UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

GENERAL (PUBLIC)

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

   John Glover Roberts, Jr.

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

   Associate Justice, 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.

   Office:

   E. Barrett Prettyman Courthouse
   333 Constitution Avenue, N.W.
   Washington, D.C. 20001

   Residence:

   Maryland

4. Birthplace: State date and place of birth.

   January 27, 1955
   Buffalo, New York

5. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business addressees). Please also indicate the number of dependent children.

   Married to Jane Sullivan Roberts, July 27,1996.
   Spouse's maiden name: Jane Marie Sullivan
   Spouse's occupation: Attorney
   Spouse's employer: Pillsbury Winthrop Shaw Pittman L.L.P.
   2300 N Street, N. W.
   Washington, D.C. 20037
   Two dependent children.

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

Attended Harvard Law School, 1976-1979. Awarded J.D. *magna cum laude* June 7, 1979.

Attended Harvard College, 1973-1976 (entered with sophomore standing). Awarded A.B. *summa cum laude* June 17, 1976.

7. **Employment Record:** List in reverse chronological order, listing most recent first, 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, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

June 2003 - present: Judge, U.S. Court of Appeals for the D.C. Circuit, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

July 2005: Adjunct Professor, Georgetown University Law Center Summer Program, Jeremy Bentham House, University College London, Endsleigh Gardens, London, WC1H OEG, Great Britain.

January 1993 - May 2003: Partner, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004.

October 1989 - January 1993: Principal Deputy Solicitor General, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

May 1986 - October 1989: Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004. I joined the firm as an associate and was elected a general partner of the firm in October, 1987.

November 1982 - May 1986: Associate Counsel to the President, White House Counsel's Office, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500.

August 1981 - November 1982: Special Assistant to Attorney General William French Smith, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

July 1980 - August 1981: Law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

June 1979 - June 1980: Law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, N.Y. 20543. At the time, Judge Friendly also served as the Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court.

Summer 1978: Law clerk, Carlsmith, Carlsmith, Wichman & Case (now Carlsmith Ball L.L.P.), 1001 Bishop Street, Suite 2200, Post Office Box 656, Honolulu, HI 96813.

Summer 1977: Law clerk, Ice, Miller, Donadio & Ryan (now Ice Miller), One American Square, Box 82001, Indianapolis, IN 46282.

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.

No military service.

Selective Service Number: 12-46-55-304. Registered at: Selective Service System, Indiana Local Board No. 46, 1200 Michigan Avenue, LaPorte, IN 46350.

05-16-73 I-H - Registrant not currently subject to processing for induction or alternate serVIce.

Note: Beginning in 1972, all new registrants were classified I-H and kept there until after the lottery drawing for their age group. For year of birth 1955, the lottery drawing was held on March 20, 1974. The highest number called for processing out of the I-H classification was number 95 for year of birth 1955. The lottery number for date of birth January 27, 1955, was 323. Those registrants with lottery numbers above the processing number remained in class I-H.

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

Harvard College honors:

William Scott Ferguson Prize, 1974, for "the outstanding essay submitted by a Sophomore concentrating in History."

Edwards Whitaker Scholarship, 1974, awarded to first-year students who "show the most outstanding scholastic ability and intellectual promise as indicated by distinction in studies and general achievement."

John Harvard Scholarship, 1974, 1975, 1976, "in recognition of academic achievement of the highest distinction."

Detur Prize, 1976, based on cumulative academic record.

Election to Phi Beta Kappa, 1976.

Bowdoin Essay Prize, 1976, for "the best dissertation submitted in the English language."

A.B. degree awarded *summa cum laude,* 1976. Honors thesis on British domestic politics, 1900-1914.

Harvard Law School honors:

Editor, *Harvard Law Review,* volumes 91-92. Managing Editor, volume 92.

J.D. degree awarded *magna cum laude,* 1979.

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

United States Judicial Conference Advisory Committee on Appellate Rules, appointed October 1, 2000.

D.C. Circuit Judicial Conference, 1991, 1992, 1998,2000,2003,2004,2005.

Fourth Circuit Judicial Conference, 1995.

American Law Institute, elected October 1990.

American Academy of Appellate Lawyers, elected August 1998.

Edward Coke Appellate American Inn of Court, joined January 2001.

Supreme Court Historical Society, joined December 10, 1987.

State and Local Legal Center, Legal Advisory Board (unpaid advisor to non-profit organization) (resigned upon assuming the bench).

Georgetown University Law Center, Supreme Court Institute, Outside Advisory Board (unpaid advisor to non-profit organization) (resigned upon assuming the bench).

National Legal Center for the Public Interest, Legal Advisory Board (unpaid advisor to non-profit organization) (resigned upon assuming the bench).

11. Bar and Court Admission:

a. List the date(s) you took the examination and the 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 examina60n and the date of such admission or refusal of such admission.

District of Columbia Bar Examination administered July 28 and 29, 1981.

Admitted to the District of Columbia Bar on December 18, 1981.

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.

District of Columbia Court of Appeals, December 18, 1981.

United States Court of Federal Claims, December 3, 1982.

United States Court of Appeals for the Federal Circuit, December 3, 1982.

Supreme Court of the United States, March 2, 1987.

United States Court of Appeals for the District of Columbia Circuit, March 31, 1988.

United States Court of Appeals for the Ninth Circuit, October 17, 1988.

United States Court of Appeals for the Fifth Circuit, November 4, 1988.

United States Court of Appeals for the Eleventh Circuit, May 31, 1995.

United States Court of Appeals for the Third Circuit, November 3, 1995.

United States District Court for the District of Columbia, February 5, 1996.

United States Court of Appeals for the Tenth Circuit, April 10, 1996.

United States Court of Appeals for the Seventh Circuit, June 21, 1996.

United States Court of Appeals for the Fourth Circuit, November 24, 1997.

United States Court of Appeals for the Sixth Circuit, June 3, 1998.

United States Court of Appeals for the Eighth Circuit, February 5, 1999.

United States Court of Appeals for the Second Circuit, September 30, 1999

12. Memberships:

3. 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 the 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.

Phi Beta Kappa, National Academic Honor Society, Elected 1976. Contact: Doris Lawrence, (202) 265-3808.

American Judicature Society. According to its website, the society "is a nonpartisan organization with a national membership of judges, lawyers, and nonlegally trained citizens interested in the administration of justice." I was a member from time-to-time during the 1990s, with lapses in membership. The Society extends membership to sitting judges. Contact: Laury Lieurance, Membership Coordinator, (515) 271-2285.

As detailed in the response to question 26, I served in 1999 on the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators George Mitchell and Robert Dole. Contact: Thomas E. Mann, (202) 797-6050, and Norman J. Ornstein, (202) 862-5893.

The Lawyers Club of Washington, Member since 1996. Social association of lawyers that meets for lunches and annual dinner. Contact: Patrick L. O'Donoghue, Esq., Secretary/Treasurer, (301) 652-6880.

The Metropolitan Club, Member since June 7, 1995. Contact: Sandra Howland, Controller, (202) 835-2500.

Robert Trent Jones Golf Club, Member since December 1992. Contact: Glenn Smickley, Chief Operating Officer, (703) 881-4450.

Palisades Pool. Neighborhood swimming pool. Family membership since 2003. Contact: Joyce Chung, (301) 320-6499.

Justice Advisory Council, December 2000-January 2001, a group of 75-90 individuals formed to advise the Bush-Cheney transition team on general issues relating to the Department of Justice. I am listed as a member, but to the best of my recollection did not participate in any of the Council's activities. Contact: Paul McNulty, (703) 299-3700.

Republican National Lawyers Association, association of Republican lawyers, joined February 18,1991; last dues paid November 15,1993; membership expired November 15, 1994. Contact: Michael Thielen, Executive Director, (703) 719-6335.

According to recent press reports, in 1997 I was listed in brochures as a member of the Washington Lawyers Steering Committee of the Federalist Society. The same reports indicate that one could be on that Committee without also being a member of the Society. I have no recollection of serving on that Committee, or being a member of the Society. I have participated in Society events, including moderating a panel around 1993 and more recently speaIGng before a lunch meeting of the Washington chapter on October 30,2003.

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 worIGng 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.

None, except for the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the BroolGngs Institution. Four copies of the report issued by the Joint Project are attached.

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.

None have from before the time I joined.

13. Published Writings:

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.

"The Takings Clause," Developments in the Law - Zoning, 91 *Harvard Law Review* 1462 (1978) (unsigned student note).

Comment, "Contract Clause - Legislative Alteration of Private Pension Agreements," 92 *Harvard Law Review* 86 (1978) (unsigned student note).

Comment, "First Amendment - Media Right of Access," 92 *Harvard Law Review* 174 (1979) (unsigned student note).

"New Rules and Old Pose Stumbling Blocks in High Court Cases," *Legal Times,* February 26, 1990 (also reprinted in various affiliated publications), co-authored with E. Barrett Prettyman, Jr.

"Article **III** Limits on Statutory Standing," 42 *Duke Law Journal* 1219 (1993).

"Riding the Coattails of the Solicitor General," *Legal Times,* March 29, 1993.

"The New Solicitor General and the Power of the Amicus," *The Wall Street Journal,* May 5, 1993.

"The 1992-93 Supreme Court," 1994 *Public Interest Law Review* 107.

"Forfeitures: Does Innocence Matter?" *Legal Times,* October 2, 1995.

"Thoughts on Presenting an Effective Oral Argument," *School Law in Review* (1997).

"Oral Advocacy and the Re-emergence of a Supreme Court Bar," 30 *Journal of Supreme Court History* 68 (2005).

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.

Aug. 23, 1993	I appeared before the House Republican Conference Task Force on Crime to discuss crime legislation. Four copies of the hearing transcript are attached.

June 11, 1999 — I appeared before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee with former Senators George MitcheH and Robert Dole and former Solicitor General Drew Days to discuss the report of the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution. Four copies of the hearing transcript and the report from the Joint Project are attached.

c. Please supply four (4) copies, transcripts or tape recordings of aH speeches or talks, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions, by you which relate in whole or in part to issues of law or public policy. If you have a recording of a speech or talk and it is not identical to the transcript or copy, please supply four (4) copies of the recording as well. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you have reason to believe that the group has a copy or tape recording of the speech, please request that the group supply the committee with a copy or tape recording of the speech. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke. If there were press reports about the speech, and they are readily available to you, please supply them.

Brookings Institution, October 3, 1983, Washington, D.C., on Giving Legal Advice to the President.

Indiana University School of Law, 1984 Harris Lecture series, January 20, 1984, Bloomington, IN, on Federal Court Jurisdiction.

Maryland Association of County Attorneys, December 7, 1989, on AppeHate Advocacy.

District of Columbia Bar Association, Section on Administrative Law, September 19, 1990, Washington, D.C., on Supreme Court Environmental Cases.

American Bankruptcy Institute, December 7, 1991, Scottsdale, AZ, on Supreme Court Bankruptcy Cases.

American Academy of AppeHate Lawyers, February 5, 1994, Kansas City, MO, on Supreme Court practice.

Elderhostel, Rockville, MD, November 14, 1996, on Supreme Court oral arguments.

D.C. Copyright Law Society, March 16, 1998, Washington, D.C., on *Feltner* v. *Columbia Pictures.*

Bureau of National Affairs, Supreme Court Constitutional Law Seminar, Washington, D.C., September 11, 1998, on Supreme Court oral arguments.

D.C. Bar AdministrativeLaw Section, September 24, 1998, Washington, D.C., on *NCVA* v. *First National Bank & Trust Co.*

Alabama Bar Institute for Continuing Legal Education, 36th Annual Southeastern Corporate Law Institute, Point Clear, AL, April 24, 1999, on recent Supreme Court cases.

Arizona Bar Appellate Practice Section, June 25, 1999, on the certiorari process.

National Mining Association, Lake George, N.Y., September 10, 1999, on amicus briefs.

Republican National Lawyers Association, Washington, D.C., April 3, 2000, on cases pending before the Supreme Court.

Cosmetics, Toiletries, and Fragrances Association, Napa Valley, CA, April 26, 2000, on the First Amendment and commercial speech.

Symposium, Bicentennial Celebration of the Courts of the District of Columbia Circuit, Washington, D.C., March 9, 2001, Panelist on Constitutional Confrontations in the District of Columbia Circuit Courts. Proceedings published at 204 F.R.D. 499.

National Association of Legal Secretaries, Washington, D.C., July 28,2001, on Supreme Court arguments.

Environmental Law Seminar, Harvard Law School, Cambridge, MA, January 17, 2002, on *Tahoe-Sierra Preservation Council* v. *Tahoe Regional Planning Agency.*

John F. Kennedy School of Government, Masters Program visit to Washington, D.C., January 24, 2002, on Supreme Court practice.

American Academy of Appellate Lawyers, New Orleans, LA, February 8, 2002, on Supreme Court practice, with E. Barrett Prettyman, JI., and Seth Waxman.

Georgetown University Law School, Supreme Court Institute, May 16,2002, Washington, D.C., 1992 Supreme Court law clerk program, on the 1992 Supreme Court term.

Brigham Young University and J. Reuben Clark Law School, Rex E. Lee Conference on the Office of Solicitor General of the United States, Provo, UT, September 12-13, 2002, with 19 other alumni of the Office. Proceedings transcribed and published at 2003 *BYU Law Review* 1 (2003) (copies attached).

Supreme Court Historical Society Annual Lecture, "Oral Advocacy and the Re-emergence of a Supreme Court Bar," June 7, 2004, published at 30 *Journal of Supreme Court History* 68 (2005) (copies attached).

Lecturer, Appellate Advocacy Course, District of Columbia Bar Continuing Legal Education Program, October 27,2004, Washington, D.C. (notes attached).

Guest Speaker, U.S. Department of Justice Civil Division Awards Ceremony, December 7,2004, Washington, D.C. (notes attached).

Wake Forest University School of Law, Jeff Rupe Memorial Lecture, February 25,2005, Winston-Salem, N.C. (videotape available).

University of Virginia School of Law, Ola B. Smith Lecture, "What Makes the D.C. Circuit Different? A Historical View," April 20,2005, Charlottesville, VA (audiodisc available).

Since 1995, I have addressed the Street Law/Supreme Court Historical Society program for high school teachers. Two sessions of the program are held annually in June, and I typically address both sessions. My remarks offer an introduction for the teachers on how the Supreme Court decides which cases to review and how it decides those cases on the merits.

Prior to joining the bench, I also regularly participated in press briefings sponsored by the National Legal Center for the Public Interest and the Washington Legal Foundation upon the opening of a new Supreme Court term or the Court's rising for the summer.

On no occasion did I speak from a prepared text. Notes or recordings are available only as indicated.

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.

NPR, Morning Edition, Nov. 13, 2002, "Supreme Court to take up issue of whether or not Megan's Law violates constitutional rights of past sex offenders."

NPR, Morning Edition, Apr. 24, 2002, "U.S. Supreme Court hears case on whether a student can sue his college for releasing his records without his permission."

NPR, Morning Edition, Jan. 16,2002, "Supreme Court to hear Illinois case concerning independent review board and HMO."

NPR, Morning Edition, Jan. 7, 2002, "Supreme Court to hear case challenging government's right to impose a moratorium on development."

NPR, All Things Considered, Nov. 7, 2001, "Supreme Court case on how impaired a person must be to be considered disabled under the Americans with Disabilities Act."

NPR, Morning Edition, July 11, 2000, "Decisions the Supreme Court reached this term."

NPR, Morning Edition, Oct. 6, 1999, "Racial discrimination case in Hawaii."

NPR, Weekend Edition, June 26, 1999, "Supreme Court's big decisions of the past week."

NPR, Talk of the Nation, June 24, 1999, "Recent decisions by the Supreme Court and their possible effects on states' rights and the rights of citizens."

PBS, MacNeillLehrer NewsHour, July 2,1997, "Focus - Supreme Court Watch."

NPR, Morning Edition, Mar. 27, 1996, "NFL antitrust case will impact all of sports industry."

PBS, MacNeillLehrer NewsHour, June 12, 1995, "Focus - Affirmative Action."

PBS, MacNeillLehrer NewsHour, Aug. 7, 1991, "Focus - Abortion Protest."

In addition to the foregoing more formal interviews, I have also occasionally been asked by media representatives to comment on particular legal developments. I have not maintained a file or listing of such requests or whether they resulted in any media report.

14. <u>Public Office, Political Activities and Affiliations:</u>

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

you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

06/79 - 06/80	Law Clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit. Appointed by Judge Henry J. Friendly.
07/80 - 08/81	Law Clerk to Justice William H. Rehnquist,Supreme Court of the United States. Appointed by Justice William H. Rehnquist.
08/81 - 11/82	Special Assistant to the Attorney General, United States Department of Justice. Appointed by Attorney General William French Smith.
11/82 - 05/86	Associate Counsel to the President, White House Counsel's Office. Appointed by President Ronald W. Reagan.
10/89 - 01/93	Principal Deputy Solicitor General, United States Department of Justice. Appointed by Attorney General Richard L. Thornburgh.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. 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.

Executive Committee, D.C. Lawyers for Bush-Quayle '88.

Lawyers for Bush-Cheney.

At the request of Benjamin Ginsberg and Ted Cruz, I went to Tallahassee in November 2000 to assist those working on behalf of George W. Bush on various aspects of the recount litigation. My recollection is that I stayed less than one week. I recall participating in a preparation session for another lawyer scheduled to appear before the Florida Supreme Court and generally being available to discuss issues as they arose. I returned to Tallahassee at some later point to meet with Governor Jeb Bush, to discuss in a general way the constitutional and statutory provisions implicated by the litigation.

15. Le2al Career: Please answer each part separately.

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

1. 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;

After graduation from law school, I served as a law clerk to Judge Henry J. Friendly, United States Court of Appeals for the Second Circuit, 40 Foley Square, New York, N.Y. 10007. At the time, Judge Friendly also served as Presiding Judge of the Special Railroad Reorganization Court, a three-judge district court. I clerked for Judge Friendly from June 1979 to June 1980.

I next served as a law clerk to then-Associate Justice William H. Rehnquist, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543. I served in that capacity from July 1980 to August 1981.

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

No.

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

After completing my clerkship with Justice Rehnquist, I accepted appointment as a Special Assistant to Attorney General William French Smith, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530. I served in that capacity from August 1981 to November 1982.

I left the Department of Justice in November 1982 to accept an appointment as Associate Counsel to the President, White House Counsel's Office, 1600 Pennsylvania Avenue, N.W., Washington, D.C. 20500.

I left the White House Counsel's Office in May 1986 tojoin the Washington law firm of Hogan & Hartson as an associate. I was elected a general partner of the firm in October 1987. Hogan & Hartson is now located at 555 13th Street, N.W., Washington, D.C. 20004.

I resigned my partnership in the firm in October 1989 to accept an appointment as Principal Deputy Solicitor General, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

I left the Solicitor General's Office in January 1993 to rejoin Hogan & Hartson as a partner. I resigned my partnership in May 2003 to assume the bench.

b. Describe:

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

From 1986 until I joined the bench in 2003, I had an intensive federal appellate litigation practice, in both the private and public sectors, with an emphasis on Supreme Court litigation. During that period I orally argued 39 times before the Supreme Court, in addition to arguments before the United States Courts of Appeals for the District of Columbia, Federal, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, as well as the District of Columbia and Maryland Courts of Appeals. The subject matter of these cases covered the full range of federal jurisdiction, including administrative law, admiralty, antitrust, arbitration, banking, bankruptcy, civil rights, constitutional law, environmental law , federal jurisdiction and procedure, First Amendment, health care law, Indian law, interstate commerce, labor law, and patent and trade dress law.

In addition to presenting oral argument and briefing the cases on the merits, my Supreme Court practice consisted of seeking and opposing Supreme Court review, seeking and opposing stays pending such review, preparing *amicus curiae* briefs on behalf of clients interested in pending Supreme Court matters, helping to prepare other counsel to argue before the Court, and counseling clients on the impact of specific Supreme Court rulings.

The court of appeals aspect of my federal appellate practice involved appearances in every federal circuit court of appeals, although the largest number of my court of appeals arguments were before the Court of Appeals for the D.C. Circuit. I did not specialize in any particular substantive area, but instead in th~ preparation of appellate briefs and the presentation of appellate oral argument.

The nature of my practice was essentially the same during my time at Hogan & Hartson and when I served as Principal Deputy Solicitor General, although of course during the latter period my sole client was the United States and its agencies and officers. As Principal Deputy Solicitor General, my duties included presenting oral argument. before the Supreme Court and preparing and filing briefs on the merits on behalf of the United States, its agencies and officers, subject to the supervision of the Solicitor General and with the assistance of subordinates in the Office of the Solicitor General. I also supervised the preparation and filing of petitions for and briefs in opposition to certiorari, and engaged in an active motions practice seeking or opposing stays or other relief from the Supreme Court. In addition to this actual litigation before the Court, my duties included participating in the government's determination whether to appeal adverse decisions in the lower courts. Any such appeal, whether from a district court to an appellate court or from a circuit court to the Supreme Court, requires the approval of the Solicitor General. The same is true for any filing of a suggestion for rehearing en banc before a court of appeals.

Immediately prior to joining Hogan & Hartson for the first time in 1986, I served in counseling and advisory roles in the federal government. My duties as Associate Counsel to the President involved reviewing bills submitted to the President for signature or veto, drafting and reviewing executive orders and proclamations, and generally reviewing the full range of Presidential activities for potential legal problems. I participated in drafting

and reviewed various documents embodying Presidential action under certain trade, aviation, asset control, and other laws. I played a role in the Presidential appointment process, reviewing the Federal Bureau of Investigation background reports and ethics disc10sures of prospective executive branch appointees.

My duties as Special Assistant to Attorney General William French Smith were also of an advisory nature, focusing on particular matters of concern to the Attorney General. I also served as a speechwriter and represented the Attorney General throughout the Executive Branch and before state and local law enforcement officials.

I was fortunate to have two appellate clerkships immediately after law school. Judge Henry J. Friendly is justly remembered as one of this Nation's truly outstanding federal appellate judges. The c1erkship on the Supreme Court for then-Associate Justice Rehnquist the following year was an intensive immersion in the federal appellate process at the highest level.

ii. your typical fonner c1ients and the areas, if any, in which you have specialized.

Clients of Hogan & Hartson for whom I rendered substantial legal services included large and small corporations, state and local governments, trade and professional organizations, nonprofit associations, and individuals. Such clients included, for example, the States of Alaska and Hawaii, the National Collegiate Athletic Association, Litton Industries, Inc., Gonzaga University, the Tahoe Regional Planning Agency, the Credit Union National Association, Pulte Corporation, and Intergraph Corporation.

From October 1989 to January 1993, my sole client was the United States, its agencies and officers. With minor exceptions, the Office of the Solicitor General is the exclusive representative of the federal government before the Supreme Court. I accordingly represented a wide variety of departments, agencies, and other entities within the federal government. In doing so, I worked with each of the litigating divisions in the Department of Justice. Also inc1uded among my c1ients were individual officers of the United States or its agencies sued in *Bivens* actions.

My clients during my service as Associate Counsel to the President included the President of the United States and members of the White House staff. As Special Assistant to the Attorney General, my client was the Attorney General.

While in practice, I specialized in federal appellate litigation.

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 appeared in federal court frequently while in practice, arguing over 65 cases before the Supreme Court of the United States, the Court of Appeals for the District of Columbia

Circuit, and various other federal circuit courts of appeals. The public service positions I held prior to 1986 did not involve court appearances, although my two clerkships necessarily afforded intensive exposure to the appellate process.

1. Indicate the percentage of these appearances in: 1. federal courts;
   2. state courts of record;
   3. other courts.

Federal courts: approx. 95 percent State courts of record: approx. 5 percent

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

Civil proceedings: approx. 95 percent
Criminal proceedings: approx. 5 percent

d. State the number of 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.

As noted, my practice was primarily an appellate one, and my appearances in court were typically to argue appeals. I have personally argued over 65 cases leading to a final appellate judgment. I have, however, also appeared on occasion in trial courts.

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

One trial proceeding in which I served as an associate counsel was before a jury, although my participation in the case did not involve work before the jury itself.

e. 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, describe in detail the nature of your participation in the litigation and the final disposition of the case, and provide the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

From 1986 unti12003, I appeared frequently before the Supreme Court, both as counsel of record and as co-counsel to others. The nature of this practice is described above in the response to question 15.b. During that period I orally argued 39 times before the Court in 38 separate matters. A description of each of these cases, and my participation, follows:

1. *Smith* v. *Doe,* 538 U.S. 84 (2003). This case involved a challenge to the Alaska Sex Offender Registration Act, which required convicted sex offenders to register with law enforcementauthorities and made offender infonnation available tothe public. The question presented was whether the application of the Act to offenders convicted before its enactment violated the Ex Post Facto Clause of the United States Constitution. Representing the petitioners, the Alaska Commissioner of Public Safety and the Alaska Attorney General, I argued that the Act was not punitive in nature and therefore did not implicate the Ex Post Facto Clause. Justice Kennedy's majority opinion accepted this argument and upheld the constitutionality of the Act.

I shared oral argument with Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut A venue, N.W., Washington, D.C. 20036, (202) 9558668, who appeared on behalf of the United States as *amicus curiae* in support of the petitioners. My co-counsel on the brief were Jonathan S. Franklin and Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Cynthia M. Cooper, 3410 Southbluff Circle, Anchorage, AK 99515, (907) 349-3483, and Bruce M. Botelho, then Alaska Attorney General, P.O. Box 110300, Juneau, AK 99811, (907) 465-3600. Mr. Botelho is now mayor of the City and Bureau of Juneau, 155 S. Seward Street, Juneau, AK 99801, (907) 586-5240. Principal counsel for the respondents were Verne E. Rupright of Rupright & Foster, 322 Main Street, Wasilla, AK 99654, (907) 373-3215, and Daryl L. Thompson of Daryl L. Thompson P.C., 841 I Street, Anchorage, AK 99501, (907) 272-9322.

2. *Barnhart* v. *Peabody Coal Co.,* 537 U.S. 149 (2003). The Coal Act of 1992 calls on the Commissioner of Social Security to assign coal industry retirees to particular coal companies "before October 1, 1993," for the purpose of funding retiree benefits. The question presented was whether assignments made after the specified date were nonetheless valid, or whether retirees not assigned in time should be allocated pursuant to the fonnula for unassigned retirees. Representing respondents Peabody Coal Company and Eastern Associated Coal Corporation, I argued that the statute precluded the Commissioner from making belated assignments. Writing for the majority, Justice Souter rejected this argument, reasoning that the date in question was meant to spur the Commissioner to action but did not restrict the time in which she could act.

With me on the brief were Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and John R. Woodrum and W. Gregory Mott of Heenan, Althen & Roles L.L.P., 1110 Vennont Avenue, N:W., Washington, D.C. 20005, (202) 887-0800. Jeffery S. Sutton, then of Jones, Day, Reavis & Pogue, 1900 Huntington Center, 41 South High Street, Columbus, OH 43215, (614)

469-3855, and now a judge on the Court of Appeals for the Sixth Circuit, 540 Potter Stewart U.S. Courthouse, 100 East Fifth Street, Cincinnati, OH 45202, (513) 564-7000, argued on behalf of respondents Bellaire Corporation, Nacco Industries, and North American Coal Corporation. Peter Buscemi of Morgan, Lewis & Bockius L.L.P., 1111 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 739-5190, represented petitioners United Mine Workers of America Combined Benefit Fund. Barbara B. McDowell, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, represented petitioner Barnhart.

3. *Rush Prudential HMO Inc. v. Moran,* 536 U.S. 355 (2002). Under an Illinois statute, if a patient's primary care physician deems a procedure to be necessary but the patient's HMO disagrees, the patient is entitled to have the HMO's decision reviewed by an outside physician, and that outside physician's decision is binding on the HMO. The question before the Court was whether this independent review provision was pre-empted by the federal Employee Retirement Income Security Act (ERISA). Representing the petitioner, I argued that the provision conflicted with ERISA's exclusive remedial scheme. Justice Souter's majority opinion disagreed, reasoning that the provision was protected by ERISA's savings clause.

I was assisted by Clifford D. Stromberg, Craig A. Hoover, Jonathan S. Franklin, and Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and James T Ferrini, Michael R. Grimm, Sr., and Melinda S. Kollross of Clausen Miller P.c., 10 South LaSalle Street, Chicago, IL 60603, (312) 855-1010. Respondent Debra Moran was represented by Daniel P. Albers of Barnes & Thornburg, 2600 Chase Plaza, 10 South LaSalle, Chicago, IL 60603, (312) 357-1313. Respondent the State of Illinois was represented by John P. Schmidt, Assistant Attorney General, 100 West Randolph Street, 12th Floor, Chicago, IL 60601, (312) 814-3312. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued on behalf of the United States as *amicus curiae* in support of the respondents.

4. *Gonzaga University v. Doe,* 536 U.S. 273 (2002). John Doe sought damages from Gonzaga University for the unauthorized release of personal information in violation of the Family Educational Rights and Privacy Act of 1974 (FERPA). The question presented was whetherFERPA's provisions could be enforced by a suit for damages under 42 U.S.C. § 1983, which provides a cause of action for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws." I represented the University and argued that FERPA did not create personal rights, and thus could not be so enforced. The Chief Justice's opinion for the majority accepted this argument and held that a Section 1983 action could not be maintained under these circumstances.

I shared oral argument with Patricia A. Millett, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, who appeared on behalf of the United States as *amicus curiae* in support of the University. With me on the briefs were Martin Michaelson, Alexander E. Dreier, and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and

Charles K. Wiggins and Kenneth W. Masters of the Wiggins Law Office, 241 Madison Avenue, N. Bainbridge Island, W A 98110 (206) 780-5033. Beth S. Brinkmann of Morrison & Foerster L.L.P., 2000 Pennsylvania Ave., N.W., Washington, D.C. 20006, (202) 887-1544, represented respondent Doe.

5. *Tahoe-Sierra Preservation Council Inc.* v. *Tahoe Regional Planning Agency,* 535 U.S. 302 (2002). The Tahoe Regional Planning Agency instituted temporary moratoria on development while devising a comprehensive land use plan. The question presented was whether the moratoria constituted a taking of property that required compensation under the Takings Clause of the United States Constitution. Representing the respondent Planning Agency, I argued that the enactment of temporary moratoria does not constitute a *per se* taking, and that the moratoria instead should be evaluated using a fact-specific inquiry set forth in prior Supreme Court opinions. Under that inquiry, there was no taking. The Court agreed, with Justice Stevens writing for the majority.

I shared oral argument with Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut A venue, N.W., Washington, D.C. 20036, (202) 9558668, appearing on behalf of the United States as *amicus curiae* supporting the respondents. With me on the brief were E. Clement Shute, Jr., Fran M. Layton, and Ellison Folk of Shute, Mihaly & Weinberger L.L.P., 396 Hayes Street, San Francisco, CA 94102, (415) 552-7272, John L. Marshall, Tahoe Regional Planning Agency, P.O. Box 1038, Zephyr Cove, NV 89448, (775) 588-4547, and Richard J. Lazarus, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, (202) 662-9129. The petitioners were represented by Michael M. Berger of Berger & Norton Law Corporation, 1620 26th Street, Suite 200, South Santa Monica, CA 90404, (310) 449-1000.

6. *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams,* 534 U.S. 184 (2002). Respondent Williams sued her former employer under the Americans with Disabilities Act, for failing to provide her with a reasonable accommodation for carpel tunnel syndrome and related injuries. The question presented was whether the Court of Appeals for the Sixth Circuit, which had ruled for Williams, had applied the proper standard in concluding that Williams's injuries qualified as a "major life impairment" under the Act. Representing petitioner Toyota, I argued that the Sixth Circuit erred in only considering the effect of the injuries on a specific set of work-related tasks, rather than on a wide range of life activities. Justice O'Connor's opinion for a unanimous Court accepted this argument and reversed and remanded the case so that the Sixth Circuit could apply the proper standard.

I shared oral argument with Barbara B. McDowell, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, who appeared on behalf of the United States as *amicus curiae* supporting the petitioners. I was assisted by Christopher T. Handman and Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeffrey A. Savarise, John A. West, and Katherine A. Hessenbruch of Greenebaum Doll & McDonald P.L.L.C., 3300 National City Tower 101, South Fifth Street, Louisville, KY 40202, (502) 589-4200.

Robert L. Rosenbaum of Rosenbaum & Rosenbaum P.S.c., 300 Lexington Building 201, West Short Street, Lexington, KY 40507, (859) 259-1321, represented the respondent.

7. *TrafFix Devices Inc.* v. *Marketing Displays Inc.,* 532 U.S. 23 (2001). Marketing Displays had patented a dual-spring base design that made road signs more resistant to wind, which TrafFix Devices copied and improved upon after Marketing Displays' patent expired. The question presented was whether the subject matter of a utility patent can be protected as trade dress after the patent expires. On behalf of TrafFix Devices, I argued that the ruling below was inconsistent with the basic "patent bargain" recognized by the Supreme Court: society grants a patent holder exclusive rights to his invention for a limited period of time, on the condition that the invention becomes public property when the patent expires. The Supreme Court agreed with this position in a unanimous opinion authored by Justice Kennedy, and ruled that the sign stand could not qualify for trade dress protection.

Co-counsel with me were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeanne-Marie Marshall and Richard W. Hoffmann, Reising, Ethington, Barnes, Kisselle, Learman & McCulloch, P.c., 201 W. Big Beaver, Suite 400, Troy, MI 48084, (248) 689-3500. I shared oral argument with Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, appearing on behalf of the United States as *amicus curiae* supporting the petitioner. John A. Artz, Artz & Artz, P.C., 28333 Telegraph Road, Suite 250, Smithfield, MI 48034, (248) 223-9500, argued for the respondent.

8. *Eastern Associated Coal Corp.* v. *United Mine Workers of America, Dist.* 17,531 U.S. 57 (2000). Eastern Associated Coal sued to vacate an arbitration award requiring it to reinstate a truck driver who had twice tested positive for marijuana. The question before the Court was whether the arbitration award should be set aside. Representing Eastern Associated Coal, I argued that the Omnibus Transportation Employee Testing Act of 1991 and implementing regulations reflected a well-defined public policy against employees performing safety-sensitive jobs under the influence of illegal drugs, and that the award should be set aside on the basis of that policy. Justice Breyer, writing for the majority, refused to vacate the award, holding that the Testing Act's complex remedial scheme counseled against courts divining a broader public policy from it.

With me on the brief were David G. Leitch and H. Christopher Bartolomucci of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 6375600, Ronald E. Meisburg of Heenan, Althen & Roles, 111 0 Vermont Avenue, N.W., Suite 400, Washington, D.C. 20005, (202) 887-0800, and Anna M. Dailey and Donna C. Kelly Hennan of Althen & Roles, 1380 One Valley Square, P.O. Box 2549, Charleston, W.V. 25329, (304) 342-8960. Mr. Leitch is now General Counsel ofFord Motor Company, One American Road, Dearborn, MI 48126, (313) 322-7453. The respondents were represented by John R. Mooney of Mooney, Green, Gleason, Baker, Gibson, & Saindon P.C., 1920 L St., N.W., Suite 400, Washington, D.C. 20036, (202) 783-0010. Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice,

Washington, D.C. 20530, (202) 514-2217, argued on behalf of the United States as *amicus curiae* in support of the respondents.

9. *Rice* v. *Cayetano,* 528 U.S. 495 (2000). The Court of Appeals for the Ninth Circuit upheld a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established to benefit Native Hawaiians. The issue before the Supreme Court was whether such a restriction constituted racial discrimination in violation the Fourteenth and Fifteenth Amendments. On behalf of the State, I argued that the classification was based on trust beneficiary status rather than race, and that the classification was also permissible because Congress had recognized the political status of Native Hawaiians as an indigenous people. Justice Kennedy, writing for the majority, rejected these arguments and struck down the statute.

On the brief with me were Gregory G. Garre and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Attorney General Earl L. Anzai and Deputy Attorneys General Girard D. Lau, Dorothy Sellers, and Charleen M. Aina of the State of Hawaii, 425 Queen Street, Honolulu, Hawaii 96813, (808) 586-1360. Counsel for petitioner was Theodore B. Olson, Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued on behalf of the United States as *amicus curiae* urging affirmance.

10. *National Collegiate Athletic Ass'n* v. *Smith,* 525 U.S. 459 (1999). The Court of Appeals for the Third Circuit had ruled that Title IX of the Education Amendments of 1972 - which applies only to organizations that receive federal financial assistanceapplied to the NCAA, because it received dues from entities that receive federal financial assistance. The issue on the merits was what it meant to "receiv[e] Federal financial assistance" under the terms of the statute. On behalf of the NCAA, we argued that according to Supreme Court precedent, coverage under the statute is limited to direct recipients of federal funding - those who knowingly entered into a bargain by accepting the funding. In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with this position and reversed the Third Circuit.

Appearing on the briefs with me were Martin Michaelson, Gregory G. Garre, and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John J. Kitchin and Robert W. McKinley of Swanson, Midgley, Gangwere, Kitchin & McLarney, 922 Walnut Street, Suite 1500, Kansas City, MO 64106, (816) 842-6100, and Elsa Kircher Cole, General Counsel, National Collegiate Athletic Association, One NCAA Plaza, 700 West Washington Street, Indianapolis, IN 46204, (317) 917-6222. Representing the respondent was Carter Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued on behalf of the United States as *amicus curiae* supporting the respondent.

11. *Feltner* v. *Columbia Pictures Television Inc.,* 523 U.S. 340 (1998). A district court granted summary judgment against petitioner Feltner in a copyright infringement suit. The question before the Supreme Court was whether the petitioner had a right to have his claim determined by a jury. I represented the petitioner, and argued that both the Copyright Act and the Seventh Amendment of the United States Constitution guaranteed a right to jury trial in copyright infringement cases. Writing for eight Justices, Justice Thomas rejected my Copyright Act argument, but agreed that the Seventh Amendment created a right to jury trial in such cases and remanded the case to district court so that a jury trial could be held.

I was assisted by David G. Leitch and Jonathan S. Franklin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Principal counsel for the respondent was Henry J. Tashman of Davis Wright Tremaine L.L.P., 1000 Wilshire Boulevard, Suite 600, Los Angeles, CA 90017, (213) 633-6800.

12. *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.,* 522 U.S. 479 (1998). The National Credit Union Administration (NCUA) interpreted the Federal Credit Union Act to allow credit unions to be composed of multiple, unrelated employee groups, each having a common bond of occupation. The questions before the Court were whether commercial banks had standing to challenge the NCUA's interpretation, and, if so, whether that interpretation was permissible. I represented petitioners, Credit Union National Association and AT&T Family Federal Credit Union, and argued that commercial banks lacked prudential standing because they were outside the "zone of interest" protected by the statute, and that the NCUA's interpretation was reasonable and entitled to deference. Writing for the majority, Justice Thomas disagreed, holding that commercial banks did have prudential standing and that the NCUA's interpretation was impermissible because the Act required *all* members of credit unions to share the *same* common bond.

With me on the briefs were Jonathan S. Franklin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Brenda S. Furlow, Credit Union National Association, Inc., 5710 Mineral Point Road, Box 431, Madison, WI 53701, (608) 231-4348, and Paul J. Lambert, Teresa Burke, and Gerard F. Finn of Bingham, Dana, & Gould L.L.P., 1200 19th Street, N.W., Suite 400, Washington, D.C. 20036, (202) 778-6150. Petitioner National Credit Union Administration was represented by Seth P. Waxman, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Wilmer, Cutler, Pickering, Hale & DOff, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6800. Respondents were represented by Michael S. Helfer of Wilmer, Cutler, Pickering, Hale & DOff, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6000.

13. *Alaska* v. *Native Village ofVenetie Tribal Government,* 522 U.S. 520 (1998). An Alaskan native village attempted to levy a business tax against a state contractor hired to construct a school on village property. The question before the Court was whether the land owned by the village - an expanse of 1.8 million acres - constituted "Indian Country," such that the village was its sovereign with taxing authority. Representing the

State of Alaska, I argued that Congress alone can recognize an area as "Indian Country," and that Congress had made no such recognition in awarding the land to the village in the Alaska Native Claims Settlement Act of 1971. Writing for a unanimous court, Justice Thomas agreed and held that the village lacked the authority to impose the tax.

I was assisted by Gregory G. Garre of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Bruce M. Botelho, then Attorney General, Barbara J. Ritchie, Deputy Attorney General, and D. Rebecca Snow and Elizabeth J. Barry, Assistant Attorneys General, State of Alaska Department of Law, P.O. Box 110300, Juneau, AK 99811, (907) 465-3600. Mr. Botelho is now mayor of the City and Bureau of Juneau, 155 S. Seward Street, Juneau, AK 99801, (907) 586-5240. Respondents were represented by Heather R. Kendall-Miller, Native American Rights Fund, 310 K Street, Suite 708, Anchorage, AK 99501, (907) 276-0680.

14. *Jefferson* v. *City of Tarrant, Alabama,* 522 U.S. 75 (1997). Petitioners sued the City of Tarrant for wrongful death in a fire. The question presented was whether the City could be held liable, given the interaction between the Alabama wrongful death statute and 42 U.S.c. § 1983. The former had been interpreted to allow only punitive damages and the latter does not allow plaintiffs to sue municipalities for punitive damages. Representing the City, I argued that the United States Supreme Court lacked jurisdiction to hear the case, because the Alabama Supreme Court had not yet rendered a final judgment in the matter. Writing for eight Justices, Justice Ginsburg agreed and dismissed the writ of certiorari as improvidently granted.

I was assisted by Gregory G. Garre and H. Christopher Bartolomucci of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Wayne Morse, John W. Clark, Jr., and David W. McDowell of Clark & Scott P.c., 3500 Blue Lake Drive, Suite 350, Birmingham, AL 35248, (205) 967-9675. Dennis G. Pantazis of Gordon, Silberman, Wiggins & Childs P.C., 1400 SouthTrust Tower, Birmingham, AL 35203, (205) 328-0640, represented the petitioners.

15. *Adams* v. *Robertson,* 520 U.S. 83 (1997). Alabama state courts approved a class action lawsuit and settlement agreement in a case against Liberty Life Insurance Company, without providing individual class members the right to exclude themselves from the class or the settlement. The question before the Court was whether that approval violated the class members' Due Process rights under the Fourteenth Amendment of the United States Constitution. Representing the respondent, I argued that the United States Supreme Court lacked jurisdiction to hear the case, as the question presented had been neither raised nor decided by the Alabama Supreme Court. In a unanimous, *per curiam* opinion, the Supreme Court agreed and dismissed the writ of certiorari as improvidently granted.

With me on the brief were David G. Leitch, Gregory G. Garre, and Amy Folsom Kett of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Michael R. Pennington, James W. Gewin, and James W. Davis of Bradley, Arant, Rose & White, 1400 Park Place Tower, Birmingham, AL 35203, (205) 521-8391, and

William C. Barclift and Edgar M. Elliott, III, Liberty National Life Insurance Company, P.O. Box 2612, Birmingham, AL 35202, (205) 325-2778. Respondent Charlie Robertson was represented by Paul M. Smith of Jenner & Block, 601 Thirteenth Street, N.W., Twelfth Floor, Washington, D.C. 20005, (202) 639-6000. The petitioners were represented by Norman E. Waldrop, Jr., of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves L.L.C., P.O. Box 290, Mobile, AL 36601, (334) 405-1300.

16. *First Options of Chicago Inc.* v. *Kaplan,* 514 U.S. 938 (1995). The Court of Appeals for the Third Circuit vacated an arbitral award in a case involving debts to First Options of Chicago, a stock-clearing company. The questions presented were what standard a trial court should use in reviewing an arbitrator's conclusion that the parties had agreed to arbitration, and what standard a court of appeals should use in reviewing that trial court's ruling confirming the award. Representing respondent Manuel Kaplan - one of the parties against whom the arbitrator had ruled - I argued that the first issue should be reviewed *de novo* and that the second issue should be reviewed according to ordinary appellate review standards. Writing for a unanimous Court, Justice Breyer agreed and affirmed the Third Circuit's decision.

My co-counsel on the brief were David G. Leitch of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Donald L. Perelman
and Richard A. Koffman of Fine, Kaplan & Black, 1845 Walnut Street, Philadelphia, PA 19103, (215) 567-6565. Respondent Carol Kaplan was represented by Gary A. Rosen of Connolly Epstein Chicco Foxman Engelmyer & Ewing, 1515 Market Street, 9th Floor, Philadelphia, PA 19102, (215) 851-8426. The petitioner was represented by James D. Holzhauer of Mayer, Brown & Platt, 190 South LaSalle Street, Chicago, IL 60603, (312) 782-0600.

17. *Jerome B. Grubart Inc.* v. *Great Lakes Dredge & Dock Co.,* 513 U.S. 527 (1995). The respondent, which owned a barge involved in construction on the banks of the Chicago River, sought to limit its liability for damages that occurred when the river flooded into a set of tunnels beneath the City of Chicago. The question presented was whether federal courts had admiralty jurisdiction over the case. Representing the respondent, I argued that they did, as the barge was a "vessel on navigable waters" under the Extension of Admiralty Jurisdiction Act, and as Great Lakes' allegedly negligent actions posed a threat to maritime commerce. Justice Souter's opinion for the majority accepted this argument and reinstated the case in district court.

With me on the brief were David G. Leitch of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Duane M. Kelley and Jack J. Crowe of Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60601, (312) 5585600. Petitioner Jerome G. Grubart was represented by Ben Bamow of Bamow and Hefty P.C., 105 W. Madison St., Ste. 2200, Chicago, IL 60602 (312) 621-2000. Petitioner City of Chicago was represented by Lawrence Rosenthal, Deputy Corporation Counsel, Room 610, City Hall, Chicago, IL 60602, (312) 744-5337.

11. *Feltner v. Columbia Pictures Television Inc.*, 523 U.S. 340 (1998). A district court granted summary judgment against petitioner Feltner in a copyright infringement suit. The question before the Supreme Court was whether the petitioner had a right to have his claim determined by a jury. I represented the petitioner, and argued that both the Copyright Act and the Seventh Amendment of the United States Constitution guaranteed a right to jury trial in copyright infringement cases. Writing for eight Justices, Justice Thomas rejected my Copyright Act argument, but agreed that the Seventh Amendment created a right to jury trial in such cases and remanded the case to district court so that a jury trial could be held.

I was assisted by David G. Leitch and Jonathan S. Franklin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Principal counsel for the respondent was Henry J. Tashman of Davis Wright Tremaine L.L.P., 1000 Wilshire Boulevard, Suite 600, Los Angeles, CA 90017, (213) 633-6800.

12. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998). The National Credit Union Administration (NCUA) interpreted the Federal Credit Union Act to allow credit unions to be composed of multiple, unrelated employee groups, each having a common bond of occupation. The questions before the Court were whether commercial banks had standing to challenge the NCUA's interpretation, and, if so, whether that interpretation was permissible. I represented petitioners, Credit Union National Association and AT&T Family Federal Credit Union, and argued that commercial banks lacked prudential standing because they were outside the "zone of interest" protected by the statute, and that the NCUA's interpretation was reasonable and entitled to deference. Writing for the majority, Justice Thomas disagreed, holding that commercial banks did have prudential standing and that the NCUA's interpretation was impermissible because the Act required *all* members of credit unions to share the *same* common bond.

With me on the briefs were Jonathan S. Franklin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Brenda S. Furlow, Credit Union National Association, Inc., 5710 Mineral Point Road, Box 431, Madison, WI 53701, (608) 231-4348, and Paul J. Lambert, Teresa Burke, and Gerard F. Finn of Bingham, Dana, & Gould L.L.P., 1200 19th Street, N.W., Suite 400, Washington, D.C. 20036, (202) 778-6150. Petitioner National Credit Union Administration was represented by Seth P. Waxman, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Wilmer, Cutler, Pickering, Hale & Dorr, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6800. Respondents were represented by Michael S. Helfer of Wilmer, Cutler, Pickering, Hale & Dorr, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6000.

13. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). An Alaskan native village attempted to levy a business tax against a state contractor hired to construct a school on village property. The question before the Court was whether the land owned by the village — an expanse of 1.8 million acres — constituted "Indian Country," such that the village was its sovereign with taxing authority. Representing the

State of Alaska, I argued that Congress alone can recognize an area as "Indian Country," and that Congress had made no such recognition in awarding the land to the village in the Alaska Native Claims Settlement Act of 1971. Writing for a unanimous court, Justice Thomas agreed and held that the village lacked the authority to impose the tax.

I was assisted by Gregory G. Garre of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Bruce M. Botelho, then Attorney General, Barbara J. Ritchie, Deputy Attorney General, and D. Rebecca Snow and Elizabeth J. Barry, Assistant Attorneys General, State of Alaska Department of Law, P.O. Box 110300, Juneau, AK 99811, (907) 465-3600. Mr. Botelho is now mayor of the City and Bureau of Juneau, 155 S. Seward Street, Juneau, AK 99801, (907) 586-5240. Respondents were represented by Heather R. Kendall-Miller, Native American Rights Fund, 310 K Street, Suite 708, Anchorage, AK 99501, (907) 276-0680.

14. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997). Petitioners sued the City of Tarrant for wrongful death in a fire. The question presented was whether the City could be held liable, given the interaction between the Alabama wrongful death statute and 42 U.S.C. § 1983. The former had been interpreted to allow only punitive damages and the latter does not allow plaintiffs to sue municipalities for punitive damages. Representing the City, I argued that the United States Supreme Court lacked jurisdiction to hear the case, because the Alabama Supreme Court had not yet rendered a final judgment in the matter. Writing for eight Justices, Justice Ginsburg agreed and dismissed the writ of certiorari as improvidently granted.

I was assisted by Gregory G. Garre and H. Christopher Bartolomucci of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Wayne Morse, John W. Clark, Jr., and David W. McDowell of Clark & Scott P.C., 3500 Blue Lake Drive, Suite 350, Birmingham, AL 35248, (205) 967-9675. Dennis G. Pantazis of Gordon, Silberman, Wiggins & Childs P.C., 1400 SouthTrust Tower, Birmingham, AL 35203, (205) 328-0640, represented the petitioners.

15. *Adams v. Robertson*, 520 U.S. 83 (1997). Alabama state courts approved a class action lawsuit and settlement agreement in a case against Liberty Life Insurance Company, without providing individual class members the right to exclude themselves from the class or the settlement. The question before the Court was whether that approval violated the class members' Due Process rights under the Fourteenth Amendment of the United States Constitution. Representing the respondent, I argued that the United States Supreme Court lacked jurisdiction to hear the case, as the question presented had been neither raised nor decided by the Alabama Supreme Court. In a unanimous, *per curiam* opinion, the Supreme Court agreed and dismissed the writ of certiorari as improvidently granted.

With me on the brief were David G. Leitch, Gregory G. Garre, and Amy Folsom Kett of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Michael R. Pennington, James W. Gewin, and James W. Davis of Bradley, Arant, Rose & White, 1400 Park Place Tower, Birmingham, AL 35203, (205) 521-8391, and

William C. Barclift and Edgar M. Elliott, III, Liberty National Life Insurance Company, P.O. Box 2612, Birmingham, AL 35202, (205) 325-2778. Respondent Charlie Robertson was represented by Paul M. Smith of Jenner & Block, 601 Thirteenth Street, N.W., Twelfth Floor, Washington, D.C. 20005, (202) 639-6000. The petitioners were represented by Norman E. Waldrop, Jr., of Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves L.L.C., P.O. Box 290, Mobile, AL 36601, (334) 405-1300.

16. *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1995). The Court of Appeals for the Third Circuit vacated an arbitral award in a case involving debts to First Options of Chicago, a stock-clearing company. The questions presented were what standard a trial court should use in reviewing an arbitrator's conclusion that the parties had agreed to arbitration, and what standard a court of appeals should use in reviewing that trial court's ruling confirming the award. Representing respondent Manuel Kaplan — one of the parties against whom the arbitrator had ruled — I argued that the first issue should be reviewed *de novo* and that the second issue should be reviewed according to ordinary appellate review standards. Writing for a unanimous Court, Justice Breyer agreed and affirmed the Third Circuit's decision.

My co-counsel on the brief were David G. Leitch of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Donald L. Perelman and Richard A. Koffman of Fine, Kaplan & Black, 1845 Walnut Street, Philadelphia, PA 19103, (215) 567-6565. Respondent Carol Kaplan was represented by Gary A. Rosen of Connolly Epstein Chicco Foxman Engelmyer & Ewing, 1515 Market Street, 9th Floor, Philadelphia, PA 19102, (215) 851-8426. The petitioner was represented by James D. Holzhauer of Mayer, Brown & Platt, 190 South LaSalle Street, Chicago, IL 60603, (312) 782-0600.

17. *Jerome B. Grubart Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). The respondent, which owned a barge involved in construction on the banks of the Chicago River, sought to limit its liability for damages that occurred when the river flooded into a set of tunnels beneath the City of Chicago. The question presented was whether federal courts had admiralty jurisdiction over the case. Representing the respondent, I argued that they did, as the barge was a "vessel on navigable waters" under the Extension of Admiralty Jurisdiction Act, and as Great Lakes' allegedly negligent actions posed a threat to maritime commerce. Justice Souter's opinion for the majority accepted this argument and reinstated the case in district court.

With me on the brief were David G. Leitch of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Duane M. Kelley and Jack J. Crowe of Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60601, (312) 558-5600. Petitioner Jerome G. Grubart was represented by Ben Barnow of Barnow and Hefty P.C., 105 W. Madison St., Ste. 2200, Chicago, IL 60602 (312) 621-2000. Petitioner City of Chicago was represented by Lawrence Rosenthal, Deputy Corporation Counsel, Room 610, City Hall, Chicago, IL 60602, (312) 744-5337.

18. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). In a Virginia civil contempt proceeding, petitioners were assessed $64 million in fines for violating a court-ordered injunction barring them from engaging in unlawful strike-related activities. The question before the Court was whether the fine amounted to a criminal penalty that could be constitutionally levied only after a jury trial. Representing respondents, including the special commissioner appointed to collect the fine, I argued that the fine was a civil penalty because it had been assessed according to a prospective schedule of fines announced with the court's earlier injunction and was therefore coercive, not punitive. The Court disagreed and unanimously ruled that a jury trial was required.

Co-counsel with me on the briefs were David G. Leitch and Kathryn W. Lovill, Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and William B. Poff, Clinton S. Morse, Frank K. Friedman, Woods, Rogers & Hazlegrove, Dominion Tower, Suite 1400, 10 South Jefferson Street, Roanoke, VA 24038, (703) 983-7600. Arguing for petitioners was Laurence Gold, 815 16th Street, N.W., Washington, D.C. 20006, (202) 637-5390.

19. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994). Digital Equipment Corp. sought to appeal a district court's decision to vacate a settlement agreement Digital had reached with Desktop Direct. The question presented was whether the decision to vacate was appealable as a collateral order even without final resolution of Desktop Direct's cause of action. I argued on behalf of Digital Equipment that the decision was appealable because it met the established criteria of conclusively resolving the issue of Digital's right not to go to trial under the settlement agreement, was separate from the underlying merits, and was effectively unreviewable on appeal from a final judgment. The Court, in a unanimous opinion by Justice Souter, ruled that the decision to vacate was not appealable as a collateral order.

Co-counsel with me on the briefs were Thomas C. Siekman and Andrew C. Holcomb, Digital Equipment Corporation, 111 Powdermill Road, Maynard, MA 01754, (508) 493-3264, David G. Leitch and Denise P. Lindberg, Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Laurence R. Hefter and David M. Kelly, Finnegan, Henderson, Farabow, Garrett & Dunner, 1300 I Street, N.W., Washington, D.C. 20005, (202) 408-4000. Arguing for respondent Desktop Direct was the late Rex E. Lee, then of Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000. Mr. Lee was assisted by Carter Phillips, also of Sidley & Austin.

20. *Helling v. McKinney*, 509 U.S. 25 (1993). William McKinney, an inmate in the Nevada prison system, sued state officials claiming that having to share a cell with a smoker violated the Eighth Amendment's proscription of "cruel and unusual punishment." The question before the Court was whether exposure to environmental tobacco smoke could serve as the basis for such a claim. I argued on behalf of the United States as *amicus curiae* that exposure to tobacco smoke did not amount to a "serious deprivation of basic human needs" under the Court's Eighth Amendment decisions. The Court ruled that the claim could go forward, in part because the Court considered it

premature to dismiss respondent's claim as a matter of law on the grounds I had advanced.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Edwin S. Kneedler, Assistant to the Solicitor General, William Kanter, Peter R. Maier, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Mr. Starr is now Dean at Pepperdine University School of Law, 24255 Pacific Coast Highway, Malibu, CA 90263. Arguing for petitioner was Frankie Sue Del Papa, Attorney General of the State of Nevada, Capitol Complex, Carson City, NV 89710, (702) 687-4170. Arguing for respondent was Cornish F. Hitchcock, Public Citizen Litigation Group, 2000 P Street, N.W., Suite 700 Washington, D.C. 20036, (202) 833-3000.

21. *Withrow v. Williams*, 507 U.S. 680 (1993). Robert Williams, a Michigan prisoner, filed a federal habeas corpus action challenging his murder convictions on the ground that they were obtained using statements taken in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The question before the Court was whether federal habeas jurisdiction extended to claims of *Miranda* violations, or whether instead such claims should be treated like certain Fourth Amendment claims that are not cognizable in habeas under *Stone v. Powell*, 428 U.S. 465 (1976). As Deputy Solicitor General, I argued on behalf of the United States as *amicus curiae* that the claims were not cognizable in habeas. The Court disagreed, and in a 5-4 decision, ruled that federal habeas jurisdiction extended to claims grounded in *Miranda*.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General and Ronald J. Mann, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jeffrey Caminsky, Assistant Prosecuting Attorney, 12th Floor, 1441 St. Antoine Detroit, MI 48226, (313) 224-5846. Arguing for respondent was Seth P. Waxman, then of Miller, Cassidy, Larroca & Lewin, 2555 M Street, N.W., Washington, D.C., 20037, (202) 833-5125. Mr. Waxman is now at Wilmer, Cutler, Pickering, Hale & Dorr, 2445 M Street, N.W., Washington, D.C. 20037, (202) 663-6800.

22. *United States v. Green*, 507 U.S. 545 (1993). Lowell Green, after being arrested on a drug charge and given his *Miranda* warnings, invoked his right to counsel and later pled guilty to a lesser charge as part of a plea bargain. Three months later, while still in police custody, he was arrested for murder and — after receiving *Miranda* warnings again — waived his *Miranda* rights and confessed to the crime. The question before the court was whether the lower court erred in excluding the confession on the ground that police may not reinitiate interrogation once a suspect has invoked his rights under *Miranda*. I argued on behalf of the United States that the confession should not have been excluded because it concerned a matter wholly unrelated to the original drug charge and because the passage of time and intervening guilty plea dispelled any concern that police had coerced Mr. Green into confessing the murder. Mr. Green died before the case was decided, and the Court dismissed the petition.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General, William C. Bryson, then Deputy Solicitor General, Robert A. Long, Jr., then Assistant to the Solicitor General, Nina Goodman, Roy McLeese, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for respondent was Joseph R. Conte, Bond, Conte & Norman, P.C., 601 Pennsylvania Avenue, N.W., Suite 900, Washington, D.C. 20001, (202) 638-4100.

23. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). Several abortion clinics sued to enjoin Operation Rescue, an anti-abortion organization, from conducting demonstrations outside their facilities. The question before the Court was whether the clinics had a cause of action under section 2 of the Civil Rights Act of 1871. As Deputy Solicitor General representing the United States as *amicus curiae*, I argued that, while the clinics had various state-law remedies, section 2 did not provide a federal cause of action because defendants' conduct did not involve class-based invidiously discriminatory animus, as required by the Court's section 2 precedents. The case was first argued before 8 Justices and reargued when a full court was available. The Court, in an opinion by Justice Scalia, agreed with the government's position.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Paul J. Larkin, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jay Alan Sekulow, 1000 Thomas Jefferson Street, N.W., Suite 520, Washington, D.C. 20007, (202) 337-2273. Arguing for the respondents was Deborah Ellis, NOW Legal Defense and Education Fund, 99 Hudson Street, New York, N.Y. 10018, (212) 925-6635.

24. *Franklin v. Massachusetts*, 505 U.S. 788 (1992). The Commonwealth of Massachusetts, having lost a seat in the House of Representatives due to reapportionment, challenged the Commerce Department's method for counting federal employees serving overseas in the 1990 census. The questions before the Court were, first, whether the conduct of the census is subject to judicial review and, second, whether the Commerce Department's allocation of overseas federal employees to their home states was consistent with both the Constitution and the Administrative Procedure Act. I argued on behalf of the United States that the census was not subject to judicial review and that, even if it were, the Commerce Department's method of allocating overseas federal employees was consistent with the Census Clause and not arbitrary or capricious. The opinion for the Court by Justice O'Connor ruled that the census was not reviewable under the Administrative Procedure Act, and that the Commerce Department's method of allocation, while subject to judicial review as to constitutional claims, was nevertheless consistent with the requirements of the Census Clause.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Edwin S. Kneedler, Assistant to the Solicitor General, Michael Jay Singer, Mark B. Stern, Lori M. Beranek, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the

respondent was Dwight Golann, Assistant Attorney General, One Ashburton Place, Boston, MA 02108, (617) 727-2200.

25. *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992). The question presented was whether the Interstate Commerce Commission (ICC) had properly approved an exercise of eminent domain authority by Amtrak under the Rail Passenger Service Act. As Acting Solicitor General, I argued that a subsequent congressional amendment to the Act — passed while rehearing was pending before the lower court — made clear that Amtrak's action was permissible. The Supreme Court agreed with our position, 6-3, and in an opinion by Justice Kennedy gave deference to the ICC's construction of the statute it has been charged with administering.

With me on the brief were then Deputy Solicitor General Lawrence G. Wallace and then Assistant to the Solicitor General Michael R. Dreeben (now Deputy Solicitor General), Department of Justice, Washington, D.C. 20530, (202) 514-2217, as well as General Counsel Robert S. Burk, Deputy General Counsel Henri F. Rush, and Attorney Charles A. Stark, Interstate Commerce Commission (now the Surface Transportation Board), 1925 K Street, N.W., Washington, D.C. 20423, (202) 565-1558. Arguing for the respondent was Irwin Goldbloom, Latham & Watkins, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 637-2200.

26. *Suter v. Artist M.*, 503 U.S. 347 (1992). Respondents filed a class-action suit alleging that officials at the Illinois Department of Children and Family Services failed to comply with the Adoption Assistance and Child Welfare Act of 1980. The question before the Court was whether the Act contained an implied right of action or conferred rights enforceable through an action under 42 U.S.C. § 1983. I argued on behalf of the United States as *amicus curiae* that the language of the Act demonstrated that Congress contemplated enforcement by the Secretary of Health and Human Services, not through private civil suits. The Court agreed, 7-2, with Chief Justice Rehnquist writing for the majority.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Michael R. Dreeben, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioners was Christina M. Tchen, Skadden, Arps, Slate, Meagher & Flom, 333 West Wacker Drive, Suite 2100, Chicago, IL 60606, (312) 407-0700. Arguing for the respondents was Michael G. Dsida, Cook County Public Guardian, 1112 South Oakley Boulevard, Chicago, IL 60612, (312) 633-2500.

27. *Hudson v. McMillian*, 503 U.S. 1 (1992). Petitioner Keith Hudson, a Louisiana prison inmate, filed suit against several corrections officers alleging that the officers had used excessive force while attempting to restrain him. The question before the Court was whether Hudson was required to show a "significant injury" as part of his claim that the officers' conduct amounted to cruel and unusual punishment under the Eighth Amendment. Representing the United States as *amicus curiae* supporting the inmate, I argued that the "significant injury" test was inappropriate because it lacked any basis in

the Constitution or in the Court's prior Eighth Amendment decisions. The Court agreed, ruling that where the claim is excessive force, a plaintiff need not show a "significant injury," but only that "prison officials maliciously and sadistically use[d] force to cause harm."

Co-counsel with me on our briefs were Kenneth W. Starr, then Solicitor General, John R. Dunne, then Assistant Attorney General, Robert S. Mueller, III, then Assistant Attorney General, Christopher J. Wright, then Acting Deputy Solicitor General, Ronald J. Mann, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Alvin J. Bronstein, National Prison Project of the American Civil Liberties Union Foundation, 1875 Connecticut Ave., N.W., Suite 410, Washington, D.C. 20009, (202) 234-4830. Arguing for respondent was Harry McCall Jr., Chang, McCall, Philips, Toler & Sarpy, 2300 Energy Centre, 1100 Poydras Street, New Orleans, LA 70163, (504) 585-7000.

28. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991). In the Tax Reform Act of 1986, Congress authorized the Chief Judge of the United States Tax Court to appoint special trial judges to hear certain cases. The question before the Court was whether vesting this power in the Chief Judge was consistent with the Appointments Clause of the Constitution. Representing the Commissioner, I argued that petitioners had waived their constitutional claim by consenting to trial before a special trial judge and that, in any event, vesting this power with the Chief Judge was consistent with the Appointments Clause. The Court ruled that the Tax Court, as a "Court of Law" within the meaning of the Appointments Clause, was eligible to exercise the appointment power.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Shirley D. Peterson, then Assistant Attorney General, Stephen J. Marzen, then Assistant to the Solicitor General, Gary R. Allen, Steven W. Parks, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioners was Kathleen M. Sullivan, then at Harvard Law School, 1525 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-4633. Ms. Sullivan is now at Stanford Law School, Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305, (650) 725-9875.

29. *Florida v. Jimeno*, 500 U.S. 248 (1991). A police officer received consent to search the car of a suspected drug trafficker, and found a kilogram of cocaine in a paper bag lying on the floor of the car; the suspect challenged the search of the bag. The question before the Court was whether the contents of the paper bag were beyond the scope of the consented search. I argued on behalf of the United States as *amicus curiae* that consent to search a car, in the absence of any express or implied limitation, includes consent to search a container within the car. The Court agreed, ruling that a search satisfies the Fourth Amendment if it is objectively reasonable for an officer to believe that the scope of a suspect's consent permitted a search of the container.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Robert S. Mueller, III, then Assistant Attorney General, William C. Bryson, then Deputy Solicitor General, Amy L. Wax, then Assistant to the Solicitor General, Sean Connelly,

Attorney, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Michael J. Neimand, Assistant Attorney General, Department of Legal Affairs, Suite N-921, 401 Northwest 2nd Avenue, Miami, FL 33128, (305) 377-5441. Arguing for respondent was Jeffrey Weiner, Weiner & Ratzan, P.A., Two Datran Center, Nineteenth Floor, Suite 1910, 9130 South Dadeland Boulevard, Miami, FL 33156, (305) 670-9919.

30. *Cottage Savings Ass'n v. Commissioner of Internal Revenue*, 499 U.S. 554 (1991). Cottage Savings Association exchanged a pool of its own mortgages for an equivalently-valued pool of mortgages belonging to four other savings and loans; the Internal Revenue Service disallowed Cottage's attempt to claim a deduction for a realized loss on the transaction. The question before the Court was whether, under the relevant statute, an exchange of interests in mortgages gave rise to a tax-deductible loss. Representing the Commissioner as Acting Solicitor General, I argued that the exchange of substantially identical pools of mortgages did not give rise to a deductible loss because the property transferred was not materially different from that received. The Court disagreed in an opinion by Justice Marshall, ruling that a gain or loss is realized so long as the properties exchanged embody "legally distinct entitlements."

Co-counsel with me on the briefs were Shirley D. Peterson, then Assistant Attorney General, Lawrence G. Wallace, then Deputy Solicitor General, Clifford M. Sloan, then Assistant to the Solicitor General, Richard Farber, Bruce R. Ellisen, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioner was Dennis L. Manes, Schwartz, Manes & Ruby, 2900 Carew Tower, 441 Vine Street, Cincinnati, OH 45202, (513) 579-1414.

31. *United States v. Centennial Savings Bank FSB*, 499 U.S. 573 (1991). On its 1981 tax return, Centennial Savings Bank claimed a deduction for a realized loss from an exchange of mortgages, and excluded certificate of deposit withdrawal penalties from its income; the Internal Revenue Service disallowed both. The question before the Court was whether the deduction and exclusion were permitted under the relevant statutes. As Acting Solicitor General, I argued on behalf of the United States that an exchange of substantially identical pools of mortgages did not give rise to a tax-deductible loss, and that withdrawal penalties did not constitute income from the discharge of indebtedness and therefore could not be excluded. The Court agreed as to the exclusion of withdrawal penalties, but relying on *Cottage Savings*, *supra*, which was argued the same day, ruled that Centennial could claim a tax-deductible loss on the mortgage transaction.

Co-counsel with me on the briefs were Shirley D. Peterson, then Assistant Attorney General, Lawrence G. Wallace, then Deputy Solicitor General, Clifford M. Sloan, then Assistant to the Solicitor General, Richard Farber, Bruce R. Ellisen, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for respondent was Michael F. Duhl, Hopkins & Sutter, 888 Sixteenth Street, N.W., Washington, D.C. 20006, (202) 835-8257.

32. *Grogan v. Garner*, 498 U.S. 279 (1991). Before petitioners could collect on a securities fraud judgment they had won against respondent, respondent included the judgment as a dischargeable debt in a petition under Chapter 11 of the Bankruptcy Code. Petitioners then brought an action claiming that the judgment was not dischargeable under the Bankruptcy Code because it was money obtained by "actual fraud." The question before the Court was whether petitioners' claim under the Bankruptcy Code required proof of fraud by clear and convincing evidence, rather than by the preponderance of the evidence — the standard applied in the securities fraud trial. I argued on behalf of the United States as *amicus curiae* that the language of the relevant statute was silent as to burden of proof and that applying a standard of clear and convincing evidence in bankruptcy actions would require burdensome relitigation of fraud claims. The Court agreed, and in a unanimous opinion by Justice Stevens, ruled that the preponderance of the evidence standard applied.

Co-counsel with me on the briefs were James R. Doty, then General Counsel, Paul Gonson, Solicitor, Jacob H. Stillman, Associate General Counsel, Richard A. Kirby, Senior Litigation Counsel, Joseph O. Click, Attorney, Securities and Exchange Commission, Washington, D.C. 20549, Alfred J.T. Byrne, General Counsel, Federal Deposit Insurance Corporation, Washington, D.C. 20429, Kenneth W. Starr, then Solicitor General, Robert A. Long, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for the petitioners was Michael J. Gallagher, One Main Plaza, Suite 840, 4435 Main Street, Kansas City, MO 64111, (816) 756-0030. Arguing for the respondent was Timothy K. McNamara, 2600 Mutual Benefit Life Building, 2345 Grand Avenue, Kansas City, MO 64108, (816) 842-0820.

33. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The lower court dismissed Shirley Irwin's suit under Title VII of the Civil Rights Act of 1964 because it was filed more than 30 days after the Equal Employment Opportunity Commission (EEOC) denied Irwin's discrimination claim. The questions before the Court were whether the statutory 30-day period began to run when the EEOC letter was delivered to Irwin's attorney, as opposed to when Irwin or his attorney actually received the letter, and whether the 30-day period was subject to equitable tolling. Representing the Department of Veterans Affairs as Deputy Solicitor General, I argued that Irwin received constructive notice of the EEOC decision when the letter was delivered to his counsel and that the 30-day time limit was jurisdictional and therefore not subject to equitable tolling. The Court, in an opinion by Chief Justice Rehnquist, ruled that the 30-day period ran from delivery of the letter and that equitable tolling, while not categorically barred by the statute, did not extend to the circumstances of this case.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Harriet S. Shapiro, Assistant to the Solicitor General, Robert S. Greenspan, Michael E. Robinson, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was Jon R. Ker, P.O. Box 1087, Hewitt, TX 76643.

34. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Two individuals filed suit challenging thousands of agency decisions affecting millions of acres of public land. The question presented was whether the individuals' allegations of injury, based on their affidavits alone, were sufficient to support standing to bring such a broad-based challenge. As Acting Solicitor General, I argued that the allegations were insufficient to give the respondents standing to sue. The Court, in a 5-4 opinion by Justice Scalia, agreed and ruled that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not presume the specific facts necessary to establish adequate injury.

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

35. *United States v. Kokinda*, 497 U.S. 720 (1990). Two individuals soliciting contributions outside a U.S. Post Office were convicted under a postal regulation making it a misdemeanor to solicit funds on "postal premises" — defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The question before the Supreme Court was whether respondents' convictions were consistent with the First Amendment. As Deputy Solicitor General, I argued on behalf of the United States that the regulation was constitutionally valid as applied to the respondents. Writing for a plurality of four Justices, Justice O'Connor agreed that the postal walkway where the conduct at issue occurred was not a public forum, but instead government property set aside to facilitate particular government business — in this case, the handling of the mails.

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

36. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). The Virginia Hospital Association filed suit against several Virginia officials under 42 U.S.C § 1983 to enforce a provision of the Medicaid Act requiring "reasonable and adequate" reimbursement of medical care. The question before the Court was whether the provision was enforceable through an action under section 1983. As Deputy Solicitor General representing the United States as *amicus curiae*, I argued that neither the language nor the history of the provision evinced an intent by Congress to create a right enforceable through section 1983. The Court, by a 5-4 margin, ruled in an opinion by Justice Brennan that the mandatory language of the relevant provision of the Medicaid Act gave rise to an enforceable right.

Co-counsel with me on the briefs were Kenneth W. Starr, then Solicitor General, Stuart M. Gerson, then Assistant Attorney General, Lawrence S. Robbins, then Assistant to the Solicitor General, Anthony J. Steinmeyer, Irene M. Solet, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Arguing for petitioner was R. Claire Guthrie, Deputy Attorney General, 101 North Eighth Street, Richmond, VA 23219, (804) 786-4072. Arguing for respondent was Walter Dellinger, Corner of Science Drive and Towerview Road, Durham, N.C. 27706, (919) 684-3404.

37. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). USA Petroleum sued Atlantic Richfield, alleging antitrust violations. The question presented was whether a firm suffers an "antitrust injury" under section 4 of the Clayton Act when it loses sales to a competitor that charges non-predatory prices pursuant to a vertical, maximum-price-fixing scheme. Representing the United States as *amicus curiae* in support of the petitioner, I argued that a plaintiff suffers an "antitrust injury" only if its injury results from the anticompetitive effect of the alleged violation, and that the antitrust laws do not protect competitors from non-predatory pricing by their rivals. Justice Brennan, writing for the majority, accepted this argument and held that USA Petroleum could not maintain the antitrust suit.

My co-counsel on the brief were Kenneth W. Starr, then Solicitor General, Michael Boudin, then Acting Assistant Attorney General, David L. Shapiro, then Deputy Solicitor General, Michael R. Dreeben, then Assistant to the Solicitor General, Catherine G. O'Sullivan and Steve MacIsaac, Attorneys, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and Kevin J. Arquit, General Counsel, Federal Trade Commission, Washington, D.C. 20530. Ronald C. Redcay of Hughes Hubbard & Reed, 555 South Flower Street, Los Angeles, CA 90071, (213) 489-5140, represented the petitioner. Maxwell M. Blecher of Blecher & Collins P.C., 611 West Sixth Street, Suite 2800, Los Angeles, CA 90017, (213) 622-4222, represented the respondent.

38. *United States v. Halper*, 490 U.S. 435 (1989). Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties for the same false Medicaid claims. The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. In private practice at the time, I was appointed by the Supreme Court to argue in support of the judgment below and handled the case on a pro bono basis. I argued that the aspect of the Double Jeopardy Clause forbidding successive punishments was not limited to the criminal context, but applied in certain circumstances to civil penalties as well. In a unanimous opinion authored by Justice Blackmun, the Court agreed.

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

Cases in which, while I was in private practice, my name appeared on the briefs of petitioners or respondents, but in which I did not present oral argument:

1. *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461 (2004). The Alaska Department of Environmental Conservation (DEC), in approving the operation of a mine, determined that the mine's proposed electric power generation plan made use of the "best available control technology," as required by the Clean Air Act. EPA disagreed with DEC's determination. The question before the Court was whether EPA had authority under the Clean Air Act to review DEC's determination and block issuance of the permit. My participation in the case was interrupted by confirmation to the D.C. Circuit, and I participated only at the certiorari stage and in petitioner's opening brief. The Court ruled, 5-4, that EPA had authority to block the permit.

With me on the briefs were Gregg D. Renkes, then Attorney General, State of Alaska Department of Law, P.O. Box 110300, Juneau, Alaska 99811, (907) 465-3600, Cameron M. Leonard, Assistant Attorney General, State of Alaska Department of Law, 100 Cushman Street, Suite 400, Fairbanks, AK 99701, (907) 451-2811, Jonathan S. Franklin, Lorane F. Hebert, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the respondents was Thomas Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. *Goldberg v. Sweet*, 488 U.S. 252 (1989). The State of Illinois imposed a tax on all interstate telecommunications charged to a service address within the State. The question for the Court was whether this tax violated the Constitution's Commerce Clause. We argued on behalf of two Illinois residents that it did. The Court disagreed, holding that the tax was fairly apportioned, non-discriminatory, and fairly related to the activities of taxpayers within the State.

With me on the briefs were Walter A. Smith, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-6448, William G. Clark, Jr., William G. Clark, Jr. & Associates, Ltd., 29 South LaSalle Street, Chicago, IL 60603, (312) 263-0830, John G. Jacobs, Jonah J. Orlofsky, Plotkin & Jacobs, Ltd., 116 South Michigan Avenue, Suite 1300, Chicago, IL 60603, (312) 372-0001. Arguing for appellees was Andrew L. Frey, Mayer, Brown & Platt, 2000 Pennsylvania Ave., N.W., Suite 6500, Washington, D.C. 20006, (202) 778-0602.

3. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 485 U.S. 976 (1988). The Webster County tax assessor valued petitioners' recently purchased properties at their purchase prices, but made only minor adjustments to the value of similar property that had not been recently conveyed. The question presented was whether this practice — the so-called "welcome stranger" approach — denied petitioners equal protection of the laws under the Fourteenth Amendment. We argued on behalf of petitioners that it did. The Court, in a unanimous opinion by Chief Justice Rehnquist, agreed.

With me on the briefs were William James Murphy, Robert T. Shaffer, III, Murphy & McDaniel, 118 West Mulberry St., Baltimore, MD 21201, (301) 685-3810, E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th St., N.W., Washington, D.C. 20004, (202) 637-5685, Ernest V. Morton, Jr., 210 Back Fork St., Webster Springs, W.V. 26288, (304) 847-5256, William D. Peltz, 900 Louisiana St., P.O. Box 2463, Houston, TX 77252, (713) 241-2414, Dan O. Callaghan, Callaghan & Ruckman, 48 East Main St., Richwood, W.V. 26261, (304) 846-2561, W. T. Weber, Jr., 208 Main Ave., Weston, W.V. 26452, (304) 269-2228. Arguing for the respondents was C. William Ullrich, Chief Deputy, Attorney General's Office, State of West Virginia, State Capitol, Charleston, W.V. 25305, (304) 348-2021.

4. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). In this case, environmental groups sued Gwaltney of Smithfield, the holder of a Clean Water Act discharge permit, for having exceeded in past years the effluent limitations of its permit. The question before the Court was whether the action could be maintained under the Clean Water Act. Representing Gwaltney, E. Barrett Prettyman, Jr. of Hogan & Hartson argued that the citizen-suit provision of the Act did not authorize such suits for wholly past violations. The Court agreed, in an opinion by Justice Marshall.

I was on the briefs with Mr. Prettyman, along with Richard M. Poulson, Patrick M. Raher, David J. Hayes, and Catherine James LaCroix of Hogan & Hartson, then located at 815 Connecticut Ave., N.W., Washington, D.C. 20006, and now at 555 13th Street, N.W., Washington, D.C. 20009, (202) 637-5600. Respondents were represented by the late Louis F. Claiborne, Washburn and Kemp P.C., 144 Second Street, San Francisco, CA 94188, (415) 543-8131.

5. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). The Pole Attachments Act calls on the FCC to regulate the rates that utilities can charge cable television companies for use of the utilities' poles. The question presented was whether the Act violates the Takings Clause of the United States Constitution. Representing appellants Group W Cable Inc., National Cable Television Association Inc., and Cox Cablevision Corporation, Jay E. Ricks, then of Hogan & Hartson, argued that rate regulation does not constitute a *per se* taking of property, and that the specific rate imposed by the FCC provided for adequate compensation. The Court, Justice Marshall writing for the majority, accepted both arguments and upheld the constitutionality of the Act.

I was on the briefs with Mr. Ricks, along with E. Barrett Prettyman, Jr., Gardner F. Gillespie, III, and Timothy J. Dowling of Hogan & Hartson, then located at 815 Connecticut Ave., N.W., Washington, D.C. 20006, and now at 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 633-2217, argued the case on behalf of the FCC. The appellees were represented by Allan J. Topol of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20044, (202) 662-6000.

Cases in which, while I was in private practice, my name appeared on an amicus brief at the merits stage:

1. *Pharmaceutical Research & Mnfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). State law created a drug rebate in excess of that provided by Medicaid, and subjected non-participating companies to a pre-authorization regime for Medicaid sales. The question presented was whether the state regime was consistent with federal law and the United States Constitution. On behalf of the United States Chamber of Commerce, I submitted an *amicus* brief in support of petitioner, in which I contended that the state law was preempted by the Medicaid Act and conflicted with the Commerce Clause. The Court disagreed. While no opinion on Medicaid preemption commanded a majority of the Justices, the Court held that the district court had abused its discretion in enjoining the state program. Writing for a majority, Justice Stevens also rejected the Commerce Clause challenge.

My co-counsel on the brief were Catherine E. Stetson, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600 and Robin S. Conrad, National Chamber Litigation Center Inc., 1615 H Street, N.W., Washington, D.C. 20062 (202) 463-5337. Carter G. Phillips of Sidley Austin Brown & Wood L.L.P., 1501 K Street, N.W., Washington, D.C. 20005, (202) 736-8000, represented the petitioners and shared oral argument with Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, appearing on behalf of the United States as *amicus curiae* supporting reversal. Andrew S. Hagler, Assistant Attorney General, Six State House Station, Augusta, ME 04333, (207) 626-8800, represented the respondents.

2. *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). Petitioner, representing the estate of a boat passenger who had died when struck by a propeller blade, brought a tort suit in state court against the boat engine designer. The question presented was whether federal law preempted the suit. In an *amicus* brief on behalf of the Chamber of Commerce, I maintained that the uniquely federal field of maritime law, the Federal Boat Safety Act, and a Coast Guard decision not to require propeller guards on engines such as the one at issue, all conflicted with the petitioner's state tort claim. Writing for the majority, Justice Stevens disagreed and held that the suit could go forward.

With me on the brief were Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Robin S. Conrad, National Chamber Litigation Center Inc., 1615 H. Street, N.W., Washington, D.C. 20062, (202) 463-5337. Leslie A. Brueckner, Trial Lawyers for Public Justice P.C., 1717 Massachusetts Avenue, N.W., Suite 800, Washington, D.C. 20036, (202) 797-8600, represented the petitioner and shared oral argument with Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, appearing on behalf of the United States as *amicus curiae*. The respondent was represented by Stephen M. Shapiro of Mayer, Brown, Rowe & Maw, 190 South LaSalle Street, Chicago, IL 60603, (312) 782-0600.

3. *United States v. Fior D'Italia, Inc.*, 536 U.S. 238 (2002). Fior D'Italia, a restaurant, challenged the IRS's method of assessing Federal Insurance Contribution Act (FICA) taxes on tips received by restaurant employees. The question presented was whether FICA authorized the IRS to base the assessment on an aggregate estimate of all the tips received by restaurant employees, rather than estimating each employee's tip income separately. On behalf of the American Gaming Association, I filed an *amicus* brief in support of the restaurant, in which I contended that the IRS's aggregate method improperly shifted the responsibility of policing tip reporting from the agency onto the employer. Justice Breyer, writing for the majority, disagreed and held that FICA allowed the IRS to use an aggregate method.

I was assisted by John S. Stanton, Robert H. Kapp, and Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Frank J. Fahrenkopf Jr. and Judy L. Patterson, American Gaming Association, 555 13th Street, N.W., Washington, D.C. 20004 (202) 637-6500. Eileen J. O'Connor, Assistant Attorney General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, represented the United States. Tracy J. Power of Power & Power, 2300 Clarendon Blvd., Arlington, VA 22201, (703) 841-1330, represented the respondents.

4. *Festo Corporation v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002). The Court of Appeals for the Federal Circuit held that patent-holders cannot rely on the "doctrine of equivalents" — which protects them from copyists who try to circumvent the patent by making minor alterations in design — if the holders had previously submitted a claim-narrowing amendment to the Patent and Trademark Office. The question before the Supreme Court was whether this ruling complied with the Patent Act and the United States Constitution. Representing Litton Systems, Inc., I filed an *amicus* brief in support of petitioner, arguing that the Federal Circuit's decision effected a taking of private property without just compensation, and that the ruling should not be applied retroactively. The Court, in a unanimous opinion by Justice Kennedy, vacated the Federal Circuit's decision and held that claim-narrowing amendments do not always bar patentholders from relying on the doctrine of equivalents.

With me on the brief were Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Frederick A. Lorig and Sidford L. Brown of Bright & Lorig, 633 West 5th Street, Los Angeles, CA 90071, (213) 627-7774, Rory J. Radding of Pennie & Edmonds L.L.P., 1155 Avenue of the Americas, New York, N.Y. 10036, (212) 790-9090, and Stanton T. Lawrence III and Carl P. Bretscher of Pennie & Edmonds L.L.P., 1667 K Street, N.W., Washington, D.C. 20006, (202) 496-4400. Robert H. Bork, Suite 1000, 1150 17th Street, N.W., Washington, D.C. 20036, (202) 862-5851, argued the case for the petitioner. Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, argued for the United States as *amicus curiae* supporting vacatur and remand. Arthur I. Neustadt of Oblon, Spivak, Mcclelland, Maier & Neustadt P.C., 1755 Jefferson Davis Highway, Arlington, VA 22202, (703) 413-3000, argued for the respondents.

5. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). Petitioner Adarand Constructors challenged a Department of Transportation program on the ground that racial preferences in the program violated the Equal Protection Clause of the Fourteenth Amendment. On behalf of the Association of General Contractors of America, I filed an *amicus* brief supporting petitioner, in which I argued that the DOT program did not have a sufficient basis in evidence of discrimination, as required by Supreme Court precedent, to support the preferences. The Court dismissed certiorari as improvidently granted — finding that Adarand lacked standing — and hence did not reach the merits of the dispute.

My co-counsel on the brief were Lorane F. Hebert of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Michael E. Kennedy, General Counsel, The Associated General Contractors of America Inc., 333 John Carlyle Street, Suite 200, Alexandria, VA 22314, (703) 837-5335. Adarand was represented by William Perry Pendley, Mountain States Legal Foundation, 707 Seventeenth Street, Suite 3030, Denver, CO 80202, (303) 292-2021. The Secretary of Transportation was represented by Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668.

6. *United States and Dep't of Agriculture v. United Foods, Inc.*, 533 U.S. 405 (2001). A mushroom producer challenged a federal assessment imposed on the mushroom industry to fund advertisements promoting mushroom sales. The question before the Court was whether the assessment violated the First Amendment. On behalf of the American Mushroom Institute, the National Cattlemen's Beef Association, the American Soybean Association, the National Milk Producers Federation, the Milk Industry Foundation, the United Egg Producers, and the United Egg Association, I filed an *amicus* brief in support of the United States and the Department of Agriculture, in which I defended the assessment as a form of government speech. In an opinion by Justice Kennedy, the Court struck the assessment down, but specifically noted that it was not engaging the government speech argument, because the petitioners had not raised it below.

With me on the brief were David G. Leitch, then of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Wayne R. Watkinson Richard and T. Rossier McLeod of Watkinson & Miller, One Massachusetts Ave., N.W., Washington, D.C. 20001, (202) 842-2345. Barbara McDowell, Assistant to the Solicitor General, Department of Justice Washington, D.C. 20530, (202) 514-2217, represented the petitioners. Laurence H. Tribe, Hauser Hall 420, 1575 Massachusetts Ave., Cambridge, MA 02138, (617) 495-4621, represented the respondents.

7. *Jones v. United States*, 529 U.S. 848 (2000). The defendant in this case set fire to his cousin's house. The question before the Court was whether this act constituted a federal crime under 18 U.S.C. § 884(i), which outlaws the arson of "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." In an *amicus* brief on behalf of Dale Lynn Ryan — another defendant convicted of a similar act — I argued that the arson of private residences does not fall within the statute's compass.

The Court, in an opinion by Justice Ginsburg, agreed and dismissed the federal prosecution.

With me on the brief was Gregory G. Garre of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. The petitioner was represented by Donald M. Falk of Mayer, Brown & Platt, 1909 K Street, N.W., Washington, D.C. 20006, (202) 263-3000. Representing the United States was Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

8. *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999). Petitioners sued the United States and the FCC, seeking to establish their right to broadcast advertisements for legal gambling at area casinos. The question presented was whether 18 U.S.C. § 1304, which criminalizes broadcast advertising of lotteries and casino gambling, could be applied in areas where gambling was legal. In an *amicus* brief on behalf of the American Gaming Association, I argued that such an application violated the First Amendment of the United States Constitution. The Court agreed, in an opinion by Justice Stevens.

My co-counsel on the brief were David G. Leitch and Adam K. Levin of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Frank J. Fahrenkopf, Jr. and Judy L. Patterson, American Gaming Association, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-6500. The petitioners were represented by the late Bruce J. Ennis, Jr. of Jenner & Block, 601 13th Street, N.W., Washington, D.C. 20005. The United States was represented by Barbara D. Underwood, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Ms. Underwood is now Chief Assistant United States Attorney for the Eastern District of New York, 147 Pierrepont St., Brooklyn, N.Y. 11201, (718) 254-7000.

9. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). This case involved a challenge to the Coal Act, which required employers to fund coal industry retiree benefits, even if the employer had since exited the coal business. The question presented was whether this funding mechanism violated the Takings Clause of the United States Constitution. In an *amicus* brief on behalf of the Ohio Valley Coal Company and Maple Creek Mining, Inc., I argued that the Act did not effect a taking of private property. The Court disagreed and held that the Act was unconstitutional as applied to employers who had left the coal industry.

With me on the brief was Mathew A. Lamberti of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. John T. Montgomery of Ropes & Gray, One International Place, Boston, MA 02110, (617) 951-7000, argued on behalf of the petitioner. Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and Peter Buscemi of Morgan, Lewis & Bockius L.L.P, 1800 M Street, N.W., Washington, D.C. 20036, (202) 467-7190, represented the respondents.

10. *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). Growers, handlers, and processors of California tree fruits challenged targeted federal assessments used to fund generic advertising of California nectarines, plums, and peaches. The question presented was whether the assessments violated the First Amendment. On behalf of the National Association of State Departments of Agriculture, the National Milk Producers Federation, and the National Cattlemen's Beef Association as *amici curiae* in support of petitioner, I argued that the assessment was a constitutional exercise of government speech. The Court upheld the assessments but did not engage the government speech argument.

With me on the brief were Wayne R. Watkinson and Richard T. Rossier of McLeod, Watkinson & Miller, One Massachusetts Ave., N.W., Washington, D.C. 20001, (202) 842-2345. Alan Jenkins, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, represented the petitioners. Thomas E. Campagne of Thomas E. Campagne & Associates, 1685 North Helm Avenue, Fresno, CA 93727, (209) 255-1637, represented the respondents.

11. *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997). A California law prohibited employers from paying an apprentice wage to workers in unapproved apprenticeship programs; an employer brought suit challenging the law. The question before the Court was whether the law was pre-empted by the federal Employee Retirement Income Security Act (ERISA). I participated in an amicus brief filed on behalf of the Associated General Contractors of America. We argued that if the Court found the California law protected by ERISA's saving clause, it should do so only to the extent that California's standards for approving apprenticeship programs were consistent with federal apprenticeship standards. The Court held that the California law did not fall within ERISA's pre-emption clause, and did not reach the saving clause issue.

With me on the brief were William G. Jeffery, Jeffery, Ferring & Jenkel, 1000 Second Avenue, Suite 3300, Seattle, WA 98104, (206) 623-4600, David P. Wolds, Merrill, Schultz & Wolds, Ltd., 401 West "A" Street, Suite 2550, San Diego, CA 92101, (619) 234-4525, Carmel Martin, Hogan & Hartson L.L.P., 555 13th Street, N.W. Washington, D.C. 20004, (202) 637-5600, Michael E. Kennedy, General Counsel, Associated General Contractors Of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735. Arguing for the petitioners was John M. Rea, Chief Counsel, State of California Department of Industrial Relations, Office of the Director, Legal Unit, 45 Fremont Street, Suite 450, San Francisco, CA 94105, (415) 972-8900. Arguing for the respondents Richard N. Hill, Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, 20th Floor, San Francisco, CA 94108, (415) 433-1940. Arguing for the United States as *amicus curiae* was James A. Feldman, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

12. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The question presented was whether the Medical Device Amendments (MDA) of 1976 pre-empted a state common-law negligence action. I participated in an amicus brief filed on behalf of the Center for

Patient Advocacy and the California Health Care Institute. We argued that the comprehensive regulatory scheme established by the MDA pre-empted state common law claims. The Court ruled, 5-4, that respondents' common law claims were not pre-empted by the MDA.

With me on the brief were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5810. Arguing for the petitioner was Arthur R. Miller, 1545 Massachusetts Avenue, Cambridge, Massachusetts 02138. Arguing for the respondents was Brian Wolfman, Public Citizen Litigation Group, 1600 20th Street, N.W., Washington, D.C. 20009, (202) 588-1000. Arguing for the United States as *amicus curiae* was Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

13. *Brown v. Pro Football, Inc., D/B/A Washington Redskins*, 518 U.S. 231 (1996). After labor negotiations reached an impasse, NFL owners agreed among themselves to impose unilaterally the terms of their last bargaining offer. The question for the Court was whether this agreement fell within an implicit antitrust exemption for collective bargaining. I participated in an amicus brief filed on behalf of the Associated General Contractors of America. We argued in support of the respondents that certain activities of multi-employer bargaining groups were exempt from the antitrust laws. The Court held, 8-1, that the collective-bargaining exemption applied.

With me on the brief were Michael E. Kennedy, General Counsel, Associated General Contractors Of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735, Charles E. Murphy, Murphy, Smith & Polk, P.C., Twenty-Fifth Floor, Two First National Plaza, Chicago, IL 60603, (312) 558-1220, Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioners was Kenneth W. Starr, Kirkland & Ellis, 655 15th Street, N.W., Washington, D.C. 20005, (202) 879-5000. Arguing for the respondents was Gregg H. Levy, Covington & Burling, 1201 Pennsylvania Ave., N.W., Washington, D.C. 20004, (202) 662-6000. Arguing for the United States as *amicus curiae* was Lawrence G. Wallace, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

14. *Holly Farms Corporation v. NLRB*, 517 U.S. 392 (1996). The NLRB approved a collective bargaining unit that included a class of workers known in the poultry industry as "live-haul" workers; Holly Farms challenged the Board's decision on the ground that "live-haul" workers are agricultural laborers exempt from the coverage of the National Labor Relations Act (NLRA). The question before the Court was whether the Board's decision was based on a reasonable interpretation of the NLRA. I participated in an amicus brief filed on behalf of the National Broiler Council. We argued in support of the petitioners that the Board's decision was contrary to the NLRA. The Court disagreed, and ruled that the Board's interpretation was reasonable.

With me on the brief were Gary Jay Kushner and Jonathan S. Franklin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5856.

Arguing for the petitioners was Charles P. Roberts III, Haynsworth, Baldwin, Johnson & Greaves, P.A., 2709 Henry Street, Greensboro, N.C. 27405, (910) 375-9737. Arguing for the respondents was Richard H. Seamon, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

15. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). A group of employee welfare benefit plan beneficiaries sued their employer alleging that they had been misled into withdrawing from the plan. The questions before the Court involved whether the employer breached its fiduciary obligations under the Employee Retirement Income Security Act (ERISA) and whether the particular ERISA provision at issue authorized the beneficiaries to sue to enforce those obligations. I participated in an amicus brief filed on behalf of the U.S. Chamber of Commerce in support of the petitioner. We argued, first, that the relevant provision did not provide a cause of action because the liability of fiduciaries was governed by other sections of ERISA, and second, that ERISA contemplated a different standard from the one argued for by the beneficiaries. The Court disagreed, and ruled for the beneficiaries.

With me on the brief were Stephan A. Bokat, Mona C. Zieberg, The National Chamber Litigation Center, Inc., 1615 H Street, N.W., Washington, D.C. 20062, (202) 463-5337, Evan Miller, H. Christopher Bartolomucci, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was Floyd Abrams, 80 Pine Street, New York, N.Y. 10005, (212) 701-3000. Arguing for the respondent was H. Richard Smith, Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., 100 Court Avenue, Suite 600, Des Moines, IA 50309, (515) 243-7611. Arguing for the United States as *amicus curiae* was Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

16. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Adarand Constructors challenged a federal government preference in the award of contracts for firms that employ minority-owned subcontractors. The question before the Court was whether this preference was subject to strict scrutiny. I participated in an amicus brief filed on behalf of the Associated General Contractors of America in support of petitioner. We argued that the Court's earlier decision to apply strict scrutiny in the context of state and local contracts should apply equally to federal contracts. The Court agreed.

With me on the brief were Michael E. Kennedy, Special Counsel, Associated General Contractors of America, Inc., 1957 E Street, N.W., Washington, D.C. 20006, (202) 383-2735, David G. Leitch, H. Christopher Bartolomucci, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was William Perry Pendley, Mountain States Legal Foundation, 1660 Lincoln Street, Suite 2300, Denver, Colorado 80264, (303) 861-0244. Arguing for the respondents was Drew S. Days, III, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Mr. Days is now at Morrison & Foerster, 2000 Pennsylvania Avenue, N.W., Suite 5500, Washington, D.C. 20006, (202) 887-6920.

17. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995). The Plant Variety Protection Act of 1970 grants the developer of a novel plant variety a limited monopoly to sell seeds of that variety; petitioners alleged that respondents were selling seeds in violation of the Act. The question presented was whether respondents' sales fell within an exemption provided for by the Act. I participated in an amicus brief filed on behalf of the American Seed Trade Association in support of the petitioner. We argued that reading the Act to exempt respondents' sales was inconsistent with its language and purpose. The court, in an 8-1 decision, agreed.

With me on the brief were Gary Jay Kushner, Mark D. Dopp, David G. Leitch, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was Richard L. Stanley, Arnold, White & Durkee, 750 Bering Drive, Suite 400, Houston, Texas 77057, (713) 787-1400. Arguing for the respondents was William H. Bode, William H. Bode & Associates, 1150 Connecticut Avenue, N.W., Ninth Floor, Washington, D.C. 20036, (202) 828-4100. Arguing for the United States as *amicus curiae* was Richard H. Seamon, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

18. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). Several individuals brought suit challenging retroactive changes in the terms and conditions of an airline frequent flyer program. The question before the Court was whether the Airline Deregulation Act of 1978 pre-empted respondents' claims. I participated in an amicus brief filed on behalf of the Air Transport Association of America, arguing that state regulation of frequent flyer programs was pre-empted. The Court held that the respondents' claims under an Illinois consumer fraud act were pre-empted, but that their common-law breach of contract claim could go forward.

With me on the brief were John R. Keys, Jr., Winston & Strawn, 1400 L Street, N.W., Washington, D.C. 20005, (202) 371-5700, Calvin P. Sawyier, Winston & Strawn, 35 West Wacker Drive, Chicago, IL 60601, (312) 558-5600, and Walter A. Smith, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioner was the late Bruce J. Ennis, Jr., Jenner & Block, 601 13th Street, N.W., Washington, D.C. 20005, (202) 639-6000. Arguing for the respondents was Gilbert W. Gordon, Marks, Marks, and Kaplan, Ltd., 120 North LaSalle Street, Suite 3200, Chicago, IL 60602, (312) 332-5200. Arguing for the United States as *amicus curiae* was Cornelia T.L. Pillard, then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

19. *Washington v. Harper*, 494 U.S. 210 (1990). A mentally-ill inmate in a Washington prison challenged the State's attempt to administer psychiatric medication against his will. The question presented was whether in deciding to medicate the inmate, the State afforded him the process required by the Due Process Clause of the Fourteenth Amendment. I participated in a brief filed on behalf of the American Psychological Association, arguing that the inmate had not been afforded a truly impartial hearing. The Court held that the procedures established by the prison met the requirements of due process.

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

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

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

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

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

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

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

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

Goetz v. Glickman (No. 98-607), *cert. denied*, 525 U.S. 1102 (1999).
Kamilewicz v. Bank of Boston Corp. (No. 96-1184), *cert. denied*, 520 U.S. 1204 (1997).
Amoco Production Co. v. Public Service Co. of Colorado (No. 96-954), *cert. denied*, 520 U.S. 1224 (1997).
Rockland Industries, Inc. v. Chumbley (No. 87-1220), *cert. denied*, 485 U.S. 961 (1988).

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

    a. the date of representation;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fornaro v. James, 2005 WL 1719431 (D.C. Cir. July 26, 2005)
United States v. Jackson, 2005 WL 1704843 (D.C. Cir. July 22, 2005) (dissenting)
Brady v. FERC, 2005 WL 1591463 (D.C. Cir. July 08, 2005)
Booker v. Robert Half International, Inc., 2005 WL 1540796 (D.C. Cir. July 01, 2005)
Outlaw v. Airtech Air Conditioning and Heating, Inc., 2005 WL 1489687 (D.C. Cir. June 24, 2005)
Amoco Production Co. v. Watson, 410 F.3d 722 (D.C. Cir. 2005)

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

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

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

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (May 16, 2005)
United States v. Holmes, 385 F.3d 786 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1388 (Feb. 22, 2005)
In re England, 375 F.3d 1169 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1343 (Feb. 22, 2005)
Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004) (concurring opinion), *cert. denied*, 125 S. Ct. 1928 (Apr. 25, 2005)
Graham v. Ashcroft, 358 F.3d 931 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 83 (Oct. 4, 2004)
Sioux Valley Rural Television, Inc. v. FCC, 349 F.3d 667 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2042 (Apr. 19, 2004)
Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (dissent from denial of rehearing en banc), *cert. denied*, 124 S. Ct. 1506 (Mar. 1, 2004)

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

None.

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

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

Flynn v. Ohio Building Restoration, Inc. (June 27, 2005)
Pennsylvania Mun. Auth. Ass'n v. Leavit (June 3, 2005)
Interstate Industrial Corp. v. Sec. of Labor (May 19, 2005)
Swinson v. Coates & Lane, Inc. (May 18, 2005)
Mercy Medical Skilled Nursing Facility v. Leavitt (May 18, 2005)
i2way Corp. v. FCC (Mar. 23, 2005)
Muckle v. Gonzalez (Mar. 21, 2005)
Richardson v. Loyola (Mar. 4, 2005)
U.S. Ship Management, Inc. v. U.S. Maritime Admin. (Mar. 3, 2005)
United States v. Fornah (Mar. 1, 2005)
Nat'l Alt. Fuels Ass'n v. EPA (Feb. 25, 2005)
Hernandez v. Norinco (Jan. 21, 2005)
Willson v. SunTrust Bank (Dec. 21, 2004)
United States v. Catlett (Nov. 24, 2004)

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

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

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

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

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

American Federation of Government Employees, AFL-CIO v. Loy, 367 F.3d 932 (D.C. Cir. 2004)
National R.R. Passenger Corp. v. Lexington Ins. Co., 365 F.3d 1104 (D.C. Cir. 2004)
National Ass'n of Government Employees, Local R5-136 v. FLRA, 363 F.3d 468 (D.C. Cir. 2004)
Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB, 363 F.3d 437 (D.C. Cir. 2004)
Evergreen America Corp. v. NLRB, 362 F.3d 827 (D.C. Cir. 2004)
SA Storer and Sons Co. v. Sec. of Labor, 360 F.3d 1363 (D.C. Cir. 2004)
United States v. Thomas, 361 F.3d 653 (D.C. Cir. 2004), *cert. granted, judgment vacated in light of United States v. Booker*, 125 S.Ct. 1056 (Jan. 24, 2005)
Association of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA, 360 F.3d 195 (D.C. Cir. 2004)
United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004)
Godwin v. Sec'y of Housing and Urban Development, 356 F.3d 310 (D.C. Cir. 2004)
English-Speaking Union v. Johnson, 353 F.3d 1013 (D.C. Cir. 2004)
Harris v. FAA, 353 F.3d 1006 (D.C. Cir. 2004)
Whitaker v. Thompson, 353 F.3d 947 (D.C. Cir. 2004)
Warren v. District of Columbia, 353 F.3d 36 (D.C. Cir. 2004)
Natural Resources Defense Council v. Dep't of Energy, 353 F.3d 40 (D.C. Cir. 2004) (per curiam)
American Federation of Government Employees, Nat. Veterans Affairs Council 53 v. FLRA, 352 F.3d 433 (D.C. Cir. 2003)
Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc., 351 F.3d 1229 (D.C. Cir. 2003)
United States v. Riley, 351 F.3d 1265 (D.C. Cir. 2003)
Lohrenz v. Donnelly, 350 F.3d 1272 (D.C. Cir. 2003)
United States v. Howard, 350 F.3d 125 (D.C. Cir. 2003)
Tax Analysts v. IRS, 350 F.3d 100 (D.C. Cir. 2003)
International Union of Operating Engineers, Local 470, AFL-CIO v. NLRB, 350 F.3d 105 (D.C. Cir. 2003)
City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003)
United States v. Seiler, 348 F.3d 265 (D.C. Cir. 2003)
Williams Companies v. FERC, 345 F.3d 910 (D.C. Cir. 2003)
Marseilles Land and Water Co. v. FERC, 345 F.3d 916 (D.C. Cir. 2003)

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

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

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

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

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

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

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

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

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

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

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

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

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

None.

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

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

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

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

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

A copy of the financial disclosure report is attached.

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

See attached Statement of Net Worth.

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

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

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

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

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

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

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

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

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

27. **Selection Process**:

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

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

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

No.

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

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

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

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

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

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

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

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

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

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

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

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

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