alumni association serves to keep alumni involved in the law school and updated on events. I have participated as a member. I spoke at a dinner meeting and at another I introduced the Dean of the Law School. I have been a member from 1987 – present. For more information, contact Frank Pasquale, Associate Professor, Seton Hall Law School, One Newark Center, Newark, NJ 07102-5210.

Princeton Alumni Council Careers Committee: The Alumni Council represents alumni interests and concerns to the University. During 1991 – 1993, I served as the Chair of the Careers Committee, which assists in developing mentoring groups and on-campus careers programs for alumni. In this capacity, I attended meetings of the Alumni Council Executive Committee. During 1989 – 1991 and 1993 – 1994, I was a Committee member. For more information, contact Margaret Moore Miller, Director, Princeton Alumni Council, Princeton University, Princeton, NJ 08540.

Princeton Alumni Association of Essex County, New Jersey: This is a regional association for Princeton alumni. Membership is automatic for alumni in the area. I have been a member from 1987 to the present, but have not been active in my membership. For more information, contact Mary Tabor Engel, 100 Upper Mountain Ave., Montclair, NJ 07042.

Princeton Schools Committee of Essex County: I was a member from 1998 – 2003. This is regional alumni group that interviews applicants to Princeton and submits reports on interviews. I interviewed about five to ten applicants per year. For more information, contact Frank E. Ferruggia, Esq., McCarter & English, LLP, Four Gateway Center, 100 Mulberry St., P.O. Box 652, Newark, NJ 07101-0652.

Princeton Club of Washington, DC: This is a regional association for Princeton alumni. I was a member from approximately 1983 – 1987, but was not active in my membership. For more information, contact Sheila L. Summers, Executive Secretary, The Princeton Club of Washington, 4227 46th St., NW, Washington, DC 20016.

Concerned Alumni of Princeton: This was a group of Princeton alumni. A document I recently reviewed reflects that I was a member of the group in the 1980s. Apart from that document, I have no recollection of being a member, of attending meetings, or otherwise participating in the activities of the group. The group has no current officers from whom more information may be obtained.

National Italian American Foundation: This is a non-profit organization that serves to preserve and protect Italian American heritage and culture. Among other things, it sponsors programs that provide educational and career support to youth. I have participated in this group as a member from 2002 – present. For more information, contact John B. Salamone, National Executive Director, National Italian American Foundation, 1860 19th St., NW, Washington, DC 20009.

Knollwood Tennis Club: My family and I have been members from 2003 – present. It is a neighborhood group that owns two clay tennis courts but has no other facilities or property. For more information, contact Glenn Martin, 91 Westover Ave., West Caldwell, NJ 07006.

Seton Hall Law School Self Study Committee: I was a member from the fall of 1999 through spring 2000. This was a group appointed by the law school to study various aspects of the school in preparation for re-accreditation by the American Bar Association. For more information, contact Dean Patrick Hobbs, Seton Hall Law School, One Newark Center, Newark, NJ 07102.

b. If any of these organizations of which you were or are a member or in which you participated issued any reports, memoranda, or policy statements prepared or produced with your participation, please furnish the committee with four (4) copies of these materials, if they are available to you. "Participation" includes, but is not limited to, membership in any working group of any such association, committee, or conference which produced a report, memorandum or policy statement, even where you did not contribute to it. If any of these materials are not available to you, please give the name and address of the organization that issued the report, memoranda, or policy statement, the date of the document, and a summary of its subject matter.

The Seton Hall Law School Self Study Committee produced a report entitled "2001 Self Study." Copies are supplied.

As the Chair of the Princeton Alumni Council Careers Committee, I provided oral reports at meetings of the Alumni Council Executive Committee concerning the work of the Careers Committee, and I may have provided written materials, but I do not specifically recall ever having done so. I have not retained any papers relating to my service on this Committee, but I have contacted the Careers

Committee and requested any materials from the relevant time period. I will forward any such materials to the Committee.

To the best of my recollection, I have not participated in producing any other reports, memoranda, or policy statements in conjunction with my membership in the organizations listed in response to question 12.a.

c. Please indicate whether any of these organizations 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. If so, describe any action you have taken to change these policies and practices.

To my knowledge, the entities listed in response to question 12.a. do not discriminate and never have discriminated on the basis of race, sex, or religion through formal membership requirements or the practical implementation of membership policies.

13. <u>Published Writings, Testimony and Speeches:</u>

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

Foreword, 1 SETON HALL CIR. REV. 1 (2005).

Panel Speaker at the Federalist Society's 2000 National Lawyers Convention: Presidential Oversight and the Administrative State, *in* 2 ENGAGE (Federalist Soc'y, Wash. D.C.) 11 (2001).

The Role of the Lawyer in the Criminal Justice System, 2 FEDERALIST SOC'Y CRIM. L. NEWS (Federalist Soc'y, Wash., D.C.) 3 (1998), *available at* http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/role-crimv2i3.htm

Change in Continuity at the Office of Legal Counsel, 15 CARDOZO L. REV. 507 (1993).

Reviewing the Sentencing Commission's 1991 Annual Report, 5 FED. SENT. REP. 166 (1992).

The First Amendment: Information, Publication and the Media, 1 SETON HALL CONST. L.J. 327 (1991).

The Next Page in Federal Sentencing, LEGAL TIMES, August 28/September 4, 1989, at 19.

What Role Should Individual Sentencing Judges Play in the Guideline Development Process?, 1 FED SENT. REP. 372 (1989).

Racketeering Made Simple(r), *in* THE RICO RACKET 1 (Gary L. McDowell ed. 1989).

Introduction to *After the Independent Counsel Decision: Is Separation of Powers Dead?*, 26 AM. CRIM. L. REV. 1667 (1989).

Shift Won't Hamper Crime Fight, DAILY J. (Vineland, N.J.), May 5, 1989.

The Year Wasn't So Bad, NAT'L. L.J., Sep. 26, 1998, at 12.

Documents and the Privilege Against Self-Incrimination, 48 U. PITT. L. REV. 27 (1986).

Equal Protection and Classification Based on Family Membership, 80 DICK. L. REV. 410 (1976).

The "Released Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court, 83 YALE L.J. 1202 (1974).

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

Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary, 107th Cong. (2002).

Testimony before Committee of the N.J. Legislature in 1988 or 1989 on bills to permit pretrial detention in certain cases.

Confirmation Hearings on Federal Appointments: Hearings before the Senate Comm. on the Judiciary, 100th Cong. (1990).

c. Please list all speeches, talks, or presentations by you which relate in whole or in part to issues of law or public policy. For each one, please give the name and address of the group before which the speech was given, the date of the speech, and a summary of its subject matter. For each of these, please supply four (4) copies of your prepared remarks or any outline or notes from which you spoke. If a recording or transcript is available, please supply four

(4) copies of those as well. If press reports about the speech, talk, or presentation are available to you, please supply them.

While I was the United States Attorney for the District of New Jersey (March 1987 – June 1990), I was frequently called upon to speak, usually regarding the work of the office or law enforcement issues. Most of these speeches were delivered extemporaneously or using notes, which I did not keep. I have listed those events that I can specifically recall or for which I have located records, but I am sure that there are others that I cannot specifically recall and for which I have no records.

Annual Judicial Conference of the United States District Court for the District of New Jersey, Princeton, NJ, March 22, 1985 (United States District Court for the District of New Jersey, Martin Luther King, Jr. Federal Building & Courthouse, 50 Walnut Street, Newark, NJ 07102). Panel member on "Multiple Representation and the Corporate Defendant in Criminal and Civil Litigation - The Tough Questions of Privilege and Strategy." I have no recollection of the substance of my remarks and am unable to find any notes.

Kaiser-Permanente Conference, Dallas, TX, approximately 1986. (Kaiser Permanente, 1 Kaiser Plaza, Oakland, CA 94612). I summarized the Office of Legal Counsel opinion on AIDS and the Rehabilitation Act. I am unable to locate any materials relating to this talk.

The New Jersey Institute for Continuing Legal Education in cooperation with the Federal Practice and Procedures Committee of the New Jersey State Bar Association, 1988, New Brunswick, NJ (New Jersey Institute for Continuing Legal Education, One Constitution Sq., New Brunswick, NJ 08901). I participated in a CLE presentation entitled, "Special Problems Faced by Criminal Defendants and Their Lawyers: The Forfeiture of Attorney's Fees, Subpoenas for Defense Attorneys." I have no recollection of the substance of my remarks and am unable to find any notes.

Passaic County Bar Association's Law Day Celebration, May 2, 1988, Paterson, NJ (77 Hamilton Street, Paterson, NJ 07505). I spoke about the history of Law Day and the meaning that has been attached to it through the years. I specifically discussed the problem of drugs. A text of the speech is supplied.

Child Pornography and Exploitation Seminar sponsored by the Law Enforcement Coordinating Committee of New Jersey, May 17, 1988, Newark, NJ (United States Attorney's Office, Peter J. Rodino Federal Building, 970 Broad Street, Newark, NJ 07102.) I spoke about enforcement of federal laws on child pornography. A copy of the speech is supplied.

Graduation ceremony for new New Jersey State Police Troopers, July 28, 1988, West Trenton, NJ (New Jersey State Police, River Road, P.O. Box 7068, West

Trenton, NJ 08628). I spoke about the importance of the work of the State Police and the problem of crime in the state of New Jersey. A copy of the speech is supplied.

Annual Federalist Society Lawyers' Convention, November 1989, Washington, DC (1015 18th St., N.W., Washington, DC 20036). I participated as a moderator on a panel entitled, "Debate -- After the Independent Counsel Decision: Is Separation of Powers Dead?" On the panel were Hon. Charles Fried, professor at Harvard Law School and former Solicitor General, and Paul M. Bator, then-professor at University of Chicago Law School and former Deputy Solicitor General. A copy of the transcript is attached.

New Jersey Institute of Continuing Legal Education, Seminar, 1989, New Brunswick, NJ (New Jersey Law Center, One Constitution Sq., New Brunswick, NJ 08901). I provided an outline of discovery in criminal cases. The outline from which I spoke is supplied.

Yale Law School Association of New Jersey, March 2, 1989, in West Orange, NJ (c/o Frank Pasquale, Associate Professor, Seton Hall Law School, One Newark Center, Newark, N.J. 07102.) I spoke about the work and priorities of the United States Attorney's Office for the District of New Jersey. I am unable to find any text or notes relating to this talk.

The 200 Club of Union County (a non-profit organization dedicated to providing aid and support to uniformed officers in the county), November 3, 1989, Mountainside, NJ (222 Park Ave., Scotch Plains, NJ 07076). I spoke about law enforcement's need for the help of private citizens. A copy of the speech is supplied.

Yale Law School Federalist Society, April 10, 1991, New Haven, CT (127 Wall Street, New Haven, CT 06520). I spoke about the evolution of federal sentencing, the Sentencing Reform Act, and the Sentencing Guidelines. The notes used in delivering this talk are supplied.

Symposium sponsored by the University of Pennsylvania chapter of the Federalist Society, October 20, 1990, Philadelphia, PA (3400 Chestnut Street, Philadelphia, PA 19104). I moderated a panel discussion on "State Crime in the Federal Forum." The panel members were Judges Jon O. Newman and Roger J. Miner of the United States Court of Appeals for the Second Circuit, Professor Robert Blakey of the Notre Dame Law School, and L. Gordon Crovitz of the Wall Street Journal. I am unable to locate any text or notes relating to the substance of my remarks.

Widener Law School, early 1990s, Harrisburg, PA (Harrisburg Campus, 3800 Vartan Way, Harrisburg, PA 17106). I spoke about federal sentencing. As best I can recall, my remarks were very similar to those given at Yale Law School in

1991, and I probably used the same notes. I am unable to locate any other materials relating to the substance of my talk.

Princeton University Class in Politics 305, early 1990s, Princeton, NJ (Department of Politics, Princeton University, Princeton, NJ 98540). As best I can recall, I spoke about the Third Circuit and my work as a judge. I am unable to locate any materials relating to these remarks.

Panel discussion sponsored by the Rutgers School of Law Newark chapter of the Federalist Society, April 13, 1992, Newark, NJ (123 Washington Street, Newark, NJ 07102). I moderated a panel discussion on "Judicial Activism: Individual Rights - the Court as Super Legislature." The panel members were Hon. Charles Fried, professor at Harvard Law School and former Solicitor General; Professor James Pope of Rutgers School of Law Newark; and George McCarter, Esq., then of McCarter & English. I have no specific recollection of the substance of my remarks. I am unable to locate any materials relating to these remarks.

Seton Hall School of Law, early 1990s, Newark, NJ (One Newark Center, Newark, NJ 07102). As best I can recall, I spoke about differences between federal and New Jersey constitutional law on some issues of criminal procedure and perhaps some other issues. I am unable to locate any materials relating to these remarks.

Continuing legal education workshop sponsored by the Federalist Society, May 7, 1992, New York, NY (1015 18th St., NW, Washington, DC 20036). The workshop focused on Commerce Clause issues in the pre-Lopez era, including the dormant Commerce Clause, state taxation of commerce, and the federalization of crime. As best I can recall, my talk was basically historical. I believe that I recounted the problems relating to commerce that contributed to the call for a constitutional convention and the limited discussion of the Commerce Power in the Philadelphia Convention and the state ratifying conventions. I also recall discussing the competing arguments concerning the dormant Commerce Clause. I am unable to locate any materials relating to these remarks.

New Jersey Department of Law and Public Safety, March 24, 1993, Trenton, NJ (Hughes Justice Complex, 25 W. Market St., Trenton, NJ 08625). I spoke about the work of my court and effective appellate advocacy. Notes that I used in delivering this talk are supplied.

Yale Law School Association of New Jersey, 1995, West Orange, NJ (c/o Frank Pasquale, Associate Professor, Seton Hall Law School, One Newark Center, Newark, NJ 07102). I introduced the new dean of the Yale Law School. A copy of my remarks is supplied.

Conference on the Tenth Amendment sponsored by the Heritage Foundation and Federalist Society, September 12, 1995, Washington, DC (Heritage Foundation,

214 Mass. Ave., NE, Washington, DC 20002; Federalist Society, 1015 18th St., NW, Washington, DC 20036). I moderated a panel discussion on the Commerce Clause. The panel members were Professor Steven Calabresi, Northwestern Law School; Professor Jonathan Macey, then at Cornell Law School; and Dr. Roger Pilon, CATO Institute. I provided a brief introduction to the topic and the Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995). I then introduced the panel members. Notes that I used are supplied.

Luncheon sponsored by Seton Hall School of Law, October 1995, West Orange, NJ (One Newark Center, Newark, NJ 07102). I gave remarks after I was presented with Seton Hall Law School's St. Thomas More Medal. A copy of the speech is supplied.

Seton Hall School of Law, October 18, 1995, Newark, NJ (One Newark Center, Newark, NJ 07102). I spoke about appellate advocacy. Notes that I used in delivering this talk are supplied. I recall giving similar talks to Seton Hall Law School students on several other occasions but I have no record of the dates and no papers relating to these talks.

Annual Conference of the United States District Court for the District of New Jersey, April 11, 1996, West Orange, NJ (United States District Court for the District of New Jersey, Martin Luther King, Jr. Federal Building & Courthouse, 50 Walnut Street, Newark NJ 07102). I spoke about technological issues facing the courts, including video taped appellate records, oral arguments by video conferencing, and televised oral arguments. A copy of the speech is supplied.

Duke Law School chapter of the Federalist Society, November 19, 1996, Durham, NC (Science Drive and Towerview Rd., Durham, NC 27708). I spoke about the selection, role, and importance of federal law clerks. Notes relating to this talk are supplied.

Portrait presentation ceremony for Judge Leonard I. Garth, June 25, 1997, Newark, NJ (United States Court of Appeals for the Third Circuit, 610 Market St., Philadelphia, PA 19106). I spoke about the work and character of my colleague, Hon. Leonard I. Garth. A copy of the remarks is supplied.

Constitutional Conclave sponsored by Pennsylvania Bar Institute, October 24, 1997, Philadelphia, PA, (5080 Ritter Rd., Mechanicsburg, PA 17055). I was a member of a panel that discussed a variety of constitutional issues. As I recall, other panel members included Hon. Louis Pollak of the United States District Court for the Eastern District of Pennsylvania and Professor Seth Kreimer of the University of Pennsylvania Law School. My recollection is that the remarks were extemporaneous, and I am unable to locate any materials relating to these remarks.

Annual Federalist Society Lawyers Convention, November 1997, Washington, DC (1015 18th St., NW, Washington, DC 20036). I spoke on "The Role of the Lawyer in the Criminal Justice System" and explained why the model of the lawyer as a "gladiator" is inaccurate and deleterious. A copy of the speech is supplied.

Rutgers School of Law Newark, March 23, 1998, Newark, NJ (123 Washington Street, Newark NJ 07102). I discussed effective appellate advocacy. I spoke from notes but am unable to locate the notes. I recall giving similar talks at Rutgers School of Law Newark on other occasions but have no records concerning these talks.

New Jersey State Bar Association, Federal Practice and Procedure Section, Teaneck, NJ, May 15, 1998 (N.J. State Bar Assn., One Constitution Sq., New Brunswick, NJ 08901). I spoke on "Presenting the Appeal to the Panel." Notes relating to this talk are supplied.

Editorial Board of the New Jersey Law Journal, May 6, 1999, West Orange, NJ (238 Mulberry St., P.O. Box 20081, Newark, NJ 07101). I spoke after receiving an award from the Board. I cannot specifically recall the substance of my remarks. I am unable to locate any materials relating to these remarks.

Investiture of Hon. Melvin S. Kracov, March 22, 2000, Brennan Courthouse, Jersey City, NJ (Superior Court of New Jersey, Brennan Courthouse, Jersey City, NJ 07306). I spoke about the life, character, and work of Judge Kracov. A copy of the speech is supplied.

Seminar sponsored by American Bar Association Employment and Labor Section, June 1, 2000, Rutgers School of Law Newark, Newark, NJ (321 North Clark St., Chicago, IL 60610). I summarized recent Third Circuit cases concerning employment discrimination claims. I am unable to locate any materials relating to these remarks.

Annual American Bar Association Convention, July 2000, New York, NY (321 North Clark St., Chicago, IL 60610). I moderated a panel discussion on "Non-Delegation's Revival." I provided a very brief introduction to the issue and explained the decision of the District of Columbia Circuit in American Trucking Associations, Inc. v. United States EPA, 175 F.3d 1027 (D.C. Cir. 1999), rev'd sub nom Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001), which was then pending before the Supreme Court. I also introduced the panel members. A copy of my remarks is supplied.

Third Circuit Judicial Conference, October 17, 2000, Hershey, PA (United States Court of Appeals for the Third Circuit, 610 Market St., Philadelphia, PA 19106). Judge Richard Arnold of the United States Court of Appeals for the Eighth Circuit and I spoke on "Use of Non-Precedential opinions." As best I can recall, Judge

Arnold summarized his arguments in Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000), which held that the Constitution requires that all courts of appeals' decisions be given precedential weight. As best I can recall, I summarized scholarship reaching the contrary conclusion and discussed the practical value of non-precedential opinions. I am unable to locate any materials relating to these remarks.

Annual Federalist Society Lawyers Convention, November 2000, Washington, DC (1015 18th St., NW, Washington, DC 20036). I was a member of a panel that discussed "Presidential Oversight and the Administrative State." I discussed the Framers' understanding of the power of the President over the various components of the Executive Branch as well as the treatment of this question in Morrison v. Olson, 487 U.S. 654 (1988). A transcript is supplied.

Conference sponsored by the Heritage Foundation, April 18, 2002, Philadelphia, PA (214 Mass. Ave., NE, Washington, DC 20002). I spoke about the importance of *amicus curiae* briefs in the court of appeals and the Supreme Court. A copy of my remarks is supplied.

Portrait presentation ceremony for Judge Morton I. Greenberg, May 30, 2002, Philadelphia, PA (United States Court of Appeals for the Third Circuit, 610 Market St., Philadelphia, PA 19106). I spoke about the work and character of my colleague, Hon. Morton I. Greenberg. A copy of the remarks is supplied.

National Symposium for United States Court of Appeals Judges, October 21, 2002, Washington, DC (Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE, Washington, DC 20002). Judge Richard Arnold of the Eighth Circuit and I spoke on the use of unpublished opinions. As best I can recall, I spoke about proposed Federal Rule of Appellate Procedure 32.1. I am unable to locate any materials relating to these remarks.

Rex E. Lee Advocacy Award Luncheon, February 2003, Washington, DC (J. Reuben Clark Law School, Brigham Young University, Provo, UT 84601). The luncheon was hosted by the Washington, DC chapter of the J. Reuben Clark Law Society and the Dean of the J. Reuben Clark Law School at Brigham Young University. I spoke about the life, work, and character of former Solicitor General Rex E. Lee. A copy of the speech is supplied.

Pepperdine Law School, March 17, 2003, Malibu, CA (24255 Pacific Coast Highway, Malibu, CA 90263). I discussed with first-year students the general problems faced by appellate courts in deciding cases involving civil liberties in times of national emergency. I used as examples North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002); Ex Parte Milligan, 71 U.S. 2 (1866), the Japanese-American Internment Cases; Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003); and Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003). Notes and printouts of Power Point slides used in giving this talk are supplied.

Pepperdine Law School, March 18, 2003, Malibu, CA (24255 Pacific Coast Highway, Malibu, CA 90263). I discussed appellate practice and procedure with upper-class students. I am unable to locate any materials relating to these remarks.

Conference sponsored by Princeton University, June 21, 2003, Williamsburg, VA (Princeton University, Princeton, NJ 08540). I was a member of a panel that addressed the question "How Does Democracy Restrain the Power of the Judiciary?" I argued that in constitutional litigation our constitutional system lacks external restraints that can be routinely invoked and thus relies heavily on judicial restraint. Notes used in delivering this talk are supplied.

ABA Appellate Practice Institute, October 3-6, 2003, Reno, NV (321 North Clark St., Chicago, IL 60610). I spoke several times about aspects of appellate advocacy. I am unable to locate any materials relating to these remarks.

Rutgers School of Law Newark, March 24, 2003, Newark, NJ (123 Washington Street, Newark NJ 07102). I spoke about federal clerkships. I am unable to locate any materials relating to these remarks.

American Bar Association, March 8, 2004 (321 North Clark St., Chicago, IL 60610). I spoke at an ABA CLE event. I am unable to locate any materials relating to these remarks.

Seton Hall University School of Law, Federalist Society Student Division, September 23, 2004, Newark, NJ (One Newark Center, Newark, NJ 07102). I spoke informally over lunch in my chambers with a small group of students. I believe that I simply described in general terms the work of my court. I did not use any notes.

Annual Federalist Society Lawyers' Convention, November 2004, Washington, DC (1015 18th St., NW, Washington, DC 20036). I moderated a panel discussion on the Patriot Act. I provided a brief introduction to the topic and introduced the participants: Hon. Viet Dinh, a professor at Georgetown Law School and the former Assistant Attorney General for the Office of Legal Policy; Timothy Lynch of the Cato Institute; Udi Ofer of the New York Civil Liberties Union; and Hon. Christopher Wray, then the Assistant Attorney General for the Criminal Division. Notes used in delivering this introduction are supplied.

Panel discussion on sentencing sponsored by the Constitution Project and the American Constitution Society, March 9, 2005, Washington, DC (Constitution Project, 1120 19th Street, NW, Eighth Floor, Washington, DC 20036; American Constitution Society for Law and Public Policy, 1333 H Street, NW, 11th Floor, Washington, DC, 20005). Judge Paul Friedman of the United States District Court for the District of Columbia, Judge Nancy Gertner of the United States

District Court for the District of Massachusetts, and I participated in a panel discussion on federal sentencing. The panel discussed the effect of United States v. Booker, 125 S. Ct. 738 (2005) on the future of federal sentencing. A transcript of the panel discussion is supplied.

Conference sponsored by the Atlantic Legal Foundation on the Attorney-Client Privilege, March 10, 2005, Washington, D.C. (60 East 42nd St., New York, N.Y. 10165). I was a member of a panel assigned to discuss the question "Should the Attorney-Client Privilege be Abolished?" I discussed areas in which the privilege might be modified either through legislation or the development of case law. I specifically addressed the question of selective waiver. A transcript is supplied.

Washington & Lee Law School, March 18, 2005, Lexington, VA (Lewis Hall, Lexington, VA 24450). I gave the keynote address at a conference on the use of unpublished, "depublished," withdrawn, and per curiam opinions. My speech attempted to explain why the courts of appeals have come to rely so heavily on so-called "unpublished" opinions. I also discussed the consequences of taking an alternative approach. A copy of the speech is supplied.

d. Please 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 spoke to reporters regularly during my service as United States Attorney regarding cases handled by the office. I also recall being interviewed by reporters when I became U.S. Attorney and during my service as U.S. Attorney. I have attached as appendix 1 a list of all newspaper articles in which I was quoted. There may have been additional occasions when I spoke to a reporter for which I am unable to locate a record. I have provided copies of all articles that I was able to locate.

14. 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 made for elective office or unsuccessful nominations for appointed office.

July 1976 – August 1977: Law clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit. Appointed by Judge Leonard I. Garth.

November 1977 – August 1981: Assistant United States Attorney, Office of the United States Attorney for the District of New Jersey. Career position.

August 1981 – December 1985: Assistant to the Solicitor General, Office of the Solicitor General, U.S. Department of Justice. Career position.

December 1985 – March 1987: Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice. Appointed by Attorney General Edwin Meese.

March 1987 – April 1990: United States Attorney for the District of New Jersey. Appointed by President Ronald W. Reagan.

b. If, in connection with any public office you have held, there were any reports, memoranda, or policy statements prepared or produced with your participation, please supply four (4) copies of these materials. Please also provide four (4) copies of any resolutions, motions, legislation, nominations, or other matters on which you voted as an elected official, the corresponding votes and minutes, as well as any speeches or statements you made with regard to policy decisions or positions taken. "Participation" includes, but is not limited to, membership in any subcommittee, working group or other such group, which produced a report, memorandum, or policy statement, even where you did not contribute to it. If any of these materials are not available to you, please give the name of the document, the date of the document, a summary of its subject matter, and where it can be found.

I have attached two reports published during my tenure as U.S. Attorney for the District of New Jersey. In addition, the Department of Justice has released materials that I drafted or participated in drafting during my tenure as a Deputy Assistant Attorney General in the Office of Legal Counsel and provided copies to the Committee. An appendix of these materials is attached.

United States Attorney's Office for the District of New Jersey, 1988 Annual Report.

United States Attorney's Office for the District of New Jersey, 1989 Annual Report.

c. List all memberships and offices held in and services rendered, whether compensated or uncompensated, to any political party, election committee, or transition team. Please supply four (4) copies of any memoranda analyzing issues of law or public policy that you wrote on behalf of or in connection with a presidential transition team.

None.

d. If in connection with any public office, you have ever filed a financial disclosure form, ethics form, or any similar form, please supply four (4) copies of each one.

Please see attached financial disclosure forms. Both the Department of Justice and the Administrative Office of the U.S. Courts maintain financial disclosure forms for six years. In addition to those forms since 1999, I have provided forms that I was able to locate in my personal records.

15. <u>Legal Career:</u> Please 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;

Yes. I served as a law clerk to Judge Leonard I. Garth, U.S. Court of Appeals for the Third Circuit, from 1976 – 1977.

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

No.

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

January – June 1976: Law clerk, law firm of Warren, Goldberg & Berman, 210 E. Hanover Street, Trenton, NJ 08608.

July 1976 – August 1977: Law clerk, Hon. Leonard I. Garth, U.S. Court of Appeals for the Third Circuit, U.S. Courthouse and Post Office Building, Newark, NJ 07101.

November 1977 – August 1981: Assistant U.S. Attorney, Office of the United States Attorney for the District of New Jersey, 970 Broad Street, Newark, NJ 07102.

August 1981 – December 1985: Assistant to the Solicitor General, Department of Justice, Washington, DC 20530.

December 1985 – March 1987: Deputy Assistant Attorney General, Office Legal Counsel, Department of Justice, Washington, DC 20530.

March 1987 – June 1990: United States Attorney for the District of New Jersey, 970 Broad Street, Newark, NJ 07102.

June 1990 – Present: Judge, U.S. Court of Appeals for the Third Circuit. U.S. Courthouse and Post Office Building, Newark, NJ 07101.

b. Describe:

i. the general character of your law practice and, where appropriate, indicate by date any changes in its character over the years.

I have devoted my legal career to public service, and while practicing law my client was the United States. I began my service in 1976 as a law clerk to Judge Leonard I. Garth, U.S. Court of Appeals for the Third Circuit. Judge Garth continues to serve on the Third Circuit, and I have been fortunate to have him as a colleague.

After my appellate clerkship, I joined the U.S. Attorney's Office for the District of New Jersey in 1977. I focused on appellate matters, primarily criminal. While an Assistant U.S. Attorney, I argued more than 20 cases and briefed more than 75 cases on behalf of the United States in the Third Circuit. I also served as an associate counsel in an important espionage trial.

In 1981, I continued my appellate work when I joined the Office of the Solicitor General, United States Department of Justice, as an Assistant to the Solicitor General. The Office of the Solicitor General is responsible for representing the United States and its agencies and officers before the Supreme Court. As an Assistant, I made recommendations to the Solicitor General, through the Deputy Solicitors General, on the merits of appellate matters. I was responsible for drafting petitions for and oppositions to certiorari, as well as merits briefs in both civil and criminal matters. All briefs and petitions were subject to the approval of the Solicitor General. During this time, I argued twelve cases before the Supreme Court on behalf of the United States.

In 1985, I joined the Office of Legal Counsel, United States Department of Justice, as a Deputy Assistant Attorney General. The Office of Legal Counsel provides legal advice and opinions to the agencies and officers of the United States. With the Assistant Attorney General and under his direction, I assisted in preparing formal opinions for the Office of Legal Counsel and in rendering informal opinions and legal advice on a wide variety of subjects and legal questions facing the departments and agencies of the Executive Branch.

In 1987, I became the United States Attorney for the District of New Jersey. I was responsible for the management of all federal criminal prosecutions and the prosecution and defense of all civil matters within the district. As U.S. Attorney, I set initiatives for the office. During my tenure, the office handled important white-collar crime, public corruption, drug trafficking, and organized crime prosecutions. I personally participated in court proceedings and in major decisions involving the office's most important trials and investigations. I also reviewed in detail the proposed charges and evidence in all major cases prosecuted by the office.

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

While practicing, all of my "clients" were federal agencies, officers, or employees. With the exception of time spent as an Assistant United States Attorney doing principally criminal work, my practice has been highly diversified.

c. Describe 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 these appearances in:
1. federal courts;
2. state courts of record;
3. other courts.

Federal courts: over 99%
State courts: less than 1%

ii. Indicate the percentage of these appearances in:
1. civil proceedings;
2. criminal proceedings.

Civil: approximately 10%
Criminal: approximately 90%

Virtually all of my court appearances have been in federal court. When I was an Assistant United States Attorney (1978-81), approximately 90% of my appearances were in criminal matters. When I was an Assistant to the Solicitor General (1981-85), I argued 12 cases in the United States Supreme Court. Of these, eight cases were civil and four were criminal. When I was in the Office of Legal Counsel (1985-87), I did not appear in court. When I was the United States Attorney for the District of New Jersey (1987-90), I argued four appeals, three criminal and one civil, and I appeared in district court in a number of proceedings. Almost all, if not all, of these appearances were in criminal matters.

d. List all cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

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

As a practicing attorney, I focused almost exclusively on appellate matters. I did serve as lead trial counsel in two criminal cases tried to verdict or judgment, one jury and one non-jury. I was an associate counsel in one jury trial.

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990). I served as lead counsel in this case. Kikumura involved an attempted terrorist bombing in which a verdict of guilty on all counts was reached on stipulated facts following extensive pretrial hearings. See United States v. Kikumura, 698 F. Supp. 546 (D.N.J. 1988). The verdict in Kikumura was followed by a detailed factual hearing at which the nature and circumstances of the offenses were proved for purposes of sentencing. See United States v. Kikumura, 706 F. Supp. 331 (1989).

United States v. Stonaker, 860 F.2d 1076 (3d Cir. 1988)(Table). I served as lead counsel in this 1987 trial for the shooting of an FBI agent. The defendant was convicted and sentenced to 23 years in prison.

United States v. Enger, 472 F.Supp. 490 (D.N.J. 1978). As an Assistant U.S. Attorney, I was associate counsel in this complex espionage trial.

e. List all appellate cases in which you made oral arguments, and supply four (4) copies of any briefs on which you worked.

All Supreme Court arguments are listed in response to question 15.f. I have not kept records of all oral arguments in which I participated at the appellate level, although I indicated in my questionnaire for my nomination to the U.S. Court of Appeals for the Third Circuit that I argued more than 20 cases and briefed more than 75 cases in the Third Circuit while in the U.S. Attorney's Office. I have made my best efforts to reconstruct my work based on public databases and with the assistance of the U.S. Attorney's Office for the District of New Jersey and the Clerk's Office for the Third Circuit. I have been able to determine that I participated in oral argument in the published cases listed below. As best I can determine, I also presented oral argument in the cases listed below that were decided without a published opinion. It was the practice of the U.S. Attorney's Office for oral argument to be presented by the AUSA who was principally responsible for the brief, and the U.S. Attorney's Office has determined that I was principally responsible for the briefs in these cases. I have attached all appellate briefs that I was able to secure.

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990)
United States v. Accetturo, 842 F.2d 1408 (3d Cir. 1988)
Matter of Grand Jury Empanelled March 17, 1987, 836 F.2d 150 (3d Cir. 1988)
Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988)
Matter of Grand Jury Empaneled March 19, 1980, (Docket No. 81-1782)
United States v. Friedland, 660 F.2d 919 (3d Cir. 1981)
United States v. Alessandrello, 637 F.2d 131 (3d Cir. 1980)

United States v. Miller, 624 F.2d 1198 (3d Cir. 1980)
Appeal of Malfitano, 633 F.2d 276 (3d Cir. 1980)
United States v. Costanzo, 625 F.2d 465 (3d Cir. 1980)
United States v. Martinez, 613 F.2d 473 (3d Cir. 1980)
Matter of Grand Jury Empanelled February 14, 1978, 603 F.2d 469 (3d Cir. 1979)
United States v. Stassi, 583 F.2d 122 (3d Cir. 1978)
United States v. Tonelli, 577 F.2d 194 (3d Cir. 1978)
United States v. Geary, (Docket No. 78-1330)
United States v. Holder, (Docket No. 78-1939)
United States v. Levin, (Docket No. 78-1306)
United States v. Michael, (Docket No. 78-2545)
United States v. Shabazz, (Docket No. 78-1385/5)
United States v. Labriola, (Docket No. 77-2172)
United States v. DeFalco, (Docket No. 77-1540)

f. Describe your practice, if any, before the Supreme Court of the United States. Please 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. Give a detailed summary of the substance of each case, outlining briefly the factual and legal issues involved, the party or parties whom you represented, the nature of your participation in the litigation, and the final disposition of the case. Please also provide the individual names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

As an Assistant to the Solicitor General, I argued 12 Supreme Court cases and drafted or assisted in drafting approximately 55 merits briefs or petitions for certiorari. The relevant petitions and briefs are attached.

1. Oregon v. Kennedy, 456 U.S. 667 (1982). The issue before the Court was whether the Double Jeopardy Clause prohibits the retrial of a criminal defendant who successfully moved for a mistrial on the basis of a prosecutorial error that was not intended to provoke the mistrial request.

The United States, participating as *amicus* in support of Oregon, argued that a rule of law prohibiting retrial absent prosecutorial intent to obtain a mistrial would substantially impair the right of the public to secure a resolution of criminal charges and would create grave practical problems for judicial administration. The Supreme Court, in an opinion written by then-Justice Rehnquist, agreed with the reasoning advanced in our brief. The Court adopted a standard that focused on whether the government deliberately denied the defendant an opportunity to meaningfully exercise his or her due process rights. Specifically, the Court held that where a defendant in a criminal trial moves for a mistrial, he may invoke the double jeopardy bar in a subsequent prosecution only if the prosecutorial or judicial conduct in question was intended to provoke the defendant to move for a mistrial.

I worked on the government's brief as *amicus curiae*, and I orally argued the case on March 29, 1982. With me on the brief were Rex E. Lee, then-Solicitor General, (deceased); D. Lowell Jensen, then-Assistant Attorney General, Chambers of Senior District Judge D. Lowell Jensen, United States Courthouse, 1301 Clay Street, Oakland, CA (510) 637-3540; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006, (202) 263-3291; and David B. Smith, English & Smith, 626 King Street, Suite 213, Alexandria, VA 22314, (703) 548-8911. Counsel for the petitioner was David Frohnmayer, then-Attorney General of Oregon, University of Oregon, Office of the President, 110 Johnson Hall, Eugene OR 97403, (541) 346-3036. With him on the brief were Robert E. Barton, then-Assistant Attorney General, Cosgrave Vergeer Kester LLP, 805 SW Broadway, 8th Floor, Portland, OR 97205, (503) 323-9000; John C, Bradley, then-Assistant Attorney General, Multnomah County District Attorney's Office, Multnomah County Courthouse, 1021 SW Fourth Avenue, Room 600, Portland, OR 97204, (503) 988-3162; Thomas H. Denney, then-Assistant Attorney General, Oregon Department of Justice, 1162 Court Street NE, Salem, OR 97301, (503) 378-4400; and Stephen F. Peifer, then-Assistant Attorney General, Office of the United States Attorney for the District of Oregon, 1000 SW 3rd Avenue, Suite 600, Portland, OR 97204, (503) 727-1012. Counsel for the respondent was Donald C. Walker (deceased).

2. Russello v. United States, 464 U.S. 16 (1983). The petitioner, a member of an arson ring formed to defraud insurance companies, was ordered to forfeit some $340,000 in insurance proceeds. The issue before the Court was whether racketeering profits and proceeds constituted an "interest" within the meaning of the RICO statute and were thus subject to forfeiture upon conviction. The petitioner contended that the insurance profits were not an "interest," because the relevant section of the RICO statute reached only interests "in an enterprise."

On behalf of the government, I emphasized the importance of requiring the forfeiture of illegal profits and proceeds in preventing organized criminal activities. The Supreme Court unanimously agreed in an opinion written by Justice Blackmun. Following the analysis in the government's brief, the Court first examined the plain language of the RICO statute and concluded that the term "interest" included every property interest, including a right to profits or proceeds. Next, the Court examined the structure of the relevant section in relation to other statutes and to other provisions of the RICO statute, and concluded that Congress deliberately incorporated a looser definition of "interest" with respect to forfeitures. The Court determined that Congress specifically "intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello, 464 U.S. at 26. Relying on the language, structure, and legislative history of the RICO statute, the Court upheld the petitioner's forfeiture of insurance proceeds.

I worked on the government's brief as respondent, and I argued the case on October 5, 1997. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); D. Lowell Jensen, then-Assistant Attorney General, Chambers of Senior District Judge D. Lowell Jensen, 1301 Clay Street, Oakland, CA 94612, (510) 637-3540; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington DC 20006, (202) 263-3291; and Sara Criscitelli, 347 Boyd Avenue, Takoma Park, MD 20912, (301) 270-1045. Counsel for petitioner was Ronald A. Dion, Esq., 5701 SW Fifth Street, Plantation, FL 33317,

(954) 581-4727. With him on the brief was Alvin E. Entin, Entin, Margules & Della Fere PA, 110 SE 6th Street, Suite 1970, Fort Lauderdale, FL 33301, (954) 524-8697.

3. United States v. Villamonte-Marquez, 462 U.S. 579 (1983). Customs officials and police officers boarded a sailboat anchored on a channel with access to the Gulf of Mexico. Once on board, they first inspected the vessel's documentation and then discovered 5,800 pounds of concealed marijuana. The issue before the Court was whether, under the Fourth Amendment, customs officials acting pursuant to a statute, but without reasonable suspicion, may board a vessel with easy access to the open sea and inspect its documents. The respondents argued that the statute allowing customs officials to board vessels and inspect documents infringed respondents' Fourth Amendment rights against unreasonable search and seizure.

On behalf of the government, I argued that the suspicionless boardings pursuant to the statute were consistent with the Fourth Amendment, important for public safety, and essential in the ongoing battle against drug-trafficking crimes. The Supreme Court agreed in a majority opinion authored by then-Justice Rehnquist. After acknowledging the historical pedigree of the relevant statute (modeled after a similar statute passed in 1790, by the same Congress that promulgated the Bill of Rights), the Court devoted the bulk of its opinion to explaining the differences between waterborne commerce and vehicular traffic on highways. Ultimately, the Court determined that the strength of the governmental interest in securing waterways outweighed the statute's authorization of limited intrusion on the Fourth Amendment.

I worked on the government's brief as petitioner, and I argued the case on February 23, 1983. With me on the briefs were Rex E. Lee, then-Solicitor General, (deceased); D. Lowell Jensen, then-Assistant Attorney General, Chambers of Senior District Judge D. Lowell Jensen, 1301 Clay Street, Oakland, CA 94612, (510) 637-3540; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington DC 20006, (202) 263-3291; Louis M. Fischer, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 514-2613; James G. Lindsay, (current address unknown); Stuart P. Seidel, Baker & McKenzie LLP, 815 Connecticut Avenue NW, Washington, DC 20006, (202) 463-7295; and Jeanne Mullenhoff, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 616-8429. Counsel for the respondent was Richard P. Ieyoub, Esq., Couhig Partners, 1100 Poydras Street, New Orleans, LA 70163, (504) 588-9750.

4. United States v. Weber Aircraft Corp., 465 U.S. 792 (1983). An Air Force pilot, who was severely injured when he ejected from his plane, sued respondents as the entities responsible for the design and manufacture of the ejection equipment. The respondents sought discovery of confidential unsworn statements from safety investigations conducted by the Air Force after the accident. To that end, the respondents filed requests for the statements under the Freedom of Information Act (FOIA). The issue before the Court was whether confidential statements made by witnesses in an Air Force air crash safety investigation were protected from disclosure under the Freedom of Information Act.

On behalf of the government, I made two principal arguments. First, I argued that the FOIA exemption for material routinely privileged in a civil discovery context applied to these

confidential statements. Second, I argued that Congress specifically intended to protect confidential statements given in military air safety investigations. The Supreme Court, in a unanimous opinion written by Justice Stevens, held that the statements were protected from disclosure. The Court reasoned that exempting information that would not otherwise have been collected was consistent with FOIA because it would not reduce the amount of information available to the public.

I worked on the government's petition and brief, and I argued the case on March 30, 1984. With me on the briefs were Rex E. Lee, then-Solicitor General, (deceased); J. Paul McGrath, then-Assistant Attorney General, American Standard, One Centennial Avenue, P.O. Box 6820, Piscataway, NJ 08855, (732) 980-6000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington, DC 20006, (202) 263-3000; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 514-3441; and Wendy M. Keats, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-0265. Counsel for the respondent was Jacques E. Soiret, Esq., Kirtland & Packard, 2361 Rosencrans Avenue, fourth floor, El Segundo, CA 90245, (310) 536-1000. With him on the brief for respondent Weber Aircraft Co. were Marshall Silberberg, 660 Newport Center Drive, Suite 340, Newport Beach, CA 92660, (949) 718-0960; and Robert M. Churella, Kirtland & Packard, 2361 Rosencrans Avenue, Fourth Floor, El Segundo, CA 90245, (310) 536-1000

5. United States v. Doe, 465 U.S. 605 (1984). During an investigation of corruption in awarding government contracts, the respondent sought to quash a subpoena of certain business records because producing the records would involve testimonial self-incrimination. Previously, the Supreme Court had held that contents of business records ordinarily are not privileged because they are created voluntarily and without compulsion. Fisher v. United States, 425 U.S. 391 (1976). The issue before the Court was the extent to which the Fifth Amendment privilege against compelled self-incrimination applied to the business records of a sole proprietorship.

On behalf of the government, I argued that the rationale of Fisher applied equally in this case because the government had not compelled the creation of the documents it sought. I also emphasized that such records were extremely important in investigations of complex criminal activity. The Supreme Court, in an opinion written by Justice Powell, held that contents of business records were not privileged, but the act of producing records was privileged and could not be compelled without a grant of use immunity. Based upon this reasoning, the Supreme Court ruled in favor of the government in Doe because the records were prepared voluntarily and because the subpoena would not force the respondent to restate, repeat, or affirm the truth of their contents.

I worked on the government's petition and brief, and I argued the case in the Supreme Court on December 7, 1983. Also on the government's briefs were Rex E. Lee, then-Solicitor General (deceased); Andrew L. Frey, then-Deputy Solicitor General, Mayer Brown Rowe & Maw, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3291; Stephen S. Trott, then-Assistant Attorney General, Chambers of Senior Circuit Judge Stephen S. Trott, United States Courthouse, 550 West Fort Street, Suite 667, Boise, ID 83724, (208) 334-1612; and Joel M. Gershowitz, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington,

DC 20530, (202) 514-3742. Counsel for the respondent was Richard T. Philips, 704 Passaic Avenue, West Caldwell, NJ 07006-6408, (973) 227-1800.

6. Community Television of Southern California v. Gottfried, 459 U.S. 498 (1983). The question presented was whether the Federal Communications Commission (FCC), as part of its licensing process for public television stations, must independently assess a station's compliance with Section 504 of the Rehabilitation Act. On behalf of the FCC, I argued that Congress did not intend for the FCC to adjudicate violations of Section 504. In addition, I argued that such a requirement would be inconsistent with the provisions and policies of the Communications Act.

In an opinion authored by Justice Stevens, the Court agreed and held that the FCC could review a public television station's license renewal application under the same standard that it applied to a commercial licensee's renewal application. The Court noted that the legislative history of Section 504 did not indicate any congressional intent to impose enforcement obligations on the FCC. The Court also reasoned that because the statute did not differentiate between commercial and public television stations, the FCC acted within its discretion when it imposed uniform obligations on both groups of licensees.

I worked on the petition and brief on behalf of the FCC, and I argued the case in the Supreme Court on October 12, 1982. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); Stephen M. Shapiro, then-Deputy Solicitor General, Mayer Brown Rowe & Maw, 71 South Wacker Drive, Chicago, IL 60606-4637, (312) 782-0600; Stephen A. Sharp, then-General Counsel, Federal Communications Commission, (current address unknown); Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, (202) 418-1740; C. Grey Pash, Jr., Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, (202) 418-1751; and Linda L. Oliver, Hogan & Hartson LLP, 555 13th Street, NW, Washington, DC 20004-1109, (202) 637-5600. Counsel for petitioner Community Television was Edgar F. Czarra, Jr., Covington and Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401, (202) 662-6000. With him on the briefs were Mark D. Nozette, Attorneys' Liability Assurance Society, Inc., Suite 5700, 311 South Wacker Drive, Chicago, IL 60606-6622, (312) 697-6900; and Richard A. Meserve, Covington and Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401, (202) 662-6000. Counsel for respondents Gottfried et al. in both cases was Charles M. Firestone, Aspen Institute, One Dupont Circle, NW, Suite 700, Washington, DC 20036-1133, (202) 736-5800. With him on the briefs were Abraham Gottfried (current address unknown) and Stanley Fleishman (deceased).

7. Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364 (1984). The question presented was whether a statute prohibiting "editorializing" by public broadcasting stations that received grants from the Corporation for Public Broadcasting, 47 U.S.C. § 399, violated the First Amendment.

On behalf of the FCC, I argued that Congress has the power to establish and finance a public noncommercial and educational broadcasting system and to require that subsidized stations licensed as part of that system refrain from direct editorializing and political

electioneering. Alternatively, I argued that Congress has the power to decide that it will not subsidize private editorializing and electioneering with public funds.

The Supreme Court disagreed. In an opinion by Justice Brennan, the Court struck down the statute on the ground that its ban on editorializing was broader than needed to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official views of the government.

I worked on the government's petition and brief, and I argued the case in the Supreme Court on January 16, 1984. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); J. Paul McGrath, then-Assistant Attorney General, American Standard, One Centennial Avenue, P.O. Box 6820, Piscataway, NJ 08855-6820, (732) 980-6000; Paul Bator, then-Deputy Solicitor General (deceased); Anthony J. Steinmeyer, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, (202) 514-3388; and Michael Jay Singer, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, (202) 514-5432. Counsel for the respondent was Frederic D. Woocher, Esq., Strumwasser & Woocher LLP, 100 Wilshire Blvd Ste 1900, Santa Monica, CA, (310) 576-1233. With him on the briefs were Bill Lann Lee, Lieff, Cabraser, Heimann, & Bernstein, LLP, Embarcadero Center West, 275 Battery Street, Suite 3000, San Francisco, CA 94111, (415) 956-1000; and John R. Phillips, Phillips & Cohen LLP, 2000 Massachusetts Avenue, NW, 1st Floor, Washington, DC 20036, (202) 833-4567.

8. Chemical Manufacturers Association v. Natural Resources Defense Council, 470 U.S. 116 (1985). This consolidated case arose from a challenge by the Natural Resources Defense Council to regulatory action by the Environmental Protection Agency (EPA). At issue was whether the EPA could grant variances from national pollution standards to plants whose operations involved "fundamentally different factors" from those considered by the EPA in establishing the national standards. The lower court decision prohibiting such variances threatened to interfere with the EPA's plan to implement the Clean Water Act, imperiled existing pollution standards, and would have delayed the promulgation of new standards.

On behalf of the EPA, I argued that the EPA's practice of allowing such variances constituted a reasonable and permissible exercise of its discretion under the Clean Water Act, given the statute's text, legislative history, and goals. The Supreme Court agreed with the government and reversed the lower court in an opinion authored by Justice White.

I worked on the brief on behalf of the EPA, and I argued the case in the Supreme Court on November 6, 1984. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); F. Henry Habicht, II, then-Assistant Attorney General, Safety-Kleen Corp., One Brinckman Way, Elgin, IL 60123, (800)-323-5040; Louis F. Claiborne, then-Deputy Solicitor General (deceased); Jose R. Allen, Skadden, Arps, Slate, Meagher & Flom LLP, Four Embarcadero, Suite 3800, San Francisco, CA 94111, (415) 984-6400; Barry S. Neuman, Barry S. Neuman, PLLC, 1615 L Street, NW, Washington, DC 20036, (202) 466-2886; A. James Barnes, then-General Counsel, Environmental Protection Agency, Indiana University Law School, 107 South Indiana Avenue, Bloomington, IN 47405, (812) 856-3342; and Susan G. Lebow, then-Assistant General Counsel, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW,

Washington, DC 20460, (202) 564-7700. Counsel for the petitioner was Theodore L. Garrett, Covington and Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401, (202) 662-6000. Counsel for the respondent was Frances Dubrowski, 3215 Klingle Rd. NW, Washington, DC, (202) 295-9009.

9. Atkins v. Parker, 472 U.S. 115 (1985). Food stamp recipients in Massachusetts challenged a congressionally-mandated change in their benefit levels. At issue was whether the notice given to the recipients violated the Due Process Clause of the Fourteenth Amendment. On behalf of the Secretary of Agriculture, I argued that the notice provided was sufficient to satisfy the due process requirements of notice and opportunity to respond. I argued that the Due Process Clause does not mandate individualized advance notice of legislative changes in benefit levels. Alternatively, I argued that the Massachusetts notice, which was coupled with other procedures for reducing the risk of error, was constitutionally sufficient.

Reversing a decision of the U.S. Court of Appeals for the First Circuit, the Supreme Court agreed with the government and held that the notice disseminated to the food stamp recipients complied with all statutory, regulatory, and constitutional requirements. In an opinion authored by Justice Stevens, the Court held that the relevant statute did not require individualized notice of a general change in the law and that the notice complied with a regulation that did require individual notice of a change in the law that would affect benefit levels. In addition, the Court held that the program beneficiaries were not deprived of their constitutional right to due process because there was sufficient notice and opportunity to challenge adverse actions and the legislative process provided all the process that was due.

I argued the case in the Supreme Court on November 27, 1984. On the brief were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, The Gillette Company, Prudential Tower Building, 39th Floor, Boston, MA 02199, (617) 421-7863; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, N.W., Washington, DC 20006-1101, (202) 263-3000; then-Assistant to the Solicitor General Michael W. McConnell, United States Court of Appeals for the Tenth Circuit, 125 South State Street, Suite 5402, Salt Lake City, UT 84138, (801) 524-5145; Leonard Schaitman, Civil Division, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 514-2000; and Bruce G. Forrest, then-Department of Justice attorney, 2709 Woodley Rd, NW, Washington, DC 20008, (202) 332-9607. Counsel for petitioner Massachusetts Commissioner of Public Welfare were: Francis X. Bellotti, then-Attorney General of Massachusetts, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C., One Financial Center, Boston, MA 02111, (617) 348-1606; Ellen L Janos, then-Assistant Attorney General of Massachusetts, Gaston & Snow, One Federal Square, Boston, MA 02110, (617) 426-4600; E. Michael Sloman, then-Assistant Attorney General of Massachusetts, Meyer, Connolly, Sloman, & MacDonald, LLP, 12 Post Office Square, Boston, MA 02109, (617) 423-2254; and Carl Valvo, then-Assistant Attorney General of Massachusetts, Cosgrove, Eisenberg, and Kiley, P.C. , Suite 1820, One International Place, Fort Hill Square, Boston, MA 02110, (617) 439-7775. Counsel for respondents were Steven A. Hitov, 192 Willow Street, Roxbury, MA 02032, (617) 325-6417, and J. Paterson Rae, Western Mass. Legal Services, Springfield, MA, 55 Federal Street, Greenfield, MA 01301, (413) 774-3747.

10. National Railroad Passenger Corporation v. Atchison, Topeka & Santa Fe Railway Co., 470 U.S. 451 (1985). This case concerned the Rail Passenger Service Act of 1970 (RPSA), which created Amtrak, an independent corporation, and authorized it to contract with local railway companies to take over their passenger service obligations in exchange for a fee. After doing so, Amtrak sharply curtailed the discounted travel previously afforded to railway employees. Congress, in 1972, required Amtrak to restore these privileges, but required local railways to reimburse its costs for doing so. Subsequently, in 1979, Congress modified the reimbursement formula to increase the payments to exceed Amtrak's costs for transporting railway employees.

Several railways sued, arguing: (1) that either the RPSA or their contracts with Amtrak contractually obligated the United States to forbear charging them for the cost of intercity rail travel; and (2) that the reimbursement requirement, or at least the charge in excess of Amtrak's costs, constituted a deprivation of property without due process of law under the Fifth Amendment.

On behalf of the United States, I defended Congress's authority to legislate without creating contractual obligations. I argued that even if a right against the United States was found to exist, no such rights were violated. The RPSA did not compel private railroads to resume operation of passenger trains; instead, it simply required them to reimburse Amtrak for the continued provision of a benefit the railroads had themselves initiated. Moreover, even if the 1979 Amendments did alter contract rights, they did not violate the Fifth Amendment Due Process Clause because Congress did not act arbitrarily or irrationally.

The Court agreed that the RPSA did not restrict Congress's power because of the strong presumption that statutes do not create contractual obligations that restrict future governmental action, absent a clear expression of an intent to do so. The Court also agreed that the Amtrak contracts did not preclude legislative action because private parties may not restrict the scope of Congress's authority by contract.

I worked on the government's brief and argued the case in the Supreme Court on January 15, 1985. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154, (212) 546-4000; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530 (202) 514-3301; and Al Daniel, Jr., Cowan, DeBaets, Abrahams & Sheppard LLP, 41 Madison Avenue, New York, NY 10010, (212) 974-7474. Representing Amtrak were Paul F. Mickey Jr., Steptoe & Johnson, 1330 Connecticut Avenue, NW, Washington, DC 20036, (202) 249-3000; William R. Perlik, retired, living in McLean, VA (current address unknown); David R. Johnson, Visiting Professor of Law, New York Law School, 57 Worth Street, New York, NY 10013 (212) 431-2000; and Andrea Timko, retired, living in Washington, DC (current address unknown). Counsel for respondents were George A. Platz, retired, living in Winnetka, Illinois (current address unknown); Howard J. Trienens, Sidley Austin Brown & Wood, 1 South Dearborn Street, Chicago, IL 60603, (312) 853-7417; Thomas W. Merrill, Sidley Austin Brown & Wood, 1 South Dearborn Street, Chicago, IL 60603, (312) 853-7834; and William A. Brasher, Brasher Law Firm, 1 Metropolitan Square, 211 North Broadway, Suite 2300, Street Louis, MO 63102, (314) 621-7700.

11. Army & Air Force Exchange Services v. Sheehan, 456 U.S. 728 (1982). This case was filed by a former civilian employee of the Army & Air Force Exchange Service (AAFES) who was terminated after pleading guilty to drug possession. The plaintiff was appointed through an AAFES executive management program, which was subject to special regulations. The plaintiff alleged that his agreement to participate in this program created an actual or implied contract with the United States sufficient to create Tucker Act jurisdiction in federal court over his action for money damages.

On behalf of the government, I argued that the District Court lacked jurisdiction to entertain the claim. As instrumentalities of the United States, military exchanges share the government's sovereign immunity. Congress has the power to waive sovereign immunity, but the court below had failed to point to any statute or regulation containing the requisite waiver. I argued that the plaintiff was an appointee, rather than an employee, and therefore had no employment contract to raise under the Tucker Act. Further, in order to sustain respondent's suit, the Court would have to imply a contract enforceable under the Tucker Act using the program's regulations. The Court agreed with the government's position and, in an opinion written by Justice Blackmun, found that the Tucker Act does not itself create a cause of action; rather a plaintiff must identify another federal statute that authorizes a suit for money damages against the United States. The regulations to which respondent pointed did not do so.

I worked on the government's brief and argued the case in the Supreme Court on February 23, 1982. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); J. Paul McGrath, then-Assistant Attorney General, American Standard Companies Inc., Piscataway, NJ 08855, (732) 980-6000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006, (202) 263-3000; William Kanter, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530, (202) 514-4575; and Eloise E. Davies (current address unknown). Counsel for the respondent was Ira E. Tobolowsky, Tobolowsky & Burk, P.C., 4305 West Lovers Lane, Dallas, TX 75209, (214) 352-0662.

12. Belknap v. Hale, 463 U.S. 491 (1983). This case regarded the extent to which to the National Labor Relations Act (NLRA) preempts state law claims arising out of strike activity. Specifically, the question presented was whether the NLRA preempts a state law misrepresentation and breach-of-contract action against an employer, brought by strike replacements displaced by reinstated strikers after having been offered and accepted jobs on a permanent basis and assured they would not be fired to accommodate returning strikers.

On behalf of the National Labor Relations Board as *amicus curiae*, I argued that the NLRA preempted the state law causes of action, because allowing such suits would interfere with Congress's regulatory scheme, and would undermine the dual objectives of encouraging peaceful settlement of labor disputes and uniformly administering federal law. The argument was based on a line of preemption cases described in Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976), which proscribed state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated.

The Supreme Court, in an opinion by Justice White, held otherwise. The Court noted two doctrines allowing preemption by the NLRA: the doctrine set out in the Machinists case relied upon by the NLRB and the doctrine that applies when the state cause of action concerns conduct that is prohibited or protected by the Act. See San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Under this latter doctrine, however, if the subject of regulation is only peripherally of concern to federal law or is so deeply rooted in local law that Congress would not have intended to preempt the application of state law, courts must balance state interests with those underlying the Act. Ultimately, the Supreme Court was not convinced that allowing state suits would impermissibly burden either the federal system of labor regulation promulgated by the Act or the employer faced with a striking work force.

I argued on behalf of the government. On the brief were Rex E. Lee, then-Solicitor General (deceased); Robert E. Allen (current address unknown); Norton J. Come, Division of Enforcement, Litigation Supreme Court Branch, Office of the General Counsel, NLRB, 1099 14th Street, NW, Washington DC, 20570, (202) 273-2977; and Linda Sher, Division of Enforcement Litigation Appellate Court Branch, Office of the General Counsel, NLRB, 1099 14th Street, NW, Washington DC, 20570, (202) 273-2960. Appearing for the petitioner was Larry E. Forrester (current address unknown). Appearing for the respondents were Cecil Davenport 4636 Swift Run Dr., Leesburg, FL 34748; and Hollis Searcy, 800 Stone Creek Parkway, Suite 1, Louisville, KY 40223, (502) 425-6200.

Following are cases that I did not argue before the Court, but in which my name appeared on the briefs.

13. United States v. Inadi, 475 U.S. 387 (1986). The issue before the Court was whether the Confrontation Clause of the Sixth Amendment barred the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule when the prosecution had not established that the declarant was unavailable to testify at trial.

On behalf of the government, we argued that no unavailability showing was required. Specifically, we argued that the Confrontation Clause was intended to prohibit trial by affidavit and comparable practices, not to proscribe or generally regulate the admission of hearsay. We also argued that the co-conspirator exception is not analogous to the prior testimony exception, and noted that the Court's Confrontation Clause decisions treat most hearsay exceptions other than the prior testimony exception as presumptively valid. Finally, we maintained that reevaluating the co-conspirator rule would be duplicative and disruptive, and would also stultify the evolution of federal and state rules of evidence.

The Supreme Court agreed with the government's position. In an opinion authored by Justice Powell, the Court held that the Confrontation Clause does not preclude admission of out-of-court statements made by a co-conspirator absent a showing of unavailability. The Court held that its earlier decision in Ohio v. Roberts, 448 U.S. 56 (1980), which held that the Confrontation Clause required unavailability for admission of prior testimony, did not apply to any out-of-court statement; that the principles underlying the unavailability rule in Roberts did not apply to statements by co-conspirators; and that the burdens of imposing an unavailability requirement in this context outweighed the benefits.

I worked on the government's briefs. With me on the briefs were Charles Fried, then-Solicitor General, Harvard Law School, Cambridge, MA, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; then-Assistant Attorney General Stephen S. Trott, United States Court of Appeals for the Ninth Circuit, 550 West Fort Street, Boise, ID 83724, (208) 334-1612; and Patty Merkamp Stemler, Criminal Appellate Section, Department of Justice, 950 Constitution Avenue, NW, Washington, DC, 20530, (202) 514-2000. Representing the respondent were Holly Maguigan, New York University School of Law, 245 Sullivan Street, New York, NY 10012, (212) 998-6433; William F. Sheehan, Goodwin Proctor & Hoar, 901 New York Avenue, NW Washington, DC 20001, (202) 346-4303; and Julie Shapiro, Seattle University School of Law, 901 12th Avenue, Seattle, WA 98122-1090 (206) 398-4043.

14. Mitchell v. Forsyth, 472 U.S. 511 (1985). This case involved the immunity of the Attorney General from suit for acts performed in the exercise of his national security functions. Attorney General Mitchell, upon the FBI Director's request, had approved a warrantless wiretap in a national security case. The government argued that the Attorney General should be absolutely immune from liability for damages when he acts to protect the national security, because he should be free to act promptly and effectively for the national good without concern for his personal liability or potential entanglement in litigation. Alternatively, the government argued that the Attorney General was entitled to qualified immunity under Supreme Court precedent holding that a government official is immune from liability for damages unless he violated a "clearly established" legal standard. When Attorney General Mitchell authorized the wiretaps at issue in this case, it was unclear whether the law required a warrant for national security wiretaps. The Supreme Court ruled that the Attorney General does not have absolute immunity. However, because the acts giving rise to the litigation did not clearly violate the law, the Court found that the Attorney General was entitled to qualified immunity.

I worked on the government's briefs. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154-0037, (212) 546-4000; Paul M. Bator, then-Deputy Solicitor General (deceased); Barbara L. Herwig, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-5425; Gordon W. Daiger, retired, living in Bethesda, MD (current address unknown); and Larry L. Gregg, U.S. Attorney's Office, Eastern District of Virginia, 2100 Jamieson Avenue, Alexandria, VA 22314, (703) 299-3700. Appearing for the respondents were David Rudovsky, Kairys, Rudovsky, Epstein & Messing, 924 Cherry Street, Suite 500, Philadelphia, PA 19107, (215) 925-4400; and Michael Avery, Suffolk University Law School, 120 Tremont Street, Boston, MA, 02108, (617) 573-8000.

15. Cargill, Inc. and Excel Corp. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986). This case involved the ability of a private party to seek injunctive relief for violation of the antitrust laws. The questions presented were, first, whether Section 16 of the Clayton Act requires a plaintiff to prove a threat of antitrust injury; and, if so, whether loss or damage due to increased competition qualifies as such an injury. On behalf of the government, we argued that mere assertion of a

more competitive environment would not constitute an antitrust injury; we also suggested that accusations of future predatory pricing related to corporate mergers should be viewed with skepticism. The Supreme Court, in an opinion written by Justice Brennan, clarified that a private plaintiff seeking relief under Section 16 must show threat of injury of the type that the antitrust laws were designed to prevent. The Court went on to hold that a showing of loss or damage merely due to increased competition (for example, as here, due to proposed corporate merger) does not constitute an antitrust injury, but that predatory pricing is capable of inflicting antitrust injury.

I worked on the petition for certiorari in this case, which was filed on behalf of the United States and the Federal Trade Commission as *amici curiae* urging reversal. Arguing the case for the United States was Louis R. Cohen, then-Deputy Solicitor General, Wilmer Cutler Pickering Hale and Dorr, 2445 M Street, NW, Washington, DC 20037, (202) 663-6000. With me on the petition for a writ of certiorari were Charles Fried, then-Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; Douglas Ginsburg, then-Assistant Attorney General, Chambers of Chief Judge Douglas H. Ginsburg, E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, NW, Washington, DC 20001, (202) 216-7190; Lawrence G. Wallace, then-Deputy Solicitor General, retired, Chevy Chase, MD 20815; Charles F. Rule, then-Deputy Assistant Attorney General, Fried, Frank, Harris, Shriver & Jacobson, 1001 Pennsylvania Avenue, NW, Suite 800, Washington, DC 20004, (202) 639-7000; Catherine G. O'Sullivan, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2413; and Andrea Limmer, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2886.

16. Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). This case involved the effect and constitutionality of race-based classifications designed to benefit minorities and the appropriate degree of scrutiny to which courts should subject such classification. The question presented was whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin. On behalf of the government, we argued that state-sponsored quotas granting preference must satisfy strict scrutiny under the Equal Protection Clause like all other state-sponsored racial classifications. The Court, in a plurality opinion authored by Justice Powell, clarified that strict scrutiny applies regardless of whether the racial classification operates against a group that historically has not been subject to governmental discrimination. Applying this standard, the Court determined that because the provision in question did not meet the heavy burden imposed by strict scrutiny, it violated the Equal Protection Clause.

I worked on the brief in this case, which was filed on behalf of the United States as *amicus curiae*. With me on the brief were Charles Fried, then-Acting Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; William Bradford Reynolds, then-Assistant Attorney General, Howrey LLP, 1299 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 383-6912; Charles J. Cooper, then-Deputy Assistant Attorney General, Cooper & Kirk, 1500 K Street, NW, Suite 200, Washington, DC 20005, (202) 220-9600; Walter W. Barnett, (deceased); David K. Flynn, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2195; and Michael Carvin, then-Deputy Assistant Attorney General, Jones Day, 51 Louisiana Avenue, NW, Washington,

DC 20001, (202) 879-3939. Counsel for the petitioners was K. Preston Oade, Jr., Holme Roberts & Owen, 1700 Lincoln Street, Suite 4100, Denver, CO 80203-4541, (303) 861-7000; with him on the briefs were Constance E. Brooks, Brooks & Schluter, 999 18th Street, Suite 1605, Denver, CO 80202, (303) 297-9100; and Thomas Rasmussen (current address unknown). Counsel for the respondents was Jerome A. Susskind (deceased).

17. United States v. Abel, 469 U.S. 45 (1984). The question presented in this case was whether the prosecution could present evidence regarding a defense witness's common membership with the defendant in a particular organization in order to impeach the witness's testimony. On behalf of the government, we argued that the witness's common membership with the defendant in a prison gang whose tenets required its members to commit perjury on behalf of other members was admissible to show bias. The Supreme Court agreed with our position and, in an opinion written by then-Justice Rehnquist, unanimously held that the Federal Rules of Evidence permitted such evidence to show a witness's bias in favor of the defendant.

I assisted in the drafting the government's petition and brief. With me on the government's brief were Rex E. Lee, then-Solicitor General (deceased); Stephen S. Trott, then-Assistant Attorney General, Chambers of Senior Circuit Judge Stephen S. Trott, United States Courthouse, 550 West Fort Street, Suite 667, Boise, ID 83724, (208) 334-1612; Andrew L. Frey, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington, DC 20006, (202) 263-3291; and Gloria C. Phares, Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, New York, NY 10036, (212) 336-2686. Counsel for respondent was Yolanda Barrera Gomez, 421 E. Huntington Dr., Monrovia, CA 91016. With her on the briefs was Peter M. Horstmann (current address unknown).

18. Daily Income Fund v. Fox, 464 U.S. 523 (1984). This case involved the application of the rules of civil procedure to a shareholder derivative action. The respondent, a shareholder of a mutual fund, brought an action against the fund and its investment advisor. The respondent alleged that the fees paid by the fund to the investment advisor were unreasonable, violating the investment advisor's fiduciary duties under Section 36(b) of the Investment Company Act of 1940. The question presented was whether Rule 23.1 of the Federal Rules of Civil Procedure requires that an investment company security holder first make a demand on the company's board of directors before bringing an action to recover allegedly excessive fees. On behalf of the government, we argued that an investment company security holder who brings suit under Section 36(b) does not need to make such a demand prior to filing his action. The Supreme Court agreed with our position and, in an opinion written by Justice Brennan, held that Rule 23.1 does not require such a demand.

I worked on the brief in this case, which urged affirmance on behalf of the Securities and Exchange Commission as *amicus curiae*. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); Louis F. Claiborne, then-Deputy Solicitor General (deceased); Daniel L. Goelzer, Public Company Accounting Oversight Board, 1666 K Street, NW, Washington, DC 20006, (202) 207-9100; Paul Gonson, Kirkpatrick & Lockhart Nicholson Graham LLP, 1800 Massachusetts Avenue, NW, Washington, DC 20036, (202) 778-9434; Jacob H. Stillman**,** Office of the General Counsel, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, (202) 551-5100; Richard A. Kirby, Preston Gates Ellis & Rouvelas Meeds, 1735

New York Avenue, NW, Suite 500, Washington, DC 20006, (202) 661-3730; and Myrna Siegel (current address unknown). Counsel for the petitioners was Daniel A. Pollack, Pollack & Kaminsky, 114 West 47th Street, Suite 1900, New York, NY 10036, (212) 575-4700. With him on the briefs were Frederick P. Schaffer, City University of New York – Office of the General Counsel and Vice Chancellor for Legal Affairs, 535 East 80th Street, New York, NY 10021, (212) 794-5506; George C. Seward, Seward & Kissel LLP, One Battery Park Plaza, New York, NY 10004, (212) 574-1200; and Anthony R. Mansfield (deceased). Counsel for the respondent was Richard M. Meyer, Milberg Weiss Bershad & Schulman LLP, One Pennsylvania Plaza, 49th Floor, New York, NY 10119, (212) 946-9457.

19. FTC v. Grolier, Inc., 462 U.S. 19 (1983). This case involved the Freedom of Information Act's work-product exemption. The question presented was to what extent, if at all, the work product exemption applies when the litigation for which the requested documents were generated has been terminated. On behalf of the Federal Trade Commission, we argued that the work product remains privileged because disclosure, regardless of timing, would undermine the proper function of the adversarial process in ways that the exemption was designed to prevent. The Supreme Court agreed with our position and, in an opinion written by Justice White, held that under the Freedom of Information Act, attorney work product is exempt from required disclosure without regard to the status of the litigation for which it was prepared.

I assisted in the drafting the government's brief on behalf of the Federal Trade Commission as petitioner. With me on the government's brief were Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington, DC 20006, (202) 263-3225; J. Paul McGrath, then-Assistant Attorney General (American Standard, One Centennial Avenue, P.O. Box 6820, Piscataway, N.J. 08855); Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-3441. Counsel for the respondent was Daniel S. Mason, Zelle, Hofmann, Voelbel, Mason & Gette LLP, 44 Montgomery Street, Suite 3400, San Francisco, CA 94104, (415) 693-0700, and with him on the brief were Frederick P. Furth, The Furth Firm LLP, 225 Bush Street, 15th Floor, San Francisco, California 94104, (415) 433-2070; Michael P. Lehmann, The Furth Firm LLP, 225 Bush Street, 15th Floor, San Francisco, California 94104, (415) 433-2070; and Richard M. Clark, Howard & Howard Attorneys, P.C.**,** Comerica Building, 151 South Rose Street, Suite 800, Kalamazoo, MI 49007, (269) 382-8772.

20. Tibbs v. Florida, 457 U.S. 31 (1982). This case presented the question whether the Double Jeopardy Clause precludes reprosecution when a conviction is reversed on appeal not because the evidence was legally insufficient but because the verdict was contrary to the weight of the evidence. We argued for the government that the Double Jeopardy Clause does not bar reprosecution in this situation for two reasons. First, unlike the reversal of a conviction for legally insufficient evidence, reversal based on the weight of evidence does not establish that an acquittal should have been granted at trial. Reprosecuting a defendant whose initial conviction was not supported by the weight of the evidence therefore does not trigger the same double-jeopardy concerns. Second, barring reprosecution after reversal for evidentiary weight would usurp the jury's authority as trier of fact. The Supreme Court, in an opinion by Justice O'Connor, held after examining the policies underlying the Double Jeopardy Clause that a reversal based on weight rather than the sufficiency of the evidence allows a new prosecution.

I worked on the brief in this case, which was filed on behalf of the United States as *amicus curiae* urging affirmance. With me on the brief were Rex E. Lee, then-Solicitor General (deceased); D. Lowell Jensen, then-Assistant Attorney General, Chambers of Senior District Judge D. Lowell Jensen, 1301 Clay Street, Oakland, CA 94612, (510) 637-3540; and John Fichter De Pue, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, (202) 305-2335. Counsel for petitioner was Louis R. Beller 900 Euclid Avenue #14, Miami Beach, FL 33139. Counsel for respondent was Michael A. Palecki, then-Assistant Attorney General of Florida, 6194 Verdura Way, Tallahassee, FL 32311, (850) 877-8689. With him on the briefs were Jim Smith, then-Attorney General of Florida, 403 E. Park Avenue, Tallahassee, FL 32301 (850) 577-0444; and Deborah A. Osmond Frankel, then-Assistant Attorney General of Florida, 51305 Pointe Dr., Inverness, FL 34450.

21. Cleavinger v. Saxner, 474 U.S. 193 (1985). This case presented the question whether members of a prison disciplinary committee are entitled to absolute immunity from personal damages liability for actions taken while adjudicating cases in which inmates are charged with rules infractions. On behalf of the United States, we argued that absolute immunity should obtain because members of prison disciplinary committees, like grand jurors and administrative law judges, serve in a quasi-judicial capacity. Given the adjudicative nature of their work, they should be entitled to absolute immunity from personal damages liability. In addition, we argued that members of prison disciplinary committees play a vital role in maintaining prison security. Subjecting such officers to damages liability would compromise both their willingness to serve in such a capacity and their ability to engage in independent decisionmaking. Thus, institutional order and safety would be jeopardized if committee members were not afforded complete immunity. The Supreme Court rejected our arguments in an opinion by Justice Blackmun. The Court analogized service on a prison committee to service on a school board where members were entitled to only qualified immunity

I participated in drafting the brief for the United States. Also on the brief were Rex E. Lee, then-Solicitor General (deceased); Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; The Honorable Stephen Trott, then-Assistant Attorney General, U.S. Court of Appeals for the Ninth Circuit, 550 West First Street, Boise, ID 83724, (208) 334-1612; Gloria C. Phares, Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, New York, NY 10036, (212) 336-2686. Appearing for the respondents were G. Flint Taylor, People's Law Office, 1180 North Milwaukee, Chicago, IL 60622, (773) 235-0070; and Charles W. Hoffman, Office of the State Appellate Defender, 400 West Monroe, Suite 202, P.O. Box 5240, Springfield, IL 62705, (217) 782-7203.

22. Heckler v. Chaney, 470 U.S. 821 (1985). This case arose from a challenge by death row inmates to the use of certain drugs in executions by lethal injection. The inmates claimed that the use of the drugs for this purpose violated the Federal Food, Drug, and Cosmetic Act (FDCA) and that the Food and Drug Administration was required to enforce their claim. At issue was whether an administrative agency's decision not to take enforcement action was subject to judicial review under the Administrative Procedure Act (APA).

On behalf of the Secretary of Health and Human Services, we argued that the APA did not authorize judicial review in these circumstances. The Supreme Court, in an opinion by then-Justice Rehnquist, unanimously agreed with the government's position and reversed a decision of the U.S. Court of Appeals for the District of Columbia Circuit. The Court held that judicial review is inappropriate if a statute does not offer any meaningful standard against which to judge the agency's action. In such cases, the enforcement of the statute is committed to agency discretion as a matter of law. Moreover, an agency's decision not to take action is presumed immune from judicial review under the APA, a presumption not overcome by the enforcement provisions of the FDCA.

I participated in drafting both the petition for certiorari and the merits briefs submitted for the United States, but did not argue the case. With me on the briefs were Rex E. Lee, then Solicitor-General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, The Gillette Company, Prudential Tower Building, 39th Floor, Boston, MA 02199, (617) 421-7863; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2000; John M. Rogers, then-Department of Justice attorney, United States Court of Appeals for the Sixth Circuit, Community Trust Bank Building, 100 East Vine Street, Suite 400, Lexington, KY 40507, (859) 233-2680; Thomas Scarlett, then-Chief Counsel, Food and Drug Administration, Hyman, Phelps & McNamara, 700 Thirteenth Street, NW, Suite 1200, Washington, DC 20005, (202) 737-5600; Michael P. Peskoe, then-Associate Chief Counsel, Food and Drug Administration, Edwards, Angel, Palmer & Dodge, 111 Huntington Avenue, Boston, MA 02199-7613, (617) 239-0240. Counsel for the respondent were Steven M. Kristovich, Munger Tolles & Olson, 355 South Grand Avenue, 35th Floor, Los Angeles, CA 90071-1560 (213) 683-9251; David E. Kendall, Williams & Connolly LLP, 725 Twelfth Street, NW, Washington, DC 20005, (202) 434-5145; Julius LeVonne Chambers, Ferguson, Stein, Chambers, Gresham & Sumter, 741 Kenilworth Avenue, Suite 300, Charlotte, NC 28204-2828, (704) 375-8461; James M. Nabrit III, NAACP Legal Defense & Educ. Fund, Inc, 99 Hudson Street, Suite 1600, New York, NY 10013, (212) 965-2200; John Charles Boger, University of North Carolina School of Law, Van Hecke-Wettach Hall, 100 Ridge Road, Chapel Hill, NC 27599-3380, (919) 843-9288; James S. Liebman, Columbia Law School, Jerome Greene Hall, Rm. 846, Mailbox B-16, New York NY 10027, (212) 854-3423; and Anthony G. Amsterdam, New York University School of Law, 245 Sullivan Street, New York, NY 10012, (212) 998-6632.

23. SEC v. O'Brien, 467 U.S. 735 (1984). This case presented the issue whether the Securities and Exchange Commission (SEC) must notify a target of a non-public investigation when the SEC issues an administrative subpoena in that investigation to a third party. On behalf of the SEC, we argued that such notification was not required. No constitutional provision, statute, rule, or prior case, we noted, demanded that notification be provided. Moreover, imposition of a new notice requirement would cause law enforcement serious problems that Congress could not have intended. The Supreme Court, in an opinion by Justice Marshall, unanimously agreed and held that neither the Fourth, Fifth, nor Sixth Amendment was implicated by an administrative investigation. It also concluded that the statutes administered by the SEC did not require the agency to notify targets upon issuance of an administrative subpoena.

I worked on the government's briefs, along with Rex E. Lee, then-Solicitor General (deceased); Kenneth S. Geller, then Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006, (202) 263-3000; Daniel L. Goelzer, Public Company Accounting Oversight Board, 1666 K Street, NW, Washington, DC 20006, (202) 207-9100; Paul Gonson, Kirkpatrick & Lockhart Nicholson Graham LLP, 1800 Massachusetts Avenue, NW, Washington, DC 20036, (202) 778-9434; Linda Feinberg, Superior Court Judge, 9 Roseberry Ct., Lawrenceville, NJ 08648; Larry Lavoie, General Counsel, First Investors Corporation, 95 Wall Street, New York, NY 10005; Harry J. Weiss, Wilmer Cutler Pickering Hale & Dorr, LLP, 2445 M Street, NW, Washington, DC 20037, (202) 663-6000; and Elizabeth A. Spurlock (current address unknown). Counsel for the respondent was William D. Symmes, Witherspoon, Kelley, Davenport & Toole, 1100 U.S. Bank Building, 422 West Riverside, Spokane, WA 99201, (509) 624-5265.

24. Dickerson v. New Banner Institute, 460 U.S. 103 (1983). The question presented in this case was whether firearms disabilities imposed by provisions of the Gun Control Act apply to a person who was convicted of a state offense punishable by imprisonment for a term exceeding one year but whose conviction was expunged. On behalf of the Director of the Bureau of Alcohol, Tobacco and Firearms, we argued that statutorily prescribed disabilities are not automatically removed by expunction of the conviction under a state statute. The text of the statute applies to all persons "convicted" of certain crimes, regardless of whether the conviction is subsequently expunged. Other provisions of the Act and related federal statutes reinforce this conclusion and show that Congress carefully distinguished between present status and the occurrence of past events.

The Supreme Court agreed in an opinion by Justice Blackmun. The Court accepted our argument that an expunction under state law does not alter the effect of a disabling conviction for purposes of the federal statute, finding that the interpretation was supported not just by statutory text but by the purpose of Title IV, which was intended to curb crime by keeping firearms out of the hands of those not legally entitled to possess them.

I participated in drafting the government's briefs. With me on the briefs were Rex E. Lee, then-Solicitor General (deceased); Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw, 1909 K Street, NW, Washington, DC 20006, (202) 263-3000; J. Paul McGrath, then-Assistant Attorney General, American Standard, One Centennial Avenue, P.O. Box 6820, Piscataway, NJ 08855-6820, (732) 980-6000; William Kanter, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-4575; and Douglas Letter, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-3602. Counsel for the respondent was Lewis C. Lanier, Lanier Law Firm, 450 Summers Avenue, Orangeburg, SC 29115, (803) 268-9800; with him on the brief was Jack R. McGuinn, (current address unknown).

25. Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, 478 U.S. 501 (1986). This case concerned whether a federal district court may, consistent with Title VII of the Civil Rights Act of 1964, adopt and implement a consent decree that provides race-based preferences to individuals not shown to have been victims of the employer's discrimination. The United States submitted an *amicus* brief arguing that such a

consent judgment was unlawful for two reasons: first, because it violated the remedial principle expressed in Section 706(g) of Title VII, which bars the adoption of race-based quotas; and, second, because the consent judgment was entered over the objection of a union that intervened as of right and whose members were adversely affected.

The Supreme Court, in an opinion by Justice Brennan, rejected our position and held that Title VII allows entry of a consent decree that may benefit individuals who were not victims of discriminatory practices. The majority reasoned that voluntary race-conscious relief is not rendered impermissible because it is incorporated into a consent decree, regardless of whether a court would be precluded from imposing race-conscious relief after trial. The Court concluded that a consent decree may provide broader relief than the court itself could have awarded after trial. The Court also held that the lack of consent by the union did not invalidate the consent decree as one party cannot prevent the other parties from resolving their disputes with each other by withholding consent.

I participated in drafting the government's *amicus* brief urging reversal. William Bradford Reynolds, then-Assistant Attorney General, Howrey LLP, 1299 Pennsylvania Avenue, NW, Washington, DC 20004-2402, (202) 383-6912, argued the case for the United States. With me on the brief were Charles Fried, then-Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; Carolyn B. Kuhl, then-Assistant Attorney General, the Chambers of Judge Carolyn B. Kuhl, Superior Court of California, 111 North Hill Street, Los Angeles, CA 90012, (213) 974-5707; Michael Carvin, then-Deputy Assistant Attorney General, Jones Day, 51 Louisiana Avenue, NW, Washington, DC 20001-2113, (202) 879-3939; Walter W. Barnett (deceased); and David K. Flynn, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-2195. Petitioner Local Number 93 was represented by William L. Summers, Summers & Vargas Co., LPA, 23240 Chagrin Boulevard, Suite 525, Cleveland, OH 44122, (216) 591-0727. Respondent Vanguards of Cleveland was represented by Edward R. Stege, Jr., Stege & Michelson Co., LPA, 200 Public Square, Suite 3220, Cleveland, OH 44114, (216) 348-0700. Respondents City of Cleveland, et al., were represented by John D. Maddox (current address unknown).

26. Local 28 of the Sheet Metal Workers' Intel Ass'n v. E.E.O.C., 478 U.S. 421 (1986). This case arose out of a Title VII lawsuit brought by the United States against Local 28 to enjoin a pattern of discrimination against nonwhites in union membership. After finding a violation, the district court entered a remedial order requiring, among other things, that the union take steps to recruit more nonwhite members, and to achieve a 29.23% nonwhite membership goal. After the Union failed to comply, the district court held it in civil contempt. The Union's challenge to that contempt order led to this appeal. The appeal implicated the potential limitations on the remedies allowed pursuant to Title VII of the Civil Rights Act of 1964. The principal question presented was whether the remedial provision of Title VII allows a district court to order race-based relief that may benefit persons who are not identified victims of unlawful discrimination.

On behalf of the EEOC, our principal argument was that the set-percentage membership goal was a race-based quota, and therefore improper. We based our analysis on the Supreme Court's prior decision in Firefighters Local Union No. 1784 v. Stotts, 457 U.S. 561 (1984), which

held that Section 706(g) of Title VII prohibits the award of relief such as union membership to individuals who were never the actual victims of illegal discrimination. Because there was no showing that the beneficiaries of the membership quota had been victimized by the unions, we argued that the remedy was unconstitutional. The Supreme Court, in an opinion by Justice Brennan, disagreed. Six justices agreed that a district court may, in appropriate circumstances, order relief for a class, which may include individuals who are not the actual victims of discrimination as a remedy for violations of Title VII. In addition, five justices determined that the membership goal required of the Union in this case did not violate either Title VII or the Constitution.

I participated in drafting the government's brief on behalf of respondent the Equal Employment Opportunity Commission. Appearing with me on the government's brief were Charles Fried, then-Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; William Bradford Reynolds, then-Assistant Attorney General, Howrey LLP, 1299 Pennsylvania Avenue NW, Washington, DC 20004, (202) 383-6912; The Honorable Carolyn B. Kuhl, then-Assistant Attorney General, Superior Court of California, 111 North Hill Street, Los Angeles, CA 90012, (213) 974-5707; Brian K. Landsberg, McGeorge School of Law, 3200 5th Avenue, Sacramento, CA 95817, (916) 739-7101; Dennis J. Dimsey, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-2195; David K. Flynn, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-2195; and Johnny J. Butler, then-Acting General Counsel of Equal Employment Opportunity Commission, Booth & Tucker, LLP, 1617 JFK Boulevard, Suite 1700, Philadelphia, PA 19103, (215) 875-0609. Appearing for respondent the New York State Division of Human Rights were O. Peter Sherwood, then-Deputy Solicitor General of New York, Manatt, Phelps & Phillips, LLP, 7 Times Square, New York, NY 10036, (212) 830-7288; Robert Abrams, then-Attorney General of New York, Stroock & Stroock & Lavan LLP, 180 Maiden Lane, New York, NY 10038, (212) 806-5400; Robert Hermann, then-Solicitor General of New York, Thacher Proffitt & Wood LLP, 2 World Financial Center, New York, NY 10281, (212) 912-7400; Lawrence S. Kahn, New York City Law Department, 100 Church Street, New York, NY 10007, (212) 788-0600; Colvin W. Grannum, Bedford Stuyvesant Restoration Corporation, 1360 Fulton Street, Brooklyn, NY 11216, (718) 638-5705; Jane Levine, United States Attorney's Office for the Southern District of New York, 1 Street Andrews Plaza, New York, NY 10007, (212) 637-2200; and Martha J. Olson, Law Office of Martha Olson, 317 Madison Ave, Suite 1708, New York, NY 10017, (212) 867-8455. Appearing for respondent the City of New York were Frederick A. O. Schwarz, Jr., Cravath, Swaine & Moore LLP, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019, (212) 474-1000; Leonard Koerner, New York City Law Department, 100 Church Street, New York, NY 10007, (212) 788-1010; Stephen J. McGrath, New York City Law Department, 100 Church Street, New York, NY 10007, (212) 788-1056; Lorna B. Goodman, Office of the Nassau County Attorney, 1 West Street, Mineola, NY 11501, (516) 571-3056; and Lin B. Saberski, (current address unknown). Appearing for the petitioners were Martin R. Gold, Sonnenschein Nath & Rosenthal LLP, 1221 Avenue of the Americas, New York, NY 10020, (212) 768-6700; Robert P. Mulvey, Sonnenschein Nath & Rosenthal LLP, 1221 Avenue of the Americas, New York, NY 10020, (212) 768-6700; and William Rothberg, Sheet Metal & Air Conditioning Contractors Association of New York City, Inc., 16 Court Street, Brooklyn, NY 11241, (212) 624-2200.

27. Exxon Corporation v. Hunt, 475 U.S. 355 (1986). This case presented the question whether a particular provision of CERCLA, the federal act that established Superfund, preempted the previously enacted New Jersey Spill Act. On behalf of the United States, we argued in an *amicus* brief that the Spill Act was partially preempted. Whereas the excise tax imposed by the Spill Act could be used to compensate third parties for certain economic losses sustained as a result of hazardous substance releases, the Superfund statute provided: "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." We argued that the phrase "compensation for claims" should be given its customary, literal meaning, and thus was not a synonym for broader terms such as payments or expenditures.

The Supreme Court agreed in an opinion by Justice Marshall, holding that the New Jersey Spill Act was preempted in part. The Court concluded that Congress intended to ban state funds to the extent that they covered Superfund-eligible expenses. To the extent that the New Jersey fund had purposes that went beyond the scope of CERCLA, it was not preempted by federal law.

I was responsible in part for drafting the government's *amicus* brief. Also on the brief were: Rex E. Lee, then-Solicitor General (deceased); F. Henry Habicht II, then-Assistant Attorney General, Safety-Kleen Corporation, 2900 South Quincy Street, Suite 410, Arlington, VA 22206, (703) 379-2713; Louis F. Claiborne, then-Deputy Solicitor General, (deceased); Robert L. Klarquist, (current address unknown); and Dirk D. Snel, (deceased). Appearing for the petitioner were Daniel M. Gribbon, (deceased); John J. Carlin, Jr., Carlin & Ward, P.C., 25A Vreeland Road, Florham Park, NJ 07932, (973) 377-3350; and E. Edward Bruce, Covington & Burling, 1201 Pennsylvania Avenue NW, Washington, DC 20004, (202) 662-6000. Appearing for the respondent were the Honorable Mary C. Jacobson, then-Deputy Attorney General of New Jersey, Mercer County Civil Courts, 175 South Broad Street, Trenton, NJ 08650, (609) 571-4861; The Honorable Irwin I. Kimmelman, then-Attorney General of New Jersey, Superior Court of New Jersey, 155 Morris Avenue, Springfield, NJ 08625, (609) 292-4822; and Michael R. Cole, DeCotiis, FitzPatrick, Cole & Wisler, LLP, 500 Frank W. Burr Boulevard, Teaneck, NJ 07666, (201) 928-1100.

28. Young v. Community Nutrition Inst., 476 U.S. 974 (1986). The question presented in this case was whether the U.S. Court of Appeals for the District of Columbia Circuit correctly concluded that the Food and Drug Administration's interpretation of a particular provision of the Federal Food, Drug, and Cosmetic Act was in conflict with the plain language of that provision. The respondents had alleged that the Act required the FDA to set a tolerance level for a poisonous substance, aflatoxin, before allowing interstate shipment of food containing the substance. On behalf of the FDA, we argued that the agency's construction of the relevant provision – which did not require it to set a tolerance level – was fully consistent with the overall structure and legislative history of the Act, with the role that the provision plays in the enforcement process, and with both the Supreme Court's and Congress's current understanding. The Supreme Court, in an opinion authored by Justice O'Connor, agreed. The analysis began with the framework set out by the Supreme Court in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), determining as an initial matter that Congress had

not unambiguously expressed its intent through the plain language of the statute. Because the view of an agency charged with administering an ambiguous statute is entitled to considerable deference from the courts, the Supreme Court concluded that the FDA's interpretation was "sufficiently rational" to preclude a court from substituting its own judgment for that of the FDA.

I worked on the government's brief in this matter. Appearing with me on the brief were Charles Fried, then-Solicitor General, Harvard Law School, 1563 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4636; Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154-0037, (212) 546-4000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street NW, Washington, DC 20006, (202) 263-3225; Paul J. Larkin, Jr., then-Assistant to the Solicitor General, Verizon Communications, 1515 North Courthouse Road, Arlington, VA 22201, (703) 351-3845; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-3441; Marleigh D. Dover, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, (202) 514-3511; Thomas Scarlett, then-Chief Counsel, Food and Drug Administration, Hyman, Phelps & McNamara, P.C., 700 Thirteenth Street NW, Suite 1200, Washington, DC 20005, (202) 737-5600; and Michael M. Landa, then-Associate Chief Counsel for Enforcement Food and Drug Administration, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, (301) 827-1137. Appearing for the respondent were William B. Schultz, Zuckerman Spaeder LLP, 1800 M Street NW, Suite 1000, Washington, DC 20036, (202) 778-1800; Alan B. Morrison, Public Citizen Litigation Group, 1600 20th Street NW, Washington, DC 20009, (202) 588-1000; and Katherine A. Meyer, Meyer & Glitzenstein, 1601 Connecticut Avenue NW, Suite 700, Washington, DC 20009, (202) 588-5206.

29. United States v. Morton, 467 U.S. 822 (1984). The question presented in this case was whether the United States is liable for sums withheld from the pay of one of its employees because it complied with a writ of garnishment issued by a court without personal jurisdiction over the employee. On behalf of the United States, we argued that the government was not liable for three reasons: (1) the federal garnishment statute, 42 U.S.C. § 659(f), expressly insulates the government from liability for a payment made pursuant to proper legal process; (2) regulations implementing the statute do not allow any discretion to federal disbursing officers on the ground of latent jurisdictional defects; and (3) governmental liability would be contrary to congressional intent. In a unanimous opinion by Justice Stevens, the Court held that the government could not be held liable for honoring a writ of garnishment that was "regular on its face" and that had been issued by a court with subject-matter jurisdiction.

I worked on the petition for certiorari on behalf of the United States, but did not assist with the brief on the merits. Michael W. McConnell, then-Assistant to the Solicitor General, Chambers of Circuit Judge Michael W. McConnell, 125 South State Street, Suite 5402, Salt Lake City, UT 84138, (801) 524-5145, argued for the United States. Appearing on the briefs were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154-0037, (212) 546-4000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington,

DC 20530, (202) 514-3441; Wendy M. Keats, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-0265; and Mary S. Mitchelson, United States Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202-1500, (202) 245-6987. Counsel for the respondent was Kaletah N. Carroll (deceased).

30. F.C.C. v. ITT World Communications, Inc., 466 U.S. 463 (1984). The primary question presented in this case was whether the Government in the Sunshine Act, 5 U.S.C. § 552(b), mandating that federal agencies hold their meetings in public, applies to international conferences attended by members of the Federal Communications Commission.

On behalf of the FCC, we argued that both the language and the legislative history of the Act support the view that the Act's open meeting rules should apply only to formal sessions where agency members with decisionmaking power deliberate over concrete proposals for action. The Supreme Court unanimously agreed in an opinion by Justice Powell, holding that the statute, according to its language, could not apply unless the FCC was deliberating upon matters within its formally delegated authority to take official action. Congress, the Court concluded, did not contemplate the broad restraint on agency processes that would necessarily result from applying the Act's open meeting rules to informal meetings, particularly those not run by the agency itself.

I worked on the petition for certiorari, which was filed on behalf of the Federal Communications Commission, but did not assist with the brief on the merits. Albert G. Lauber, Jr., then-Assistant to the Solicitor General, Caplin & Drysdale, Chartered, One Thomas Circle, NW, Washington, DC 20005, (202) 862-5000, argued the case for the United States. Appearing with him on the briefs were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154-0037, (212) 546-4000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw LLP, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3000; Bruce E. Fein, then-General Counsel, Federal Communications Commission, The Lichfield Group, 910 17th Street, NW, Suite 800, Washington, DC 20006, (202) 775-1787; Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, (202) 418-1740; Leonard Schaitman, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 514-3441; Frank A. Rosenfeld, (current address unknown); and C. Grey Pash, Jr., Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, (202) 418-1751. Counsel for respondents was Grant S. Lewis (deceased).

31. United States Dept. of Justice v. Falkowski, (83-2034), April 1, 1985, 471 U.S. 1001 (1985). This case concerned the proper scope of judicial review of agency decisionmaking. On behalf of the United States, we sought Supreme Court review of two questions: first, whether the Administrative Procedure Act authorized judicial review of the Department of Justice's decision not to provide legal representation for an employee sued in her individual capacity for actions taken while on the job; and second, if so, whether the court below applied the proper scope of review in overturning the Department's decision. The Supreme Court granted, vacated, and remanded the case for further consideration in light of its decision in Heckler v. Chaney, 470 U.S. 821 (1985).

I worked on the government's petition. With me on the petition were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154, (212) 546-4000; and Paul M. Bator, then-Deputy Solicitor General (deceased).

32. United States v. Doe, (84-0823), April 1, 1985, 471 U.S. 1001 (1986). This case concerned the scope of the Fifth Amendment privilege against self-incrimination with respect to the compelled production of personal documents pursuant to grand jury subpoena. While the Supreme Court granted certiorari, during the briefing period the respondent waived his privilege, voluntarily provided the subpoenaed documents, and entered into a plea agreement with the government. At the request of all the parties, the Supreme Court vacated the lower court decisions, and remanded the case to be dismissed as moot.

I was partially responsible for drafting the government's petition. With me on the petition was Rex E. Lee, then-Solicitor General (deceased).

33. Moore v. Kenyatta (84-1445), March 12, 1985, 471 U.S. 1066 (1985). This case involved a civil claim alleging that defendant police officers committed state torts and violated plaintiff's federal constitutional rights. The Court of Appeals held that the police officers were not entitled to absolute immunity and that the denial of qualified immunity, unlike the denial of absolute immunity, was not immediately appealable under the collateral order doctrine. Although the Supreme Court denied cert in this case, it accepted our argument that a denial of qualified immunity is subject to interlocutory review in Mitchell v. Forsyth, 472 U.S. 511 (1985).

I was partially responsible for drafting the government's petition. With me on the petition were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154, (212) 546-4000; Barbara Herwig, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 514-1201; and Freddi Lipstein (current address unknown).

34. Adams v. Jasinki (84-1324), February 19, 1985, 473 U.S. 901 (1985). This case presented the question whether an order denying a motion to dismiss a complaint on the basis of qualified immunity may be appealed under the collateral order doctrine. On behalf of the United States, we submitted a petition for certiorari arguing that the district court's rejection of the defendant's immunity defense was immediately appealable. The Supreme Court granted, vacated, and remanded for further consideration in light of Mitchell v. Forsyth, 472 U.S. 511 (1985), which had accepted the government's contention that a district court's denial of qualified immunity is an appealable final decision.

I was partially responsible for drafting the government's petition. With me on the petition were Rex E. Lee, then-Solicitor General (deceased); Richard K. Willard, then-Acting Assistant Attorney General, Bristol-Myers Squibb Company, 345 Park Avenue, New York, NY 10154, (212) 546-4000; Kenneth S. Geller, then-Deputy Solicitor General, Mayer, Brown, Rowe & Maw, 1909 K Street, NW, Washington, DC 20006-1101, (202) 263-3225; Barbara L. Herwig,

United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 514-1201; and William G. Cole, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 514-1201.

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

    a. the date of representation;

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

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

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

I have described the following cases in response to question 15.f. Please see the response to 15.f. for the full description of the case.

1. Oregon v. Kennedy, 456 U.S. 667 (1982)
2. Russello v. United States, 464 U.S. 16 (1983)
3. United States v. Villamonte-Marquez, 462 U.S. 579 (1983)
4. United States v. Weber Aircraft Corp., 465 U.S. 792 (1983)
5. United States v. Doe, 465 U.S. 605 (1984)
6. Community Television of Southern California v. Gottfried, 459 U.S. 498 (1983)
7. Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364 (1984)
8. Chemical Manufacturers Association v. Natural Resources Defense Council, 470 U.S. 116 (1985)
9. Atkins v. Parker, 472 U.S. 115 (1985)

The following case is not described in the response to 15.f.

10. United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990). See also United States v. Kikumura, 698 F. Supp. 546 (D.N.J. 1988), and United States v. Kikumura, 706 F. Supp. 331 (D.N.J. 1989). This was a prosecution of a suspected member of a terrorist group who assembled bombs for use in carrying out a terrorist attack in this country. The evidence showed that the defendant entered the United States using a forged passport and then traveled around the country acquiring the components used in making the bombs. After completing the construction of the bombs, he was apprehended in New Jersey. I

was the United States Attorney for the District of New Jersey, and together with an Assistant United States Attorney, I handled the extensive pretrial motions and prepared the prosecution of the case. On the morning of the scheduled trial, the defendant stipulated to the facts alleged in the indictment and was convicted in a bench trial. I then was principally responsible for presenting the government's case at the sentencing hearing at which we successfully argued for a substantial upward departure from the low sentence prescribed by the Sentencing Guidelines. I was principally responsible for briefing the appeal, and I presented the oral argument in the Third Circuit on behalf of the government. The Third Circuit affirmed the conviction and sustained most of the upward departures imposed by the district court while remanding the case for resentencing. Specifically, the court found that under the circumstances in this case, an upward departure to 360 months was unreasonable, but an upward departure to 262 months would not be unreasonable.

I tried the matter before United States District Court Judge Alfred J. Lechner and argued the case for the United States in the Third Circuit Court of Appeals before Judges Becker, Cowen, and Rosenn. Appearing with me as co-counsel was John P. Lacey, then-Assistant United States Attorney, Connell Foley LLP, 85 Livingston Avenue, Roseland, NJ 07068, (973) 535-0500. Appearing for the defendant were William M. Kuntsler (deceased); and Ronald L. Kuby, Kuby & Perez LLP, 119 West 23rd Street, Suite 900, New York, NY 10011, (212) 529-0223.

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

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

b. citations to all cases in which you were a panel member;

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

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

e. a list of and copies of all your unpublished opinions.

See attached appendix for responses to questions 17.a. through 17.e.

18. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe these activities in detail.

During most of my legal career, my work has related exclusively or almost exclusively to litigation. From late 1985 until early 1987, however, while serving as a

Deputy Assistant Attorney General in the Office of Legal Counsel, I assisted in providing advice to the Attorney General and to components of the Executive Branch on legal issues that arose outside the context of litigation. I was one of three Deputies in the office at that time. One of the Deputies concentrated on matters involving foreign relations and international law, and the other was responsible for, among other things, reviewing proposed legislation for possible constitutional problems. I was responsible for a broad range of matters not falling into either of the above categories. At times, I responded to oral requests for expedited advice, but most of the work involved written requests for an opinion on a constitutional or legal question. Some requests grew out of disputes between government agencies, and OLC, acting on behalf of the Attorney General, was responsible for providing a resolution of the dispute. For the most part, I was responsible for providing the first level of supervision and review on work done by the Attorney Advisers. A list of the publicly released OLC opinions bearing my name has been provided, and these opinions are representative of much of my work during that time.

From March 1987 until June 1990, while serving as the United States Attorney for the District of New Jersey, I supervised an office of more than 60 attorneys. Most of my work during that time related directly to court cases, but a significant portion of the work did not. Within the parameters set by Department of Justice policies, I was responsible for developing and implementing the priorities of the United States Attorney's office. This required extensive consultation with the various federal investigative agencies and coordination with the state attorney general, the New Jersey state police, and the county prosecutors. Close federal-state cooperation permitted the United States Attorney's office to address the state's full range of federal law enforcement needs. We were able to reinvigorate the unit responsible for public corruption cases and to increase the resources devoted to the prosecution of white collar crime. I also brought about closer cooperation between the Untied States Attorney's office and the Organized Crime Strike Force, which was then under the supervision of Washington.

Other major responsibilities not directly related to litigation included assembling a supervisory staff, supervising the hiring of numerous Assistant United States Attorneys, and working with the responsible federal investigative agencies to ensure that the most important and promising criminal investigations received the investigative and legal support that was needed.

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

In 1999 – 2000, I taught a two-semester course entitled "Constitutional Law I" at Seton Hall Law School. I do not have a copy of the syllabus, which consisted of a list of the planned reading for each week. I used Stone, Seidman, and Tushnet, *Constitutional Law* (3d ed. 1996), and the class read and discussed almost the entire book.

In 2002 – 2003 and 2003 – 2004, I taught a one-semester seminar called "Terrorism and Civil Liberties" at Seton Hall Law School. Copies of the syllabus and reading list for 2003 – 2004 are attached. The syllabus and reading list for the prior year were very similar, but I am unable to locate copies.

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

Lawsuits in which I was named in my official capacity:

In Grompone, et al. v. Alito, et al. (District of New Jersey. Case No. 2:02-cv-04594-WHW), I was named along with two other Third Circuit judges in a pro se civil complaint alleging civil rights violations. The action was dismissed on defendants' motion on May 13, 2003.

In Dinorscio, et al. v. Greelish, et al. (District of New Jersey, Case No. 2:91-cv-00667-JWB), in my capacity as United States Attorney I was one of more than 20 defendants, named in a prisoner civil rights complaint. The action was dismissed on September 18, 1991.

In Watson v. Baker, et al. (District of New Jersey, Case No. 2:88-cv-02899-JFG), in my capacity as United States Attorney I was one of 10 named defendants. The action was terminated on March 13, 1990.

In Guyer v. Kunz, et al. (District of Delaware, Case No. 1:99-cv-00923-GMS), I was one of approximately 70 named defendants, including 17 other current and former Third Circuit judges, in a civil rights suit brought by a pro se frequent litigant. The district court dismissed the action and denied plaintiff's subsequent motions. The Court of Appeals affirmed on July 29, 2002.

In Noble v. Becker, et al. (District of Delaware, Case No. 1:03-cv-00906-KAJ), I was one of nearly 100 named defendants, including dozens of current and former federal judges serving within the Third Circuit, in a pro se suit brought by the same individual who brought *Guyer v. Kunz, et al.*, listed above. The action was dismissed as frivolous on January 15, 2004.

In Blackstone v. Becker, et al. (Eastern District of Pennsylvania, Case No. 2:94-cv-04080-JF), I was one of 17 named defendants, including five other Third Circuit judges, a district court judge, and a magistrate judge, in a pro se civil rights suit. The complaint

was dismissed as frivolous on July 7, 1994, and the Court of Appeals dismissed plaintiff's appeal as frivolous on January 31, 1995.

In Nickelson v. United States, et al. (Eastern District of Pennsylvania, Case No. 2:97-cv-03942-LR), I was one of 18 named defendants, including 11 other Third Circuit judges, in a pro se civil rights action. The complaint was dismissed on defendants' motion on January 8, 1998, and plaintiff's appeal was dismissed for lack of legal merit on May 8, 1998.

In Thompson v. Kramer, et al. (Eastern District of Pennsylvania, Case No. 2:95-cv-02003-RC), I was one of more than 30 named defendants, including 12 other Third Circuit judges, in a pro se civil rights action. On January 7, 1997, the court ordered that all pleadings and other papers filed after August 31, 1994 (encompassing all filings in this case) by the plaintiffs that name any federal judge, employee of the federal judiciary, judicial body, federal government employee, or agency, be stricken.

In Sassower v. Sisk, et al. (Eastern District of Pennsylvania, Case No. 2:91-cv-04047-JG), I was one of 22 named defendants in a pro se civil rights suit. The district court denied the plaintiff's motion to proceed in forma pauperis and closed the case on July 3, 1991. The Court of Appeals dismissed the plaintiff's appeal on September 23, 1991.

In Barlow v. Shanklin, et al. (Eastern District of Pennsylvania, Case No. 2:93-cv-00608-WD), I was one of five named defendants in a pro se civil rights suit. The complaint was dismissed as frivolous on May 12, 1993.

In Gaudelli v. Eisner, et al. (Western District of Pennsylvania, Case No. 00-CV-437), I was one of 25 named defendants, including 18 other current and former Third Circuit judges, in this pro se civil suit. The district court dismissed the complaint on defendants' motion on March 30, 2001; the Court of Appeals affirmed on September 17, 2001; and the Supreme Court denied certiorari on January 7, 2002.

Lawsuit in which I was named in my personal capacity:

Gerish v. Alito (Superior Court of New Jersey, Essex County, Docket No. L-672-03). My wife and another motorist were involved in a minor traffic accident on June 9, 2000. The other motorist and her husband brought suit against my wife and me on January 15, 2003. The parties reached a settlement, and the case was dismissed on August 9, 2004.

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

I do not expect to receive any deferred income as described in this question.

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

If confirmed, in matters involving recusal I would seek to follow the Code of Conduct for United States Judges (although it is not formally binding on justices of the Supreme Court of the United States), the Ethics Reform Act of 1989, 28 U.S.C. § 455, and any other relevant guidelines. As I do currently, I would look to the letter and spirit of the rules and guidelines. Specifically, I would recuse myself from any cases in which I participated as a judge on the U.S. Court of Appeals for the Third Circuit.

23. <u>Recusal:</u>

a. Please provide a list of any instance during your tenure on the Third Circuit that there has been a request for you to recuse yourself from a case, motion, or matter, or when you have otherwise considered recusing yourself from a case, motion, or matter. For each, please provide the following information:

i. whether you considered recusal in response to a motion or other suggestion by a litigant or a party to the proceeding; in response to a suggestion by any other person or interested party; or sua sponte;

ii. a brief description of the real, apparent, or asserted conflict of interest or other matter which you considered as a potential ground for recusal;

iii. the procedure you followed in determining whether to recuse yourself;

iv. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent, or asserted conflict of interest or to cure any other ground for recusal.

Cases involving the U.S. Attorney's Office:

On May 19, 1994, I wrote the following in a letter to the clerk, Mr. P. Douglas Sisk: "As you know, since becoming a judge on June 15, 1990, I have recused myself in all cases in which the United States Attorney's Office for the District of New Jersey has appeared. I am writing to inform you that, as of June 15, 1994, the fourth anniversary of my swearing in, I am ending this blanket recusal. I will, however, continue to recuse myself in any cases that were handled by the United States Attorney's Office for the District of New Jersey during the period when I was United States Attorney, i.e., from March 23, 1987, to June 15, 1990." The letter continued: "Because of the passage of time, I believe that most cases in which the United States Attorney's

Office for the District of New Jersey now appears began after I became a judge. There may, however, be some cases that were in the United States Attorney's Office during my tenure there. Unfortunately, because there were thousands of cases in the United States Attorney's Office during that period, because I do not have a list of all these cases, and because I cannot possibly remember them all, I will have to rely on counsel to a large degree to bring to my attention any cases that were in the United States Attorney's Office during the period in question. For that reason, I have written to the United States Attorney's Office and the Federal Public Defender's Office, to alert them to the fact that I am ending my blanket recusal. In those letters, I have also requested that, pursuant to Local Appellate Rule 26.1.2, they notify your office whenever an appeal in which they appear was pending in the United States Attorney's Office during the indicated period."

I do not have a record of all instances in which the United States Attorney's Office or the Federal Public Defender's Office may have notified the Court regarding the pendency of a case or investigation during my tenure as U.S. Attorney. The following list includes any case in which my records indicate that any party or person brought such a matter to my attention.

Cases in which a motion or other request or suggestion that I recuse was made by a litigant, party, or other person:

1. Delta Traffic Service, Inc. v. The Mennen Co., No. 90-5063. On September 12, 1990, approximately one month before the scheduled date of argument, I recused myself *sua sponte* from this case after noticing that my name appeared on the ICC's brief. The ICC had intervened in the action in late 1989. The ICC seems to have handled the district court litigation entirely on its own, and I had no reason to think that the U.S. Attorney's Office was even aware of the case. No one from the U.S. Attorney's Office was listed as counsel on either the district court docket sheets or the clearance sheet. Likewise, the appellate brief was apparently prepared entirely in Washington. It appeared that, after the brief was prepared, someone in Washington simply inserted the U.S. Attorney's name. Although the U.S. Attorney's Office apparently had no substantive involvement in the case, I did not think I could serve on the panel when my name appeared on a party's briefs. Hence, I recused myself and took no part in either the argument or the decision.

2. Borchers v. United States, Nos. 90-5937 and 90-5939. I was recused from this matter on November 11, 1990, because it involved allegations concerning the conduct of the U.S. Attorney's Office for the District of New Jersey during my tenure as U.S. Attorney. The recusal appears to have been automatic, as the U.S. Attorney's Office was on my automatic recusal list and the recusal was entered on the same day of the clerk's recusal check. On November 30, 1990, the appellant made a motion for my recusal. He alleged misconduct on the part of one or more representatives of the office of the U.S. Attorney for the District of New Jersey before, during, and after my tenure as U.S. Attorney. No action was taken on the appellant's motion as I already was recused.

3. Martin v. Delaware Law School, No. 91-1761. On October 8, 1991, James L. Martin, the appellant, moved to recuse 15 judges on the Third Circuit, myself included. Mr. Martin's motion offered different reasons for seeking to recuse different judges. As to me, his

motion alleged: "Justice Alito worked as a US Attorney in NJ for several years before beginning his tenure as a judge. Because the US Attorney's Office in NJ has been retained to represent parties in related cases involving similar issues, Justice Alito should be recused and disqualified." The motion did not allege specific facts in support of this claim. I was not assigned to the merits panel, but I did participate in the vote to deny rehearing en banc. I did not recuse myself from the vote because Mr. Martin's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

4. Martin v. Sparks, No. 91-3596. On August 25, 1992, the appellant, moved to recuse 11 judges on the Third Circuit, including me. As was the case in Martin v. Delaware Law School, the appellant's motion alleged that I should be recused because "the US Attorney's Office in NJ has been retained to represent parties in this case and in the related cases." This motion also did not allege specific facts in support of his claim. In an order issued on September 10, 1992, Judge Becker denied the appellant's motion. I was not a member of the panel in this case, but I did participate in the decision to deny rehearing en banc. I did not recuse myself from the vote because the appellant's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

5. Hammond v. Creative Financial, No. 92-2035. On April 7, 1993, appellants Lucinda Hammond and James L. Martin moved to recuse and disqualify 11 judges on the Third Circuit, including me. As with Mr. Martin's previous cases, the motion alleged that I should be recused because "the US Attorney's Office in NJ has been retained to represent parties in the related cases." This motion likewise did not allege specific facts in support of the claim. On June 18, 1993, the court, in an order issued by Judge Becker, denied appellant's motion. I did not serve on the merits panel, and the court's records do not indicate whether I participated in a decision to deny rehearing en banc. However, as with previous cases filed by Mr. Martin, I did not need to recuse myself because the case did not involve the conduct of the U.S. Attorney's Office for the District of New Jersey while I was U.S. Attorney, and because no other basis for recusal was offered.

6. Martin v. Francis, No. 92-5276. On August 25, 1992, James L. Martin, the appellant, moved to recuse 11 judges on the Third Circuit, myself included. As to me, the appellant's motion, like previous motions described above, alleged only that "the US Attorney's Office in NJ has been retained to represent parties in the related cases." The Court denied the motion in an order issued by Judge Becker on November 27, 1992. I did not serve on the merits panel, and the court's records do not indicate whether I participated in a decision to deny rehearing en banc. However, as with previous cases filed by Mr. Martin, I did not need to recuse myself because the case did not involve the conduct of the U.S. Attorney's Office for the District of New Jersey while I was U.S. Attorney, and because no other basis for recusal was offered.

7. United States v. Grewal, No. 95-3362. On May 2, 1996, I received a fax from Ronald Kuby, counsel for respondent Amarjit Grewal, informing me of "a possible basis for [my] recusal in the above-entitled matter." Mr. Kuby's fax informed me that the respondent

was one of the Sikh leaders involved in an extradition proceeding handled by Special Assistant U.S. Attorney Judy G. Russell during my tenure as U.S. Attorney. While handling that matter, Ms. Russell reported that she had received various threatening communications. After some investigation, the FBI determined that the typewritten letters containing those threats had been typed on Ms. Russell's own typewriter. Although I was U.S. Attorney at the time, I had no involvement in the substance of the extradition proceeding, which was handled thereafter by attorneys from the Department of Justice in Washington, DC. I had no recollection of the respondent until I received Mr. Kuby's fax, and I do not think I had any basis for realizing who the respondent was prior to receiving the fax. Although I did not believe that the facts called to my attention mandated my recusal, my practice is to err on the side of caution in such matters, and I therefore recused myself from the case.

8. Vey v. Colville, No. 93-3422. On September 20, 1993, Eileen Vey, the appellant, moved to recuse all judges on the Third Circuit. The motion stated that I should be disqualified because I had served on a panel assigned to a related habeas corpus case, Vey v. Wolfe, No. 92-3362. The Court denied the motion in an order authored by Judge Becker and issued on February 28, 1994. I was not assigned to the merits panel, but I did participate in a vote to deny an initial hearing en banc. I did not need to recuse myself from the case because my role in Vey v. Wolfe did not create any actual or apparent conflict of interest.

9. Gay v. Stockdale, No. 95-3718. On March 4, 1996, Wilmer B. Gay, the petitioner, requested that Judge Becker and I, along with all but one of the other judges on the Third Circuit, be disqualified. The petition accused all judges in question of corruption. On November 8, 1996, the Court denied petitioner's request for a writ of mandamus; the order, authored by Judge Mansmann, did not specifically address the request for recusal. I did not serve on the panel, but I did participate in the vote to deny rehearing en banc, as no plausible basis for recusal was set forth in the motion.

10. Martin v. Walmer, No. 97-1572. On August 7, 1997, James L. Martin, the appellant, moved to recuse and disqualify 11 judges on the Third Circuit, myself included. As with the appellant's previous motions, this one alleged only that "the US Attorney's Office in NJ has been retained to represent parties in the related cases." The Court denied the motion on November 20, 1997, in an order authored by Judge Greenberg. I was not on the merits panel, but I did participate in the decision to deny rehearing en banc. I did not recuse myself from the vote because the appellant's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

11. Martin v. PA Real Estate Commission, No. 99-1168. On May 3, 1999, James L. Martin, appellant, moved to disqualify 12 judges on the Third Circuit, myself included. As to me, the motion alleged only that "the US Attorney's Office in NJ has been retained to represent parties in the related cases." The Court denied the motion in an order issued on December 7, 1999, and authored by Chief Judge Scirica. I did not serve on the merits panel, but I participated in the vote to deny the petition for rehearing en banc. I did not recuse myself from the vote because the appellant's case did not involve the U.S.

Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

12. Martin v. Walmer, No. 00-2333. On September 27, 2000, James L. Martin, appellant, moved to disqualify 15 judges on the Third Circuit, myself included. As to me, the motion alleged only that "the US Attorney's Office in NJ has been retained to represent parties in the related cases." The Court denied the motion in an order authored by Judge Nygaard and issued on October 16, 2001. I did not serve on the merits panel, but I participated in the vote to deny the petition for rehearing en banc. I did not recuse myself from the vote because the appellant's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

13. Reilly v. Weiss, No. 00-3634. On August 7, 2001, Paul Reilly, appellant, moved to disqualify all three judges assigned to the merits panel for his appeal, including myself. Reilly claimed that the entire Third Circuit had violated the Constitution by delegating judicial duties to staff attorneys, and that the entire court was disqualified because a judge may not decide the constitutionality of his own conduct. The motion was denied on August 23, 2001, in an order authored by Judge Weis, because appellant had failed to present any legitimate basis for recusal. On October 25, 2001, I issued an order denying Reilly's petition for rehearing en banc.

14. Foster v. NJ Mfg. Ins. Co., Nos. 01-1533 and 01-2876. On October 1, 2003, Ivan Foster moved to vacate a previous order of the Court and to recuse 14 judges on the Third Circuit, myself included. Mr. Foster alleged that the named judges had perpetrated a fraud on the court by either denying his request for relief in a previous case or by denying review en banc. I did not serve on the merits panel but did participate in the vote regarding en banc review. I opted not to recuse myself from the vote because the allegations set forth in the motion were not true.

15. Monga v. Ottenberg, No. 01-1827. On November 24, 2003, appellant Monga made a motion to disqualify me from participating in his appeal. As I explained in a letter to Senator Specter: "I sat on the original panel that heard the appeal. Due to an oversight, it did not occur to me that Vanguard's status in the matter might call for my recusal. After the court's unanimous decision was issued affirming the district court ruling, the appellant raised the issue of my interest in Vanguard. My principal financial interest in Vanguard is in the mutual funds I own, which were not at issue in this lawsuit. After the issue was raised, I reviewed the applicable ethical rules and guidelines. According to the Code of Conduct and parallel language in 28 U.S.C. section 455, I did not have a financial interest in the outcome of the case. This law states that a financial interest exists in this type of case only 'if the outcome of the proceeding could substantially affect the value of the interest.' (Canon 3C.(3)(c)(iii) and 28 U.S.C. 455(d)(4)(iii)). Nevertheless, my personal practice is to recuse myself once my participation was called into question. Moreover, notwithstanding the fact that my vote on the unanimous panel did not affect the outcome, I took the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case. The new panel of judges reached the same unanimous conclusion as the prior panel."

16. Guyer v. Kunz, No. 01-2012. On June 6, 2011, Thomas D. Guyer, appellant, requested the recusal of all Third Circuit judges. The appellant filed suit against fifty different judges sitting in the state court, the Eastern District of Pennsylvania, and the Third Circuit; he alleged that the defendants had conspired to wrongfully imprison him for over fifteen years in a Pennsylvania state prison on state burglary charges. In affirming the decision of the district court, the court, addressing the appellant's request for recusal, stated: "Recusal is not mandated upon the merest unsubstantiated suggestion of personal bias or prejudice, and we will not allow Guyer to impede the administration of justice by suing every judge within the jurisdiction of this circuit in an effort to have his case transferred out of the Third Circuit." I did not serve on the merits panel but did participate in the vote on the petition for rehearing en banc. I opted not to recuse myself for the same reason set forth in the court's opinion.

17. Chapman v. Commonwealth of PA, No. 01-3815. On October 12, 2001, Chapman moved for recusal of the entire en banc panel of judges of the Third Circuit. He argued that the entire panel was disqualified as a matter of law from considering his request for a writ of mandamus because the court had decided against rehearing in a prior case – and had thus "tried" the case previously for purposes of 28 U.S.C. § 47. I did not serve on the merits panel but did participate in the vote on the petition for rehearing en banc. I decided not to recuse myself from the vote because petitioner's argument incorrectly stated the law.

18. Reynolds v. USX Corp., No. 01-3941. On June 6, 2002, appellant Reynolds moved to strike the opposing party's brief and to recuse any panel member who had viewed the brief. Reynolds argued that the appellee's brief contained "impertinent material regarding appellee's counsel's recollection of settlement conversations, including settlement offers, between counsel involved in this appeal in violation of L.A.R. 33.5(c) and F.R.E. 408." The merits panel, on which I sat, granted the motion to strike but denied the motion to recuse in an order authored by Chief Judge Scirica and issued on July 22, 2002. I declined to recuse myself because the brief had not compromised my ability to consider the case.

19. Reilly v. Weiss, Nos. 02-1382, 02-2821, 02-3261 and 03-1402. On November 6, 2003, appellant Reilly moved to disqualify all Third Circuit Judges. The appellant alleged that the entire court was disqualified because, among other reasons, the judges were all biased against pro se litigants and had "abdicated critical judicial functions to staff attorneys." I was not on the merits panel but did participate in the vote denying a rehearing en banc. I did not recuse myself because the appellant made no plausible argument for recusal.

20. Martin v. Delaware Law School, No. 02-1424. On March 22, 2002, appellant, James L. Martin, moved to recuse and disqualify 15 judges on the Third Circuit, myself included. As with previous cases filed by the appellant, his motion in this case alleged that I should be recused because "the US Attorney's Office in NJ has been retained to represent parties in related cases involving similar issues." The Court denied the motion on October 23, 2002, in an order issued by Judge Nygaard. I was not a member of the merits panel, but

participated in the vote to deny rehearing en banc. I opted not to recuse myself because the appellant's case did not involve the U.S. Attorney's Office for the District of New Jersey, and because he presented no other basis for recusal.

21. Manna v. United States, No. 04-4282. In this habeas case, Louis A. Manna, the appellant, filed a motion on November 30, 2004, to recuse Judge Barry, Judge Chertoff, and me. On December 14, 2004, the U.S. Attorney for the District of New Jersey, George S. Leone, also requested that all three judges be recused. At the time of the appellant's original trial, I was the United States Attorney for the District of New Jersey. The appellant alleged that Judge Chertoff and I were "relentless adversaries" with a "win at all cost" mentality. He also claimed that Judge Chertoff and I conspired to deny him due process of law. On December 14, 2004, in keeping with my standard practice, I recused because of my involvement in the original prosecution.

22. In re Shemonsky, No. 05-1736. In this case Michael R. Shemonsky moved to recuse the entire Third Circuit Court of Appeals, and also "move[d] under the theory of King's Bench under the Magna Carta to act as the Court." Mr. Shemonsky claimed that the Judicial Council for the Third Circuit had been sued in the Court of Common Pleas for the County of Monroe, and that the Third Circuit Judicial Council controls the activity of the Third Circuit Court of Appeals. He also claimed that "numerous fraudulent orders were entered under the bogus facsimile signature" of the Clerk. On July 13, 2005, Chief Judge Scirica issued an order denying the motion to recuse the entire court but allowing each judge to choose whether to recuse. On July 14, 2005, I recused myself solely to avoid any appearance of impropriety arising from the fact that I had been named as a defendant in Mr. Shemonsky's suit against the Third Circuit Judicial Council.

23. D'Amario v. Bailey, No. 05-4333. On Oct. 6, 2005, the appellant in this case, Arthur D'Amario III, moved to recuse the entire Third Circuit because U.S. Marshals had identified him as "a 'security concern,' resulting in his banishment from all federal courtrooms in Philadelphia." This designation, the appellant argued, gives the entire court a vested interest in maintaining his allegedly illegal custody. The appellant's underlying conviction was for threatening to assault and murder a federal judge, in violation of 18 U.S.C. § 115(a)(1)(B). See United States v. D'Amario, 350 F.3d 348 (3d Cir. 2003) (Alito, J.). This motion is pending before a panel of the Third Circuit. I was not assigned to the panel, and have not considered the motion.

Appendix 3, attached, includes, to the best of my knowledge, all cases from which I was recused during my tenure as a judge on the Third Circuit, regardless of whether the recusal was automatic. The Office of the Clerk assisted me in compiling the list. I have done my best to state the apparent reason for recusal for each case listed. Because the court's records only note the fact of recusal, however, I cannot be absolutely sure that the stated reason was the only or the actual reason for recusal. Where the explanation seems reasonably apparent, I have listed it. I have not offered any explanation for cases in which I could not recall the basis for recusal from my review of the parties and the attorneys involved in the case.

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

I have no plans, commitments, or agreements to pursue outside employment in the future.

25. Sources of Income: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (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.

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

Please see attached statement of net worth.

27. 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.

Since my clerkship, I have spent my entire legal career as an employee or officer of the Department of Justice or a judge and have thus been precluded from representing private clients. As a judge, I have worked, together with the other members of my court, to provide parties appearing before us with high quality pro bono representation. We have encouraged lawyers to place their names on the list of attorneys who are willing to undertake pro bono appellate representation, and we regularly appoint pro bono attorneys in pro se cases in which it appears that such representation would be beneficial. We have recently sought to encourage attorneys to accept pro bono assignments in asylum and other immigration cases and have agreed to hear oral argument in all such cases.

28. Selection Process:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List all interviews or communications you had with anyone in the Executive Office of the President or the Justice Department regarding this nomination, or any other judicial nomination for which you have been considered, the dates of such

interviews or communications, and all persons present or participating in such interviews or communications.

A short time before June 24, 2001, I was invited to an interview with then-Counsel to the President Alberto Gonzales and then-Deputy Counsel to the President, Timothy Flanigan. I was told that the interview concerned a possible future Supreme Court vacancy. I was interviewed by Judge Gonzales and Mr. Flanigan on June 24, 2001.

Some time before May 5, 2005, I was invited to another interview about a possible future Supreme Court vacancy. I was interviewed on May 5, 2005, by Vice President Cheney, Attorney General Gonzales, Andrew Card, Karl Rove, Harriet Miers, and I. Lewis Libby. A few weeks later, I was interviewed by Ms. Miers.

In July 2005, I was invited to an interview with the President and was interviewed by the President on July 15, 2005; Ms. Miers was present.

On October 28, 2005, I was telephoned by Mr. Card and told that I might receive a call from the President. The President telephoned me on that date and we discussed the possibility of my nomination. I met with the President on the morning of October 31, 2005, and he formally offered to nominate me and I accepted.

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

No one involved in the process of selecting or recommending me as a judicial nominee has ever discussed with me any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

c. Did you make any representations to any individuals or interest groups as to how you might rule as a Justice, if confirmed? If you know of any such representations made by the White House or individuals acting on behalf of

the White House, please describe them, and if any materials memorializing those communications are available to you, please provide four (4) copies.

I have made no representations to any individuals or interest groups as to how I might rule as a justice, if confirmed. I am not aware of any such representations made by the White House or any individuals acting on behalf of the White House

29. <u>Judicial Activism</u>: Please discuss your views on the following criticism involving "judicial activism."

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

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

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

The Constitution sets forth a limited role for the judicial branch. As the question notes, in recent years there have been charges that the federal judiciary has exceeded the proper bounds of judicial authority through court decisions. My experience has taught me that any such criticism should be informed by a balanced understanding of the role that the federal courts should play.

The Constitution charges the federal courts with the duty to exercise "[t]he judicial Power of the United States," Art. III, sec.1, and as Alexander Hamilton aptly put it in Federalist 78, the courts should carry out that role with "firmness and independence." "Without this," he observed, "all the reservations of particular rights or privileges [in the Constitution] would amount to nothing." But while the federal courts should act firmly and independently within their proper sphere, they must always keep in mind that their proper sphere is circumscribed. The "judicial Power" is distinct from the "legislative Powers" given to Congress and from "the executive Power," and the federal courts must engage in a constant process of self-discipline to ensure that they respect the limits of their authority.

Judicial self-discipline is especially important when federal courts are interpreting the

Constitution. In non-constitutional cases, the political branches can check what they perceive to be erroneous judicial decisions by enacting corrective legislation. Decisions based on an interpretation of the Constitution, by contrast, cannot be checked in this manner, and a thoughtful appreciation of the nature and essential limits of the judicial function is therefore acutely necessary to protect the democratic values that underlie our Constitution.

Article III of the Constitution, which is the source of the federal courts' power, simultaneously limits that power. Most importantly, Article III, section 2 restricts the jurisdiction of the federal courts to actual "Cases" and "Controversies," and this limitation necessarily means that the federal courts lack jurisdiction unless the constitutional elements of "standing" and "ripeness" are met. These elements serve to ensure that the federal courts stay within the role that courts have traditionally performed and that they are trained and equipped to perform – entertaining and adjudicating real disputes that are brought before them by real parties. By restraining the courts from reaching out to decide abstract issues and nascent disputes that may not need judicial resolution, these doctrines promote better decision making, serve democratic values, and work to prevent clashes with the authority of Congress and the Executive by reserving to the political process issues that rightly belong there. In recent decades, Supreme Court decisions have stressed the importance of these constitutional restrictions on the power of the federal courts, and as a judge of the court of appeals I have applied these precedents.

Other valuable statutory and judge-made limitations on the exercise of judicial power serve similar purposes. These limitations include prudential standing and ripeness requirements, statutory and non-statutory limitations on the scope of review that courts may properly exercise in particular contexts, and the doctrine of stare decisis, which supplies essential stability to the law and is a fundamental feature of our legal system. My experience as a court of appeals judge for the past 15 years has fortified my appreciation of the value of these important limitations.

A criticism of the federal courts cited in the question concerns the overreaching in crafting and implementing remedies, an area that highlights the tension between the federal courts' obligation to discharge their proper role firmly and independently and the need to avoid inappropriate encroachment on the authority of other government institutions. When a constitutional or statutory violation has been proven, a court should not hesitate to impose a strong and lawful remedy if that is what is needed to provide full redress. Some of the finest chapters in the history of the federal courts have been written when federal judges, despite resistance, have steadfastly enforced remedies for deeply rooted constitutional violations. At the same time, however, judges must always be sensitive to the need to avoid unnecessary interference with the authority and competence of the political branches. In addition, courts should recognize that their legitimacy is tested when they undertake in the remedial context to perform functions that are ordinarily the province of the political branches.

A paradox is inherent in our constitutional structure. The framers of the Constitution generally did not think that government institutions and actors could be trusted to refrain from unduly extending their own powers, but our constitutional system relies heavily on the judiciary to restrain itself. To do this, judges must engage in a continual process of self-questioning about the way in which they are performing the responsibilities of their offices. Judges must also have faith that the cause of justice in the long run is best served if they scrupulously heed the limits of

their role rather than transgressing those limits in an effort to achieve a desired result in a particular case. Judges must maintain a deep respect for the authority of the other branches of government – based on their democratic legitimacy – and a keen appreciation of the comparative advantages that other government institutions and actors have in making empirical judgments, devising comprehensive solutions for social problems, and administering complex programs and institutions. In addition, judges must be appropriately modest in their estimation of their own abilities; they must respect the judgments reached by predecessors; and they must be sensibly cautious about the scope of their decisions. And judges should do all these things without shirking their duty to say what the law is and to carry out their proper role with energy and independence.

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		243	700	Notes payable to banks-secured			
U.S. Government securities-add schedule		60	000	Notes payable to banks-unsecured			
Listed securities-add schedule		788	750	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		869	550	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		150	000				
Cash value-life insurance							
Other assets itemize:							
				Total liabilities			0
				Net Worth	2	112	000
Total Assets	2	112	000	Total liabilities and net worth	2	112	000
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

U.S. Government Securities	
Series EE Bonds	$ 60,000
Listed Securities	
Vanguard Small Cap Index Fund	$ 96,000
Vanguard Total Stock Market Index Fund	86,000
Windsor II Fund	25,500
XOM Common Stock	161,000
Wellington Fund	101,000
Vanguard Intermediate Term Tax Exempt Fund	90,000
Vanguard Insured Long Term Tax Exempt Fund	26,000
Vanguard N.J. Long Term Tax Exempt Fund	30,000
Star Fund	25,000
Windsor II Fund	51,000
Vanguard Intermediate Term bond Index Fund	18,000
INTC Common Stock	13,800
Fidelity Equity II Income Fund	29,400
MCD Common Stock	25,200
BMY Common Stock	8,400
DIS Common Stock	2,450
Total Listed Securities	$788,750
Real Estate Owned	
Personal residence	$ 869,550