

NOMINATION OF NEIL M. GORSUCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT

WEDNESDAY, JUNE 21, 2006

UNITED STATES SENATE,

Washington, D.C.

The hearing was convened, pursuant to notice, at 4:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Lindsey Graham, presiding.

OPENING STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator GRAHAM. The hearing will come to order.

I apologize for being late. I would like to welcome my two colleagues from Colorado. I appreciate you taking the time to come before the Committee and testify.

If you are ready, Senator Allard.

PRESENTATION OF NEIL M. GORSUCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT BY HON. WAYNE ALLARD, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator ALLARD. Mr. Chairman, it is good to see you here. I am glad I yielded to you on the floor so you could be here to preside over this hearing.

Senator GRAHAM. For the audience, he said, "I have to be at a hearing at 4:00." I said, "I do, too." No we know why.

Senator ALLARD. Now we realize we are both at the same meeting. So, thank you.

Well, Chairman Graham and members of the Committee, it is my pleasure to introduce to you Neil M. Gorsuch, President Bush's nominee to the U.S. Court of Appeals for the Tenth Circuit. Mr. Gorsuch is an extraordinarily well-qualified nominee and, if confirmed, would capably serve the citizens of Colorado, the Tenth Circuit, and indeed the United States.

I would like to begin by thanking Chairman Specter for so promptly scheduling this hearing. I look forward to the Committee's continuing the tone of expediency set by the Chairman by swiftly reporting the nominee to the floor for a timely up or down vote. It is critical to the administration of justice that this seat, which has been vacant since last year, be filled immediately.

I am pleased that we are joined today by Senator Salazar, in what I hope is an early indicator of broad bipartisan support for

this nominee. I would also like to welcome Mr. Gorsuch's wife, Louise, and her two children, Emma and Belinda, to the U.S. Senate.

Senator GRAHAM. And let the record reflect, they are beautiful children and a lovely wife.

Senator ALLARD. They are wonderful. All three of you no doubt played an important role in your husband and father being here today. Speaking from my own experience in public service, your love and support will continue to be instrumental to his ability to perform his public duties. You are embarking on this journey together.

I would also like to welcome Mr. Gorsuch back to the U.S. Senate. Some of you, including the Ranking Member, may remember Mr. Gorsuch from his service as a Senate page in the early 1980's. It was here in the Senate that he made his foray into public service, and developed the passion for it that he exudes today.

As a fifth-generation Coloradan, I am pleased that President Bush chose a nominee with deep Colorado roots. Born in Denver, Mr. Gorsuch is a fourth-generation Coloradan who, if confirmed, would carry on his family history of public service in the State. His mother, Ann Gorsuch, served in the Colorado State Legislature, and as EPA Director during the Reagan Administration.

Moreover, his grandfather founded a successful Denver law firm, Gorsuch Kirgis, where both he and Neil's father were active in the community throughout the firm's 60-year history.

Neil, if confirmed, you no doubt look forward to returning to Colorado, for family and the Rocky Mountains there await you.

Mr. Chairman, if I were asked to succinctly characterize Mr. Gorsuch, I would have to say well rounded: well rounded educationally, professionally, and personally.

Mr. Gorsuch pursued a rigorous and geographically diverse course of academic study. He earned his undergraduate degree from Columbia University, including a summer at the University of Colorado, his law degree from Harvard, and a doctorate in legal philosophy from Oxford University.

Mr. Gorsuch began his distinguished professional career as a law clerk to Judge David Sentelle on the U.S. Court of Appeals for the D.C. Circuit. He then went on to clerk for two Supreme Court justices, Justice Kennedy and Colorado's own Byron White.

Following his prestigious clerkship, Mr. Gorsuch entered private practice and became a partner in the law firm of Kellogg, Huber, Hanson, Todd, Evans & Figel. While in private practice, Mr. Gorsuch litigated matters of clients large and small, ranging from individuals, to non profits, to corporations.

Moreover, he litigated cases on a range of issues, from simple contract disputes to complex antitrust and securities fraud matters.

He left private practice in 2005 to return to public service, this time at the U.S. Department of Justice, where he currently serves as the principal deputy to the Associate Attorney General.

Looking collectively at his career, the picture of an appellate judge-in-training emerges. Mr. Gorsuch has served in all three branches of the government, including the highest levels of the judicial and executive branches: he has represented both plaintiffs and defendants; he has represented both individuals and corpora-

tions; he has litigated civil cases and criminal cases; and he has litigated in both Federal and State courts.

In sum, the breadth and depth of Mr. Gorsuch's experience makes him ideally suited to serve on the Federal appellate bench.

While Mr. Gorsuch is highly qualified, I also promised the people of Colorado I would support judicial nominees who I believe would rule on the law and the facts before them, not judges who would legislate from the bench. My support of Mr. Gorsuch here today is consistent with that promise.

Mr. Chairman, I see my time has expired. May I have permission to finish my comments, which is just about a minute and a half?

Senator GRAHAM. Take all the time you need.

Senator ALLARD. Thank you.

From my conversation with Mr. Gorsuch, I am certain that he recognizes the proper role of the judiciary. The role of the judiciary is to interpret the law, not make the law.

I believe that Mr. Gorsuch is temperamentally and intellectually inclined to stick to the facts and the law in cases that would come before him and he would refrain from legislating from the bench.

Moreover, Mr. Gorsuch's personal views would not determine the outcome of cases that come before him. Mr. Gorsuch himself says, "Personal politics or policy preferences have no useful role in judging; regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do."

I believe this statement also speaks to Mr. Gorsuch as a person. He is humble, unassuming, polite, and respectful. This sentiment is reflected in the numerous letters pouring into my office from people that have worked with him over the years. Mr. Gorsuch possesses the temperament befitting an appellate judge.

In conclusion, Mr. Gorsuch is a top-flight nominee who I am proud to introduce to the distinguished members of the Committee. I look forward to a fair and dignified confirmation process, the outcome of which I am confident will reveal a highly qualified nominee, deserving of confirmation.

Congratulations, Neil. On behalf of the citizens of Colorado, I thank you, Mr. Chairman, for allowing me the extra time to finish the introduction of an exceptional individual.

Senator GRAHAM. Thank you, Senator Allard. That was well done. We appreciate your testimony.

Senator Salazar?

PRESENTATION OF NEIL M. GORSUCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT BY HON. KEN SALAZAR, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator SALAZAR. Thank you, Chairman Graham. To the chairman of this Committee, Senator Specter and Senator Leahy, I thank them for their leadership, and I thank you for the work that you do on this Committee.

Unfortunately, it often seems that bipartisanship is a lost art here in Washington, D.C., so when I was asked to join my friend Senator Allard in introducing Neil Gorsuch to the Judiciary Committee, I was very pleased to accept that invitation.

I would also like to welcome Mr. Gorsuch's wife, Louise and his young and beautiful daughters, Emma and Belinda, here today.

While Mr. Gorsuch has spent the majority of his professional life in Washington, D.C., his roots in Colorado are strong, going back four generations. If confirmed he will return back to Colorado, where I hope that he will live up to the standards set by a long line of distinguished jurists from our State, including the late U.S. Supreme Court Justice Byron White.

At the young age of 38, Mr. Gorsuch has already had a very impressive legal career. After earning degrees from Columbia University, Harvard Law School and Oxford University, he went on to work and clerk on the D.C. Circuit of the U.S. Supreme Court.

Following his clerkships, he spent nearly 10 years in private practice before becoming principal deputy to the Associate Attorney General of the United States.

While I do not know Mr. Gorsuch well, I have had the chance to visit with him and learn about both his personal background and his professional experience. During our meeting, I found him to be very intelligent, thoughtful, and appreciative of the great honor it is to be nominated to the Federal bench. Today's hearing will provide Mr. Gorsuch with a chance to share these qualities with the Committee.

Of course, it takes much more than a great resume to be a great judge. In addition to the professional excellence as a lawyer, a judicial nominee should have a demonstrated dedication to fairness, impartiality, precedent, and the avoidance of judicial activism from both the left and the right.

By exploring Mr. Gorsuch's record, judicial philosophy and his views on a wide range of important issues, these hearings will help Senators evaluate whether Mr. Gorsuch meets that very high standard.

As always, I look forward to learning more from the careful and thorough examination, which is a hallmark of this Judiciary Committee.

Chairman Specter, Senator Leahy, Senator Graham, and all my distinguished colleagues on this Judiciary Committee, I am very pleased to introduce to you a person that I believe will make an excellent judge on the Tenth Circuit Court of Appeals, Mr. Neil Gorsuch.

Senator GRAHAM. Thanks, Senator Salazar. It was very kind of you to do this. Well done by both. Thank you very much. We appreciate you coming to the Committee.

Mr. Gorsuch, if you would come forward. Raise your right hand, please.

[Whereupon, Mr. Gorsuch was duly sworn.]

Senator GRAHAM. Well, I would like to add my welcome to you and your family, and all of your friends. I am glad to be able to chair this hearing.

I will turn over the floor to you, if you would like to say anything in an opening statement.

STATEMENT OF NEIL M. GORSUCH, NOMINEE TO BE CIRCUIT JUDGE FOR THE TENTH CIRCUIT

Mr. GORSUCH. I would like to just say a few thank yous, Senator, if that is all right. First and foremost, to the President for nominating me, to Senator Specter and Ranking Member Leahy for

holding this hearing, and to you, Senator, for agreeing to be here. I cannot tell you how much it means to me. The kind introductions from my home-State Senators, that, too, means a very great deal to me, both of them.

I have here with me, Senator, as well, a bit of my family that you have already been introduced to. I know my two daughters have what they would consider to be better things to do with a summer afternoon, so I am grateful that they are here with their dad.

Senator GRAHAM. They are behaving better than most Senators. [Laughter].

Mr. GORSUCH. What can I say?

[Laughter].

Senator, I would also like to say, I have gratitude for my family back home in Colorado. I feel their thoughts today deeply, and am looking forward to being with them soon.

I would also like to thank the members of the Department of Justice who are here, a lot of folks lending moral support, both who are appointed and a number of the career staff at the Department, who I have come to respect and admire greatly for their service to the country under very difficult conditions, often.

I also have some of my former partners and colleagues from the law firm that have come here today, and I am grateful to have them here.

Finally, my parents and grandparents, most of whom are deceased, but all of whom are here, I think, in my thoughts, and all of whom have served Colorado in many different ways over the course of their lives.

I look forward to your questions.

The biographical information of Mr. Gorsuch follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**
Neil McGill Gorsuch
2. **Address: List current place of residence and office address(es).**
Residence: Vienna, VA
Office: U.S. Department of Justice, Room 5706, Washington, D.C. 20530
3. **Date and place of birth.**
August 29, 1967 in Denver, Colorado
4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**
Married; Marie Louise Gorsuch; mother and homemaker.
5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

College:
Columbia University (1985-1988); BA with honors, 1988
University of Colorado at Denver (summer 1986, no degree)

Law School:
Harvard Law School (1988-1991); JD with honors, 1991

Doctorate:
Oxford University (1993-1995); D.Phil., 2004
6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

United States Department of Justice, Office of the Associate Attorney General, 2005 to the present (Principal Deputy to the Associate Attorney General)

Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1995-2005 (partner 1998-2005; associate, 1995-1997)

Supreme Court of the United States, 1993-94 (law clerk to Hon. Byron R. White and Hon. Anthony M. Kennedy)

U.S. Court of Appeals, D.C. Circuit, 1991-92 (law clerk to Hon. David B. Sentelle)

Sullivan & Cromwell, summer 1991 (summer associate)

Harvard Government Department, 1990-91 (Head Teaching Fellow for political philosophy course)

Cravath, Swaine & Moore, summer 1990 (summer associate)

Harvard Government Department, 1989-90 (Teaching Fellow for political philosophy course)

Davis, Graham & Stubbs, summer 1989 (summer associate)

Walden Group, LLC, 2005 to the present (part owner of Grand County, Colorado property)

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I have not served in the military.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Marshall Scholarship to Oxford University

Harry S. Truman Scholar at and cum laude graduate of Harvard Law School

Phi Beta Kappa and cum laude graduate of Columbia University

Council on Foreign Relations

Harry S. Truman 2006 Scholarship Selection Committee

Listed in Who's Who in America, Who's Who in American Law, Who's Who in the World

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

American Bar Association (since approx. 2002), including its Litigation and Antitrust sections

American Trial Lawyers Association (since approx. 2002)

American Inns of Court (approx. 1997-1999)

I occasionally represent the Department of Justice before judicially-related groups and committees with respect to the Department's initiatives, including for example the federal rules of appellate procedure advisory committee, the federal judicial conference, and various federal circuit courts. I have also periodically attended the D.C. Circuit Judicial Conference.

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I know of no organizations to which I belong, other than those listed above, which are active in lobbying before public bodies. Other organizations to which I belong include:

Phi Beta Kappa

Columbia University Alumni Representative Committee

Harry S. Truman Scholarship 2006 Selection Committee

Association of Marshall Scholars

Holy Comforter Parish

Republican National Lawyers Association

Trout Unlimited

Westwood Country Club

University Club

Walden Group, LLC

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

New York (1992)
 Colorado (1994)
 District of Columbia (1997)
 Supreme Court of the United States (1998)
 U.S. Court of Appeals for the Second Circuit (2004)
 U.S. Court of Appeals for the Third Circuit (1998)
 U.S. Court of Appeals for the Fourth Circuit (1997)
 U.S. Court of Appeals for the Sixth Circuit (2000)
 U.S. Court of Appeal for the Seventh Circuit (2006)
 U.S. Court of Appeals for the Tenth Circuit (2005)
 U.S. District Court for the District of Colorado (1996)
 U.S. District Court for the District of Washington, D.C (2001)
 U.S. District Court for the Southern District of New York (2002)
 U.S. District Court for the Eastern District of New York (2002)

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have written or co-authored the following materials since law school:

Author -

The Future of Assisted Suicide and Euthanasia (book forthcoming from Princeton University Press 2006)

Ensuring Class Action Fairness, Federal Trade Commission Workshop (Sept. 2004)

Justice White and Judicial Excellence, distributed by UPI (May 2002)

The Legalization of Assisted Suicide and the Law of Unintended Consequences, 2004 Wisconsin Law Review 1347 (2004)

Letter to the Editor, Washington Post, March 18, 2004.

Liberals and Lawsuits, National Review Online (Feb. 2005)

The Right to Assisted Suicide and Euthanasia, 23 Harvard Journal of Law and Public Policy 599 (2000)

Co-author -

No Loss, No Gain, The Legal Times (2005)

Settlements in Securities Fraud Class Actions: Improving Investor Protections, Washington Legal Foundation (April 2005) and Andrews Class Action Litigation Reporter (August 2005)

Letter to the Editor, The Legal Times (Sept. 2004)

Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limits, 20 Hofstra Law Review 341 (1991) and Policy Analysis on Term Limits, Cato Institute Policy Analysis No. 178 (1992)

The Constitutional Case for Term Limits, Wall Street Journal (Nov. 1992)

Prior to law school, I wrote for student newspapers in college and high school. I have given remarks or made presentations before the following organizations:

National White Collar Crime Center
American Association for the Advancement of Science
Washington, D.C. Bar Association
Wisconsin Bar Association
Federal Trade Commission workshop
Common Good
Prime Time Radio
British Marshall Scholarship Commission

Some of these remarks have touched on a legal issue; others have not. Generally I have not made a practice of keeping copies of my remarks and often have spoken from handwritten notes rather than a prepared text.

13. **Health:** What is the present state of your health? List the date of your last physical examination.

I am in excellent health; my last physical examination was in May 2006.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held a judicial office.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

I have not been a judge.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have never been a candidate for or held an elective public office. Since law school, I have held the following appointed positions:

Law clerk for the U.S. Court of Appeals, D.C. Circuit, Hon. David B. Sentelle, from 1991 to 1992.

Law clerk for the Supreme Court of the United States, Hon. Byron R. White and Hon. Anthony M. Kennedy, from 1993 to 1994.

United States Department of Justice, Principal Deputy to the Associate Attorney General, 2005-present.

17. **Legal Career:**

- a. **Describe chronologically your law practice and 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;**

Law clerk for the U.S. Court of Appeals, D.C. Circuit, Hon. David B. Sentelle, from 1991 to 1992.

Law clerk for the Supreme Court of the United States, Hon. Byron R. White and Hon. Anthony M. Kennedy, from 1993 to 1994.

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

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Sullivan & Cromwell, 1701 Pennsylvania Ave., NW, Washington, D.C. 20006, summer associate, summer 1991.

Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Washington, D.C. 20036, associate from 1995 to 1997 and partner from 1998 to 2005.

U.S. Department of Justice, Principal Deputy to the Associate Attorney General, Washington, D.C. 20530, from 2005 to present.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Immediately after law school, I spent the summer working for the law firm of Sullivan & Cromwell where I assisted with corporate transactional work while studying for the bar. Thereafter, I served as a law clerk to the U.S. Court of Appeals for the D.C. Circuit with Judge David Sentelle, from 1991 to 1992. In that capacity, I wrote bench briefs and assisted with the preparation of opinions and dissents in matters ranging from criminal law to constitutional and administrative law. It was an intensive immersion into federal appellate law and practice. In addition, during the summer of 1992, Judge Sentelle sat by designation on the U.S. District Court for the Western District of North Carolina. There I assisted the Court with several criminal trials and the disposition of civil district court matters.

From 1993 to 1994, I was fortunate to serve as law clerk to the Hon. Byron R. White. Justice White had just resigned from the Supreme Court and I served as his first law clerk in retirement and his only law clerk that year. Despite his "retirement," Justice White

took on a heavy load of appellate cases, sitting by designation on the Tenth Circuit. I assisted Justice White with his work on the Tenth Circuit, preparing bench briefs prior to argument and helping with opinions. Justice White also asked me to assist another sitting Justice, and Justice Kennedy kindly agreed to allow me to help in his chambers. During my clerkships, approximately half of the cases I worked on were civil matters and half were criminal matters. Most involved federal appeals but, of those that involved trials, all were criminal trials.

Between my clerkships and again after them (1992-93, 1994-95), I attended Oxford University as a British Marshall Scholar studying for a doctorate in legal philosophy. My academic research and writing involved both criminal and civil law issues in proportions of roughly 60% criminal and 40% civil.

In 1995, I joined Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC. In 1998, I became a partner at the firm and I remained there through May 2005. During my time in private practice, I was involved in matters large and small for clients ranging from individuals to non-profits to corporations; my cases ranged from simple breach of contract disputes to complex antitrust, RICO, and securities fraud matters. I tried cases, participated in substantial injunctive and evidentiary hearings, and argued motions of all kinds, including case dispositive motions to dismiss and for summary judgment, discovery disputes, in limine motions in preparation for trial, post-trial motions, etc. I also took and defended depositions regularly, worked on appeals before federal and state courts of appeals across the country, and provided antitrust and other legal counsel to clients. I estimate that, during my time in private practice, roughly 70% of my litigated matters were in federal court and 30% in state courts. Approximately 90% of these matters involved civil disputes, with the remainder involving criminal matters.

Since June 2005, I have served as Principal Deputy to the Associate Attorney General, the number three officer at the Department of Justice. In that capacity I assist in managing the Department's civil litigating components (antitrust, civil, civil rights, environment, and tax). Major litigation decisions in certain significant cases -- such as whether to file suit, what motions and defenses to bring, whether and how to settle significant cases on advantageous terms -- are reviewed by the Office of the Associate Attorney General. I also spend a substantial amount of time reviewing and editing trial and appellate court legal briefs and plotting case strategy. Virtually all of these matters are civil, though there are occasional criminal matters. I act as Associate Attorney General during periods when the Associate Attorney General is unavailable or recused and assist in the development and implementation of a variety of civil justice initiatives and policies.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

I have consciously sought to maintain a general litigation practice and avoid specialization. While in private practice, my matters ranged from complex antitrust, securities, and class actions to relatively straightforward breach of contract and breach of fiduciary duty disputes. I sought to and enjoyed representing plaintiffs and defendants in roughly equal proportions and my clients ranged from individuals to non-profits to small and large corporations. My work at the Department of Justice is, if anything, even more varied, involving cases and issues arising from each of the Department's civil litigating components.

- c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

I appeared in court frequently throughout my years in private practice and have appeared more occasionally in my current position.

2. **What percentage of these appearances was in:**
 (a) federal courts; Overall, 70%
 (b) state courts of record; 30%
 (c) other courts.

3. **What percentage of your litigation was:**
 (a) civil; Overall, 85%
 (b) criminal. 15%

4. **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.**

While in private practice, I tried four jury trials to verdict, two as chief counsel and two as associate counsel. Two of the trials involved damages claims in excess of \$1 billion; three were reported as among the top 100 verdicts for the years in which they were tried; all lasted between 2 and 6 weeks. I participated in three other jury trials, including one as lead counsel, which settled. I participated in at least five non-jury injunctive proceedings that involved substantial evidentiary hearings.

5. **What percentage of these trials was:**
 (a) jury; 100%
 (b) non-jury.

18. **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.

Some of my more significant matters while in private practice included the following:

1. *NCRIC v. Columbia Hospital for Women*, No. 00-7308 (D.C. Super.) (Judge Anna Blackburne-Rigsby) (trial 2004)

NCRIC, an insurance company that provided medical malpractice insurance to doctors, sued my client, Columbia Hospital for Women. NCRIC claimed that Columbia failed to pay certain insurance premiums owed by the hospital on behalf of the hospital's ob/gyn physicians, and NCRIC sought recovery of approximately \$3 million dollars. Columbia denied NCRIC's allegations and counterclaimed, contending that NCRIC, not Columbia, owed money under the parties' contract. Columbia also contended that, when Columbia brought this to NCRIC's attention and threatened to move its business to another insurance carrier, NCRIC began a multi-faceted campaign designed to induce doctors at Columbia to move their practices other area hospitals where NCRIC was the exclusive malpractice insurance carrier. Columbia contended that NCRIC's conduct amounted to tortious interference with its business relations with its attending physicians, many of whom had served at the hospital for decades, and that the loss of so many doctors contributed to the closure of the hospital, a non-profit with more than 130 years of community service. After a 2 week trial in which I served as lead counsel, the jury rejected NCRIC's breach of contract claim and found for Columbia on both its contract and its tortious interference counterclaims, awarding Columbia \$18.2 million. The matter was one of the top 100 reported verdicts of 2004.

Co-counsel included Priya Aiyar and Mike Zuckman of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900, as well as Eli Schulman, formerly of Kellogg Huber. Lead opposing counsel: Rodney Page, Bryan Cave, LLP, 700 Thirteenth Street N.W., Washington, DC 20005-3960, (202) 508-6002; John G. Kester, Williams & Connolly LLP, 725 Twelfth St., N.W., Washington, DC 20005, (202) 434-5069.

2. *Conwood v. UST*, Case No. 5:98-CV 00108 (W.D. Ky), 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 US 1148 (2003) (Judge Thomas Russell, W.D. Ky.) (1997- 2003)

The U.S. Court of Appeals for the Sixth Circuit upheld a \$1.05 billion treble damages award on behalf of my client, Conwood, against United States Tobacco Company (“UST”) after a jury concluded that UST had engaged in illegal monopolization. Conwood alleged that UST, which controlled nearly 80% of the U.S. market for moist snuff smokeless tobacco, had attempted to exclude competing products by entering into exclusive deals with retailers, removing competitors’ sales racks, burying competitors’ products in UST racks, and destroying point-of-sale advertising, the industry’s primary marketing medium. The verdict, reached after a four week jury trial, is believed to be the largest affirmed private damages award in the history of U.S. antitrust laws as of 2002; in its verdict, the jury also rejected UST’s counterclaims seeking millions of dollars in damages. After trial, the court took additional evidence, conducted additional motions practice, and granted a four year injunction against certain anticompetitive conduct by UST, a result also affirmed on appeal. UST petitioned for review in the Supreme Court, we opposed, and the Supreme Court ultimately denied review. The case involved scores of depositions and massive discovery, as well as ancillary proceedings in several jurisdictions. I helped manage and run the case at all stages, from the pre-suit investigation through the drafting of the complaint; the discovery process; pre-trial motions practice; trial, where I served as second chair and handled many witnesses on direct and cross; post-trial motions practice; and the preparation of appellate briefs.

Co-counsel included Mike Guzman and Mark Hansen of Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; Ben Powell, formerly of Kellogg Huber and now General Counsel to the Director of National Intelligence, (202) 395-2366; David Simpson, Eddie Foster and John S. (“Tripp”) Wilson of the Conwood Company, 813 Ridge Lake Blvd., #100, Memphis, TN 38120, (901) 761-2050; Hank Handelsman of the Pritzker Organization, 71 South Wacker Drive Suite 4700, Chicago, IL 60606, (312) 873-4900; Richard Roberts, Whitlow, Roberts, Houston & Straub, PLLC, Old National Bank Building, 300 Broadway, Paducah, KY 42001, (270) 443-4516; L. Clifford Craig and John Nalbandian, Taft, Stettinius & Hollister, LLP, 425 Walnut St., Suite 1800, Cincinnati, OH 45202, (513) 381-2838. Counsel for third parties included Alice Fisher, formerly of Latham & Watkins and currently Assistant Attorney General for the Criminal Division, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530, (202) 514-7200. Lead counsel for defendants was Neal Stoll, Skadden Arps, 4 Times Square, New York, NY, 10036, (212) 735-3000.

3. *Zachair, Ltd. v. Driggs Corp. et al.*, 762 A.2d 991, 1003 (Md. Ct. Spec. App. 2000), *cert. denied*, 768 A.2d 524 (2001) (Judge Steven I. Platt) (1997-2001)

Defendants owned a valuable airport and mining facility. According to my client, plaintiff Zachair, defendants deliberately loaded the property with debt and ran it into bankruptcy. Zachair contended that defendants schemed to purchase the property fraudulently out of bankruptcy for an artificially low price, thereby “washing” the property of the debt associated with it. Zachair, unaware of this plan at the time, attended the bankruptcy auction as the only bidder unaffiliated with defendants, and won the auction when it bid the highest price. Zachair contended that defendants then proceeded to engage in a pattern of conduct designed to defeat Zachair’s purchase and wrest control of the property from Zachair. According to Zachair, defendants maliciously used and abused legal process by filing multiple baseless proceedings against Zachair; improperly refused to vacate the property after the auction was consummated and they were legally obliged to leave; and proceeded to denude the property of valuable minerals resources and airport revenues. The case involved substantial dispositive motions practice and discovery which I handled. A 2 ½ week trial in which I served as lead counsel followed and the jury returned a verdict in favor of Zachair on counts including abuse of process, misuse of process, conversion, and tortious interference. The jury awarded approximately \$4.8 million in compensatory damages as well as punitive damages of approximately the same amount (substantially more in punitive damages than Zachair sought at trial). In post-trial motions practice, the trial judge affirmed the compensatory award of approximately \$4.8 million but granted the defendants’ motion to reduce the punitive award to \$775,000. On appeal, where I also briefed and argued, the court of appeals affirmed the trial court’s judgment in all respects. Defendants then petitioned for review in the state Supreme Court and I prepared an opposition brief; the state Supreme Court denied review, thus sustaining Zachair’s award.

Co-counsel: Matt Bester, formerly of Kellogg Huber and now with the U.S. Department of Justice Antitrust Division, (202) 353-3491 and Sarah Jorgensen, formerly of Kellogg Huber. Lead counsel for defendants: Shelby Mitchell, Baker & Hostetler, Suite 1100, 1050 Connecticut Ave., N.W., Washington, D.C. 20036, (202) 861-1601.

4. *Automall v. American Express*, Civil Action No. 01-1705-A (E.D. Va.) (Chief Judge Hilton) (trial in 2002)

In this case, I was retained by defendant American Express approximately two weeks before trial to supplement existing lawyers from another firm and serve as lead counsel in a breach of contract jury trial. Prior to my firm’s involvement, the Court had decided under *Daubert* to permit plaintiff’s expert to testify to damages in excess of \$70 million. After our involvement, we crafted a new theory for exclusion of the expert witness and presented it to the Court during trial toward the close of plaintiff’s case. After reviewing our new theory for exclusion, the Court encouraged the plaintiff to settle, something which subsequently occurred on satisfactory terms.

Co-counsel included Mike Guzman and David Ross of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202)

236-7900; Stuart Alderoty, American Express Chief Litigation Counsel, American Express Tower, 200 Vesey St., New York, NY 10385, (212) 640-2000; Julie Quagliano, Steve Seeger, and Jim Faughnan, Quagliano & Seeger, 2620 P Street, N.W., Washington, D.C. 20007, (202) 822-8838. Lead counsel for plaintiff: Herbert Milstein, Cohen, Milstein, Hausfeld, & Toll, P.L.L.C., 1100 New York Ave., N.W., Suite 500 West, Washington, D.C. 20005, (202) 408-4600.

5. (a) *California Public Employees' Retirement System v. Felzen*,
525 U.S. 215 (1999)
- (b) *Devlin v. Scardelletti*, 536 U.S. 1 (2002)

My involvement in these two cases arose as a result of the desire of the Council of Institutional Investors and various of its state public employee pension fund members to establish the right of class members to object to class action and derivative suit settlements and pursue those objections on appeal. The Council and its members claimed that, due to dynamics associated with the class action mechanism, class action settlements sometimes benefit lead class members, their counsel, and defendants at the expense of other class members. Council members CalPERS and the Florida State Board of Administration (SBA), together with the United States Government, first pursued the issue before the U.S. Supreme Court in the *Felzen*. In that case, I wrote the successful petition for certiorari on behalf of CalPERS and SBA, helped convince the U.S. Government to participate in the case on the merits on the side of our clients, and helped prepare the merits briefs. *Felzen* resulted in a tie 4-4 vote, leaving the question of objector participation unresolved, but the issue emerged again 3 years later in *Devlin*. This time the Council participated as amicus and I wrote the Council's brief. The question of objector standing to appeal was resolved in *Devlin* in favor of the Council and its members by a vote of 6 to 3.

Co-counsel in *Felzen* included Michael Kellogg of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900. Lead counsel for respondent in the *Felzen* was John G. Kester, Williams & Connolly LLP, 725 Twelfth St., N.W., Washington, DC 20005, (202) 434-5069; counsel for the government in *Felzen* was David Frederick, now with Kellogg, Huber. Lead counsel for petitioner in *Devlin* was Thomas Goldstein, 4607 Asbury Pl., N.W., Washington, D.C., 20016, (202) 237-7594; counsel for respondent in *Devlin* was Laurence Gold, Bredhoff & Kaiser, PLLC, 805 15th St., Suite 1000, Washington, D.C. 20005, (202) 842-2600.

6. *Z-Tel v. SBC Communications*, No. 5:03-CV-229 (E.D. Tex.) (Judge David Folsom and Magistrate Judge Caroline Craven) (2003-05)

This case involved antitrust allegations against my client, SBC Communications. Plaintiff Z-Tel alleged that SBC sought to drive Z-Tel and other competitive local exchange carriers (CLECs) out of business by refusing to share certain allegedly essential

elements of its network. Z-Tel sought damages in excess of \$1 billion under federal antitrust laws, federal communications laws, and various tort theories. In turn, SBC counterclaimed, alleging that Z-Tel was ailing financially due to a poor business plan and that it had sought to avoid failure by improperly shifting certain of its operating costs onto SBC. Certain portions of Z-Tel's complaint were dismissed at the outset of the case but other portions survived into discovery. Substantial discovery ensued with multiple rounds of motions practice as well as depositions and ancillary proceedings across the country before the case was settled on satisfactory terms. I directed the defense of the case on a day-to-day basis, drafting or editing extensive pleadings, arguing many motions, and taking and defending key depositions.

Co-counsel included: Steve Benz, Ken Fetterman, Mark Hansen and Aaron Panner of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; Martin Grambow of SBC Communications (now AT&T), 175 E. Houston, PO Box 2933, San Antonio, TX, 78299-2933, (210) 351-5966; Damon Young, John Pickett, and Lance Lee, of Young, Pickett & Lee, 4122 Texas Boulevard, Texarkana, TX 75504, (903) 794-1303; Judge Joseph Kendall, Provost & Umphrey, Dallas, TX, 3232 McKinney Avenue, Suite 700, Dallas, Texas 75204, (214) 744-3000. Counsel for plaintiff included Nick Patton of Patton, Tidwell & Schroeder, LLP, 4605 Texas Boulevard, Texarkana, TX 75505, (903) 792-7080.

7. (a) *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005)
- (b) *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2003)

In these two cases, I prepared amicus briefs in the U.S. Supreme Court and Second Circuit, respectively, on behalf of the Chamber of Commerce. While the facts and question presented in the two cases differed somewhat, broadly speaking both raised the question whether plaintiffs are permitted to sue in securities fraud class actions for losses not proximately caused by the fraud they allege. Our client's position, that such claims are not viable as a matter of law, prevailed before both the Second Circuit and Supreme Court in unanimous opinions.

Co-counsel in *Dura* and *Lentell* included Paul Matey, formerly of Kellogg Huber and now with the U.S. Attorney's Office in New Jersey, 790 Broad Street, Newark, NJ 07102, (973) 645-2930; Robin S. Conrad and Stephanie A. Martz, the U.S. Chamber of Commerce, 1615 H Street, N.W., Washington, D.C. 20062, (202) 463-5337. In *Lentell* counsel for defendant was Scott D. Musoff, Skadden Arps, 4 Times Square, New York, NY, 10036, (212) 735-3000; counsel for plaintiff was Herbert Milstein, Cohen, Milstein, Hausfeld, & Toll, P.L.L.C., 1100 New York Ave., N.W., Suite 500 West, Washington, D.C. 20005 (202) 408-4600. In *Dura* counsel for petitioner was William Sullivan, Paul Hastings, 3579 Valley Centre Drive, San Diego, CA 92130, (858) 720-2525; counsel for respondent was Patrick Coughlin, Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, 655 W. Broadway, Suite 1900, San Diego, CA 92101, (619) 231-1058.

8. *Teachers Retirement System of Louisiana v. Regal Entertainment*, No. 444 (Del. Chanc.) (Hon. William Chandler) (2004)

In this case, plaintiff filed a shareholder derivative suit and motion for injunction challenging a \$710 million special dividend and concomitant capital restructuring by my client, a leading movie theater chain. Plaintiff contended that the dividend and restructuring amounted to a breach of fiduciary duty and self-dealing. The Court set the case on an expedited discovery schedule and then held an extensive evidentiary hearing on the injunction motion before ruling on the merits in my client's favor. I directed our client's defense, wrote the briefs, defended and took depositions, and argued. After the hearing, plaintiff dropped the remainder of its suit.

Co-counsel included: Mark Hansen of Kellogg, Huber, Hansen, Todd, Evans & Todd, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; Peter Brandow, General Counsel of Regal Entertainment, 7132 Regal Lane, Knoxville, Tennessee 37918, (865) 922-1123; William Lafferty, Morris, Nichols, Arsht & Tunnell, LLP, 1201 N. Market St., Wilmington, DE 19899, (302) 658-9200. Lead counsel for plaintiff: Stuart Grant, Grant & Eisenhofer, PA, 1201 North Market St., Wilmington, DE 19801, (302) 622-7000.

9. *Ashley v. Coopers & Lybrand Deloitte*, Law No. CL95-6466 (Albermarle Co., VA) (Judge Paul Peatross) (1995-1998)

With his late wife, Sir Bernard Ashley co-founded the Laura Ashley company. As an outgrowth of that enterprise, Sir Bernard started a Laura Ashley inspired country house hotel business and hired his longtime consultants, Coopers & Lybrand UK, to advise him on prospective hotel acquisitions and to manage the business. Sir Bernard alleged that his advisors eventually became more interested in their own financial advancement than his interests and led him into a hotel deal that they knew was not feasible in order to enrich themselves. He sued for breach of fiduciary duty and fraud, among other things, claiming damages of approximately \$50 million. I was responsible for the prosecution of this case on a day-to-day basis, arguing various motions regularly; taking and defending depositions; responding to, preparing, and arguing case dispositive motions; and preparing the matter for trial. Among other things, during discovery the Court barred defendant from presenting much of its case at trial after, the Court found, defendant repeatedly refused to supply appropriate witnesses for deposition. After defendant's motion for mandamus to overturn the trial court's order barring its ability to put on evidence was denied by the Virginia Supreme Court, the case settled at the outset of trial on undisclosed terms.

Co-counsel included Mark Hansen of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; Richard Milnor, Zunka, Milnor, Carter & Inigo, Ltd. 414 Park Street, P.O. Box 1567, Charlottesville, Virginia 22902, (434) 977-0191. Lead counsel for defendants were Jay

Kelly Wright and Roger Fendrich, Arnold & Porter, LLP, 555 12th Street, N.W., Washington, D.C. 20004, (202) 942-5000.

10. *Goff v. Ford Motor Company and David Bickerstaff*, No. 2:97-0341 (S.D.W.Va.) (Judge John Copenhaver) (1997-2000)

In this case, we represented a former car designer and expert witness for Ford Motor Company against charges that he conspired with Ford to provide false testimony in prior cases brought by product liability plaintiffs, thereby improperly securing verdicts in Ford's favor. This individual, along with Ford, was charged with violations of RICO, subject to class action allegations, and alleged to be personally liable for multiple millions of dollars in damages. We defeated the class action allegations early in the case but the case was permitted to proceed to trial. I wrote and edited various dispositive motions, the opposition to the motion for class certification, as well as motions in limine I argued prior to trial. Our client was dismissed from the case at the outset of the trial. During the ensuing trial against Ford, I provided strategic legal advice to defense counsel.

Co-counsel included David Ross and Chris Todd of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, 1615 M Street, N.W., Suite 400, Washington, D.C. 20036, (202) 236-7900; John McHugh, Allen Guthrie McHugh & Thomas PLLC, 500 Lee St. East, Suite 800, Charleston, WV 25301, (304) 345-7250. Counsel for the other defendant included Ed Stewart, Wheeler, Trigg & Kennedy, LLP, 1801 California St., Suite 3600, Denver, CO 80202, (303) 244-1800. Lead counsel for plaintiff included A. Camden Lewis, Lewis & Babcock, 1513 Hampton St., Columbia, SC 29211, (803) 771-8000.

19. **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 the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I have devoted a significant amount of time to legal matters that do not involve court appearances, including by way of example:

- (a) In my current job I help oversee all of the Department of Justice's civil litigating units. Major litigation decisions in certain significant cases -- such as whether to file suit, what motions and defenses to bring, whether and how to settle significant cases on advantageous terms -- are reviewed by the Office of the Associate Attorney General. I also spend a substantial amount of time reviewing and editing trial and appellate court legal briefs, plotting case strategy, and assisting in the development and implementation of a wide variety of civil justice initiatives and policies.

(b) While in private practice, I provided a substantial amount of antitrust counseling for small and large companies, including: (1) assessing the antitrust implications of contemplated mergers and acquisitions; (2) analyzing the antitrust consequences of certain proposed and existing courses of business (e.g., sales and marketing techniques); and (3) assisting my clients with efforts before federal antitrust authorities, including the Department of Justice and the Federal Trade Commission, to contest acquisitions made by rival companies as violations of federal antitrust law.

(c) In private practice I advised a wide array of clients faced with potential civil and criminal liability seeking to mitigate or avoid those issues short of litigation. These matters included, among others, assisting with the representation of a member of the Administration of President William J. Clinton in connection with a then-pending investigation.

(d) While in private practice I was engaged to conduct a top to bottom internal review of a client's legal department and litigation docket, as well as to assess the legality of certain management practices under federal law.

(e) I obtained a doctorate in legal philosophy at Oxford and have devoted a significant amount of time to the academic research and legal writings discussed above.

(f) I served as a law clerk to two federal appellate judges where my responsibilities included preparing bench memos analyzing cases prior to argument; preparing draft opinions; analyzing draft opinions written by others; and, in the case of the Supreme Court, assessing petitions for certiorari.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I retain an interest in certain contingency matters with my former law firm. Under an agreement reached when I left the firm, I will be compensated according to certain predetermined rules if and when those matters result in recoveries for the firm. In addition, I have an agreement with Princeton University Press concerning royalties arising from the sale of my book. Any sums received above certain costs I incurred in connection with the book I intend to donate to hospice charities.

2. **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 intend to abide by the Code of Conduct for United States Judges and applicable statutes. I also intend to consult the practices employed by my colleagues, as appropriate. While I cannot predict all of the potential conflicts that might emerge, I would include among the potential conflicts that could arise during my initial service the following: cases argued by my former partners, close friends, or family members; cases involving the clients I represented in private practice; and matters on which I worked while at the Department of Justice.

3. **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.**

I have no such commitments or agreements, though I cannot rule out the possibility that I might seek opportunities to provide volunteer services to appropriate charitable causes, teach young persons, or otherwise participate in the life of my community. I would do so, however, within the limits of the Code of Conduct for United States Judges.

4. **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.)

Please see the attached Financial Disclosure Report.

- 5. Please complete the attached financial net worth statement in detail (Add schedules as called for).**

Please see the attached Net Worth Statement.

- 6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

I have volunteered in various political campaigns, and participated in groups such as "Lawyers for Bush-Cheney," but have not managed or held a formal position of significance in any campaign.

FINANCIAL STATEMENT

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks		3	000	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		410	000
Real estate owned-add schedule	1	050	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		60	000				
Cash value-life insurance							
Other assets itemize:							
See attached schedule	2	443	400				
				Total liabilities		410	000
				Net Worth	3	146	400
Total Assets	3	556	400	Total liabilities and net worth	3	556	400
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax		105	000				
Other special debt							

FINANCIAL STATEMENT
NET WORTH SCHEDULES

Real Estate Owned

Personal residence	\$ 1,050,000
--------------------	--------------

Other Assets

Spouse 403(b) account	\$ 2,400
Vacation property (partial ownership)	200,000
Thrift Savings Plan	14,000
IRA accounts	47,000
College Savings Accounts	350,000
USAA Money Market	320,000
USAA Mutual Funds	1,200,000
ABA 401(k)	310,000
Total Other Assets:	<u>\$ 2,443,400</u>

Real Estate Mortgages Payable

Personal residence	\$ 410,000
--------------------	------------

AO-10 (WP)
Rev. 1/2004FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2004Report Required by the Ethics
in Government Act of 1978,
(5 U.S.C. App. §§101-111)

1. Person Reporting (Last name, first, middle initial) Gorsuch, Neil M.		2. Court or Organization Tenth Circuit Court of Appeals	3. Date of Report May 12, 2006
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge- Nominee	5. Report Type (check appropriate type) _X_ Nomination, Date May 10, 2005 ___ Initial ___ Annual ___ Final	6. Reporting Period January 1, 2005 - May 12, 2006	
7. Chambers or Office Address U.S. Department of Justice, Room 5706 950 Pennsylvania Ave., N.W. Washington, D.C. 20530	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____		
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.			

I. POSITIONS. (Reporting individual only; see pp. 9-13 of Instructions.)

POSITION	NAME OF ORGANIZATION/ENTITY
☐ NONE (No reportable positions.)	
1 Partner	Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC (resigned May 2005)
2	
3	

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of Instructions.)

DATE	PARTIES AND TERMS
☐ NONE (No reportable agreements.)	
1 2005	Kellogg Huber - I retain an interest in certain contingency cases in recognition of legal services rendered and will be compensated if and when the firm obtains recoveries.
2	

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of Instructions.)

DATE	SOURCE AND TYPE	GROSS INCOME
A. Filer's Non-Investment Income		
☐ NONE (No reportable non-investment income.)		
1 2004	Kellogg Huber	\$ 1,419,050
2 2005	Kellogg Huber	\$ 1,144,538
3 2006	Kellogg Huber	\$ 277,662
B. Spouse's Non-Investment Income - If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)		
☒ NONE (No reportable non-investment income.)		
1		
2		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting Neil M. Gorsuch	Date of Report May 12, 2006
---	--------------------------------

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	NONE (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)

	SOURCE	DESCRIPTION	VALUE
☐	NONE (No such reportable gifts.)		
1	Exempt		\$
2			\$
3			\$
4			\$

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)

	CREDITOR	DESCRIPTION	VALUE CODE*
☒	NONE (No reportable liabilities.)		
1			
2			
3			
4			
5			

*Value Codes: F=\$10,000 or less R=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000
 N=\$250,001-\$500,000 O=\$500,001-\$1,000,000 P=\$1,000,001-\$2,500,000
 Q=\$2,500,001-\$5,000,000 R=\$5,000,001-\$10,000,000 S=\$10,000,001 or more

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Neil M. Gorsuch

Date of Report

May 12, 2006

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)

A. Description of Assets (including trust assets) <i>Place "00" after checkbox number for no disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(b)	(c)	(1)	(2)	(f)	If not exempt from disclosure			
	Amt. Code (a)-(d)	Type (e) or Int.	Value Code (j)-(k)	Value Code (l)-(m)	Type (f) or Sch. merger, redemption	(g) Date Month- Day	(h) Value Code (n)-(p)	(i) Value Code (q)-(r)	(j) Transfer or disposition (if any) (s)
☐ NONE (No reportable income,									
1 USAA Money Market Fund	D	Interest	N	T	exempt				
2 USAA Bond Fund	D	Interest	M	T					
3 USAA High Yield Bond Fund	C	Dividend	M	T					
4 USAA Intl Fund	D	Dividend	M	T					
5 USAA S&P Fund	C	Dividend	M	T					
6 USAA Value Fund	A	Dividend	M	T					
7 USAA Tax Ex Intern. Bond Fund	D	Interest	N	T					
8 USAA Small Cap Fund	A	Dividend	L	T					
9 USAA GNMA Trust	E	Dividend							
10 Senate Credit Union checking	A	Dividend	C	T					
11 Walden Group LLC		none	M	W					
12 529 Plans - Potomac and		none	N	T					
13 ABA 401K Value Fund		none	M	T					
14 ABA 401K Growth Fund		none	L	T					
15 ABA 401K Equity Index Fund		none	M	T					
16 Alpine FDS Dynamic Div Fund	B	Dividend							
17 Provident Energy Trust Common	A	Dividend							
18 Vanguard Total Market Index Sh	A	Dividend							
1 Income Real Estate Fund	D	Interest	M	T					
2 Value Fund	D	Interest	M	T					
3 Vanguard Total Market Index Sh	A	Dividend							

[illegible][illegible]

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Neil M. Gorsuch	May 12, 2006

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

Notes to Part III.A:

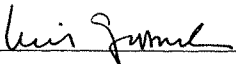
1. Income from Kellogg Huber for 2005 represents income for a partial year before I joined the government, as well as a return of capital.
2. Income from Kellogg Huber for 2006 represents a payment of contingency fee income pursuant to an agreement reached with the firm prior to my departure.
3. Additional non-investment income in 2005 and 2006 was received as United States government salary.

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature



Date

May 12, 2006

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 201
One Constitution Plaza, S.E.
Washington, D.C. 20001

III. GENERAL (PUBLIC)

1. **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 began pro bono legal work in law school, participating in the Harvard Prison Legal Assistance Project, assisting with the representation of inmates in Massachusetts state prisons with respect to, among other things, hearings on disciplinary actions taken against them. I later participated in the Harvard Defenders program, representing defendants in criminal proceedings in Massachusetts state courts. While in private practice, I took on matters for non-profit organizations and individuals who could not pay my firm's normal hourly rates. In these matters, fees were reduced, modified in unconventional ways, or waived to allow the client to obtain legal representation. These clients included the Columbia Hospital for Women, the Council of Institutional Investors, as well as private individuals. In addition, I have spent more than three years of my career in public service for the U.S. Government. Since I began at the Department of Justice, I have sought to foster efforts to encourage pro bono work by Department lawyers despite concerns that have historically served to discourage government lawyers from engaging in pro bono activities; I have, for example, spoken on the issue and participated in the District of Columbia's legal aid clinic with other Department lawyers. Beyond my legal work, I have volunteered for our children's schools, my college, and for the Harry S. Truman Scholarship Foundation which seeks to encourage university students' to become change agents in our society and government. I have assisted the Truman foundation by interviewing applicants, serving as a mentor to a recent college student, and arranging opportunities for college age scholars doing public service summer internships in Washington, D.C. to meet and hear from government leaders. I have not attempted to keep records of the hours devoted to the matters described above.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

No, other than an all male fraternity during college.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please**

describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no applicable selection commission. I was interviewed by individuals from the White House Counsel's Office and the Department of Justice. I also reached out to speak with both of the Senators from Colorado. After completing nomination paperwork and undergoing a background investigation, I was notified that I would be nominated.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

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

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

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

The Constitution requires federal judges to strike a delicate balance. The separation of powers embodied in our founding document provides the judiciary with a defined and limited charter. Judges must allow the elected branches of government to flourish and citizens, through their elected representatives, to make laws appropriate to the facts and circumstances of the day. Judges must avoid the temptation to usurp the roles of the legislative and executive branches and must appreciate the advantages these democratic institutions have in crafting and adapting social policy as well as their special authority, derived from the consent and mandate of the people, to do so.

At the same time, the founders were anxious to ensure that the judicial branch never becomes captured by or subservient to the other branches of government, recognizing that a firm and independent judiciary is critical to a well-functioning democracy. The Constitution imposes on the judiciary the vital work of settling disputes, vindicating civil rights and civil liberties, ensuring equal treatment under law, and helping to make real for all citizens the Constitution's promise of self-government.

There may be no firmly fixed formula on how to strike the balance envisioned by the Constitution in specific cases, but there are many guideposts discernable in the best traditions of our judiciary. A wise judge recognizes that his or her own judgment is only a weak reed without being fortified by these proven guides. For example:

A good judge recognizes that many of the lawyers in cases reaching the court of appeals have lived with and thought deeply about the legal issues before the court for months or years. A lawyer in the well is not to be treated as a cat's paw but as a valuable colleague whose thinking is to be mined and tested and who at all times deserves to be treated with respect and common courtesy. A good judge will diligently study counsel's briefs and the record and seek to digest them fully before argument and then listen with respectful discernment to the arguments made by his or her colleagues at the bar.

A good judge will recognize that few questions in the law are truly novel, that precedents in the vast body of federal law reflect the considered judgment of those who have come before us and embody the settled expectations of those in our own generation. A good judge will seek to honor precedent and strive to avoid its disparagement or displacement.

A good judge will also listen to his or her colleagues and strive to reach consensus with them. Every judge takes the same judicial oath; every judge brings a different and valuable perspective to the office. A good judge will appreciate the different experiences and perspective of his or her colleagues and know that reaching consensus is not always easy but that the process of getting there often tempers the ultimate result, ensuring that the ultimate decision reflects the collective wisdom of multiple individuals of disparate backgrounds who have studied the issue with care.

Throughout the process of adjudicating an appeal, a good judge will question not only the positions espoused by the litigants but also his or her own perceptions and tentative

conclusions as they evolve. And a good judge will critically examine his or her own ideas as readily and openly as the ideas advanced by others. A good judge will never become so wedded to any view of any case as to preclude the possibility of changing his or her mind at any stage -- from argument through the completion of a written opinion. Pride of position, fear of embarrassment associated with changing one's mind, along of course with personal politics or policy preferences have no useful role in judging; regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do.

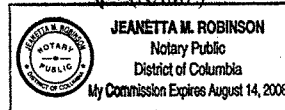
AFFIDAVIT

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

May 8, 2006
(DATE)

Luis J. ...
(NAME)

Sworn to and subscribed before me, in my presence
this 8th day of May, 2006. A District of Columbia
Notary Public, In and for the State at Large
[Signature] Notary Public
My commission expires August 14, 2008



(NOTARY)

Senator GRAHAM. I am very impressed with your legal abilities, but more importantly, with your disposition and demeanor. What I think Senators Allard and Salazar said about you is dead on. You have a humble spirit and a keen mind. But being a judge is more than being smart.

Mr. GORSUCH. Yes, sir.

Senator GRAHAM. That is very important, but you have got to understand people underneath.

What is the difference, in your opinion, if you could share with me, between being an advocate and a judge?

Mr. GORSUCH. Being an advocate is a great deal easier, in some respects. Your client's position defines your objective, and your obligation is to represent him or her zealously.

I have to tell you, Senator, I love being a lawyer. I love that aspect of the profession, of being in the arena and fighting it out within the rules of civility, decency, and common sense.

Being a judge is however, the greatest honor that any lawyer, practicing lawyer, could ask to have because your client becomes not an individual, a corporation, a partnership, it becomes the case of justice. There is no greater client than that.

Senator GRAHAM. That was well said.

I know this is something you have not really done yet. But what is your philosophy about judging and how you fit into this constitutional democracy that we have been trying to get better and tinker with for 200 years?

Mr. GORSUCH. Well, you are right, I have not done it yet so it is a little presumptuous.

Senator GRAHAM. How you see yourself fitting in.

Mr. GORSUCH. But if I were to be confirmed, Senator, I resist pigeon holes. I think those are not terribly helpful, pigeon-holing someone as having this philosophy or that philosophy. They often surprise you. People to unexpected things and pigeon holes ignore gray areas in the law, of which there are a great many.

I can tell you how I think I would like to view approaching decisions. That is, first and foremost, with this thought in mind: to those clients who are affected, to that lawyer in the well, that may be the most important thing in their life and that case deserves the attention, the care and the scrutiny of a complete lawyer and the complete attention of the judge without being diverted by personal politics, policy preferences, or what you ate for breakfast. Those people deserve your very best at all times. There are certain tools that I think can get you there.

First, you listen to that lawyer in the well. You do not treat them as a cat's paw. He is not some pawn in a game to be played with and batted around. He is to be taken seriously. He has studied this issue for, sometimes, months, years, and lived with it.

Having litigated cases in 16 different States and Courts of Appeals, I appreciate that, and I know the importance and difficulty of that role and I respect it greatly.

The second tool, I think, is respecting your colleagues and trying to reach unanimity where possible, Senator. As a practitioner, fractured opinions are very difficult to deal with and understand what the law is sometimes. I often find that the process of getting to a single position with different minds leads to a better result.

Justice White used to tell us in chambers, "Two heads are better than on." He is right. He was one of the most humble men I ever met, and was very well aware of the limitations of any single person, though he may have been among the brightest people I ever met. So I think working with your colleagues and trying to get to agreement is hugely important.

Then, finally, precedent. Precedent is to be respected and honored. It is not something to be diminished or demeaned. It is something you should try to uphold wherever you can, with the objective being, follow the law as written and not replace it with my own preferences, or anyone else's Senator.

Senator GRAHAM. The best you can, describe what you think an idealogue would be and why that would be bad.

Mr. GORSUCH. In terms of being a Federal judge, Senator?

Senator GRAHAM. Yes.

Mr. GORSUCH. Someone who is not willing to do what I just talked about. That is, someone who is not willing to listen with an open mind to the arguments of counsel, to this colleagues, and to precedent, someone who is willing to just, willy-nilly, disregard those three things, to effect his own personal views, his politics, his personal preferences. That is unacceptable.

Senator GRAHAM. In the area of assisted suicide and euthanasia, I think you have been a fairly prolific writer and you certainly have an interest in that area.

How will your past positions affect your ability to judge in cases that may contain those questions?

Mr. GORSUCH. Senator, my personal views, as I hope I have made clear, have nothing to do with the case before me in any case. The litigants deserve better than that, the law demands more than that.

That said, Senator, my writings, just to clarify, have been largely in defense of existing law, that is, they are consistent with the Supreme Court's decisions in this area and existing law in most places.

So, I do not think there is actually much tension between my writings and anything that might come before the court, but I can pledge to this Committee, Senator, that I will reach any question before me, should I become a judge, with an open mind and listen to the arguments of counsel, the views of my colleagues and prior case law from the Supreme Court, and the various Courts of Appeals.

Senator GRAHAM. What concern, if any, do you have about the future of the judiciary or the judiciary as it stands now?

Mr. GORSUCH. Senator, I think some of the things you have touched on are the challenges. The independence of the judiciary depends upon people in both parties being willing to serve, good people being willing to serve who are capable and willing to put aside their personal politics and preferences to decide cases and to follow the law and not try and make it.

Senator GRAHAM. Of all the jobs you have had, which job do you think has the most relevance to what you are about to attempt to do here?

Mr. GORSUCH. Well, I cannot help but think back to my clerkships, and most particularly my time with Justice White. I cannot

help but go back and think there. If confirmed, I would be serving at the Justice Byron White Courthouse and replacing former Justice White law clerk, David E. Bell, a wonderful judge. That is a humbling, humbling though, Senator.

Senator GRAHAM. Well, I have the statement of Senator Leahy I would like to submit for the record. I know he wishes he could be here, but we will introduce his statement in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator GRAHAM. Is there anything else you would like to let the Committee know about?

Mr. GORSUCH. Just that I am very honored to be here, very pleased to be here. Thank you very much, Senator, for chairing this.

Senator GRAHAM. The record will remain open until June 28 at 5:00 p.m.

I would just close the hearing with a personal observation. I have had the pleasure of working with Mr. Gorsuch during my time in the Senate, and not only are you intellectually gifted, you do seem to have all of the qualities that I would be looking for in terms of someone with the power to wear the robe.

You have lived a very beneficial and fruitful life, and I know your family is tremendously important to you. I know they appreciate the honor that have been bestowed upon you.

I would just like to leave you with one thought. I am very concerned about the future of the judiciary. I hope people in my business, the political business, will realize that being a judge and a politician are two different things. You can be a conservative judge and a liberal judge, but that is totally different than being a conservative or liberal politician.

I do hope we can get back on track—Senator Salazar's presence here today meant a lot to me—in the confirmation process so that we will encourage good men and women, from a variety of backgrounds, of wanting to be judges and not make the process so difficult that they would not want to participate. I find every reason to believe that you will be well received by the Committee and the Senate as a whole, and I look forward to talking with you more. Hopefully we can get you on the bench soon.

The hearing is adjourned.

[Whereupon, at 4:28 p.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

950 Pennsylvania Ave., N.W.
Room 5706
Washington, D.C. 20530

June 28, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Leahy.

Respectfully,

A handwritten signature in black ink, appearing to read "Neil Gorsuch", written in a cursive style.

Neil M. Gorsuch

Enclosure

**Responses to Written Questions from Senator Patrick Leahy
 Neil M. Gorsuch, nominated to be a United States Circuit Judge
 for the Tenth Circuit**

1. In your February 2005 article for the National Review titled "Liberals 'n' Lawsuits: Too much reliance on litigation is bad for the courts and the Dems," you criticize "liberals" for raising constitutional challenges in the courts to protect what you describe as a "social agenda." However, the issues you have described as part of a "social agenda," like school vouchers for use at parochial schools, raise questions of fundamental rights protected by the Constitution, in that instance the First Amendment's Establishment Clause. Can you discuss the importance of the courts in stepping in to ensure the protection of individual constitutional rights, especially when those rights are contrary to popular political positions and so would not be protected by the political process?

Response: I appreciate very much the chance to answer these questions from Senator Leahy.

The Constitution requires federal judges to strike a delicate balance. Under our charter, judges must allow the elected branches of government to flourish and the people, through their elected representatives, to make laws appropriate to the facts and circumstances of the day. Judges must avoid the temptation to usurp the roles of the democratic branches and must appreciate the advantages those branches have in crafting and adapting social policy as well as their mandate, derived from the people, to do so.

At the same time, the founders were anxious to ensure that the federal judiciary never becomes captured by or subservient to the other branches, recognizing that a firm and independent judiciary is critical to the protection of *all* citizens' constitutional rights and to a well-functioning democracy. The Constitution imposes on the judiciary the vital role of ensuring the equal protection of each and every citizen – whatever his or her views – and the vindication of personal civil rights and liberties – however unpopular – as well as the work of making real for every American the Constitution's promise of self-government. If confirmed by the Senate, I would take these duties seriously and discharge them to the best of my abilities.

I also appreciate the chance to clarify the article referenced in the question. That article drew attention to a newspaper column that, in turn, argued that our society has become increasingly litigious, with parties often proceeding to court without first attempting to resolve disputes through the electoral process. I wrote to express the view that, when it is possible, resolving our political and policy disputes through the electoral process, rather than increased litigiousness, is a healthy thing for our society and for the judiciary.

At the same time, I did not argue that litigation to protect civil rights and civil liberties is inappropriate. To the contrary, I expressly pointed to *Brown v. Board of Education* as an example of those cases where the judiciary has played and must play an essential role in securing civil rights for all Americans. I deeply admire and respect the judiciary's

tradition of independence and its history of vindicating the constitutional rights and liberties of the unpopular. If confirmed, I would do my best to honor and carry on that tradition.

2. Your February 2005 article does not discuss the many constitutional challenges raised in court by conservatives, corporations, and industry groups to further their own agenda. These groups have aggressively pursued constitutional challenges in courts under the Takings Clause, the Commerce Clause and the non-delegation doctrine in order to overturn environmental laws passed by an overwhelming bipartisan majority of Congress, such as Safe Drinking Water Act, RCRA, the Clean Air Act, the Clean Water Act, and the Endangered Species Act.

A. Do you believe your critique of those who pursue a “social agenda” through constitutional challenges in the court applies equally to these conservative and industry groups challenging environmental law? Is their “overweening addiction to the courtroom” also “bad for the country and bad for the judiciary”?

Response: Yes, the point of the article can be applied to groups of all kinds across the political spectrum. The newspaper column referenced in my article focused on litigation from one end of the political spectrum, but the essential point of my argument – that we as a society can often benefit from resolving our differences through the electoral process rather than through litigation – applies equally to all points of view.

B. You conclude your February 2005 article by praising “a generation of Democratic-appointed judges, from Louis Brandeis to Byron White, [who] argued for judicial restraint and deference to the right of Congress to experiment with economic and social policy.” Do you believe that these judges’ approach of judicial restraint should be applied in the same manner to constitutional challenges by industry groups to environmental laws as you have advocated it be applied to groups pursuing the protection of individual rights?

Response: Yes. The concept of judicial restraint, like justice itself, should be blind – blind to the identity or beliefs of the litigants before the court.

C. The court to which you have been nominated, the Court of Appeals for the Tenth Circuit, hears many appeals involving the management of the Nation’s many public lands that lie within its jurisdiction, including national parks, national wildlife refuges, and wilderness areas. In particular, the Tenth Circuit hears appeals brought by parties dissatisfied with federal agency decisions. This is another area in which concerned citizens turn to the courts to vindicate their interests. If confirmed, can you assure the Committee your courtroom would be open to intervention in litigation by those concerned with the administration of those public lands?

Response: Yes. Judges owe the same obligation of fidelity to the record and the law in all cases and to all persons appearing before them – regardless of who the litigant is or

what the nature of the claim may be. If confirmed, those challenging agency decisions involving the management of the Nation's public lands would receive the same openness, care, and attention – free of bias and extra-record influences – as every other litigant who might appear before me.

As a practicing lawyer for many years, litigating matters in state and federal courts across the country on behalf of plaintiffs and defendants, individuals, non-profits, corporations, and class actions, I never allowed my personal views and policy preferences to interfere with the zealous representation of my clients. My duty of loyalty meant preferring my clients' interests and objectives to my own views, even when I may not have agreed with my client's point of view or purpose. If confirmed, I would have a new client: the law itself. Just as my personal and political views had no proper place in my job as an advocate and counselor, neither would they have any place in my role as a judge. I would seek only and always to follow the law faithfully and fairly in each and every case.

As a fourth generation Colorado native and someone who spends as much time as I can manage in the Colorado mountains, I cherish the natural beauty of the West and the remarkable legacy our forefathers bequeathed us there in the form of protected national parks and lands and I deeply respect all of those – of all points of view – who seek to protect and enhance that legacy.

3. Over the past decade, the Supreme Court has struck down an unprecedented number of federal statutes, most notably several designed to protect the civil rights of Americans, as beyond Congress's power under Section 5 of the Fourteenth Amendment, for example, *Flores v. City of Boerne*, 117 S. Ct. 2157 (1997), *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), and *Board of Trustees v. Garrett*, 19 S. Ct. 2240 (1999). The Supreme Court has also recently struck down statutes as being outside the authority granted to Congress by the Commerce Clause, such as in the case of *U.S. v. Lopez*, 115 S. Ct. 1624 (1995) or *U.S. v. Morrison*, 120 S. Ct. 1740 (2000). I am hopeful that the Court's recent decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) signals a turn away from the diminishing of the authority of Congress to legislate to protect the American people.

In light of your advocacy for judicial restraint and deference to Congress, what is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause, and under Section 5 of the Fourteenth Amendment?

Response: As the question indicates, one of the Court's most recent pronouncements with respect to the Commerce Clause came last year in *Gonzales v. Raich*. There the Court made clear that "Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce is firmly established." The precedents of the Supreme Court addressing the Fourteenth Amendment have likewise repeatedly demonstrated that Congress's authority to enact legislation pursuant to Section 5 is very broad. If confirmed, I would enforce these Supreme Court rulings fully in cases that may come before me, applying the same

judicial restraint and deference to congressional judgment in these arenas as I would in any other.

4. You are currently the Principle Deputy to the number three official at the Department of Justice and your responsibilities include managing the Department's civil litigating components and helping make litigation decisions in significant cases. If confirmed, on what cases involving what subject matter will you recuse yourself? Will you commit to recusing yourself from participating in any cases in which you were involved at the Justice Department?

Response: If confirmed and a case in which I was personally involved during my service at the Department of Justice should come before me as a judge, I would expect to recuse myself. Under 28 U.S.C. Section 455(b)(3), a government lawyer should, among other things upon becoming a judge, recuse himself or herself when he or she "participated as a counsel, adviser or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy." It is difficult to predict what other potential conflict of interests might arise from my service at the Department, but in each such instance I intend, if confirmed, to consult the Code of Conduct for United States Judges, applicable congressional statutes, and the practices of my colleagues to make an appropriate decision given the particular facts and circumstances.

5. You have written extensively about end of life choices. Almost a decade ago, in *Washington v. Glucksberg*, the Supreme Court declined to find that terminally ill patients had a "generalized" constitutional right to a physician's aid in dying, preferring that this matter be left to the states in part because "throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician assisted suicide." The late Chief Justice Rehnquist noted that the court's "holding permits this debate to continue, as it should in a democratic society."

Last spring, the nation witnessed a fierce legal battle over the medical treatment of Terri Schiavo, who was in a persistent vegetative state for more than a decade. Politicians engaged in extraordinary measures to override what state courts determined to be her own wishes. The power of the federal government was wielded by some to determine deeply personal choices. Some even made medical diagnoses on the floor of the Senate, and the President came back to Washington in the middle of his vacation to sign legislation to override the precise wishes of this one patient.

Do you agree that end of life decisions are deeply personal issues? Do you agree with the idea advanced in the *Cruzan* case, that the wishes of an unconscious patient, to the degree they can be known, should govern decisions regarding life sustaining therapies?

Response: In *Cruzan* the Supreme Court expressly recognized that end of life treatment cessation decisions are "deeply personal" and that life sustaining care can be rejected on behalf of unconscious patients by their surrogates for many upright reasons, including in

order to effect the patient's prior expressed desire to avoid the burdens associated with certain intrusive modern life sustaining therapies. The Court further recognized a "legitimate interest" by the State of Missouri in enacting laws designed to "safeguard[] the personal element of this choice" by requiring proof about the patient's previously expressed intentions in order to guard against "potential abuses" by the surrogate decisionmaker. If confirmed, I would faithfully follow the Supreme Court's guidance should the matter come before me. I also appreciate this opportunity to clarify that my writings express no disagreement whatsoever with *Cruzan*, including its holding about the "deeply personal" nature of this issue.

6. As the one undemocratic branch, the courts have a special responsibility to make sure they are available to those Americans most in need of the courts to protect their rights. You have publicly criticized consumer class action lawsuits and advocated limitations on the ability of plaintiffs to bring securities fraud cases and, for limiting the liability of corporations for wrongdoing.

What assurances can you give that litigants coming into your courtroom will be treated fairly regardless of their political beliefs or whether they are rich or poor, defendant or plaintiff? What assurances can you give that litigants will be treated fairly even if they are plaintiffs bringing categories of cases that you don't personally support, but that the law allows?

Response: In my years as a practicing lawyer -- working on matters in approximately 16 different states and 8 federal courts of appeal as well as in state appellate courts and the U.S. Supreme Court -- I represented plaintiffs; putative and certified statewide consumer class actions; public employee pension funds; prominent Democrats and Republicans active in national politics; a non-profit hospital serving the women, children, and poor of the District of Columbia as well as defendants; those challenging class actions; and corporations. I represented each and every client with equal vigor and zeal, whatever the client's views or lawful objectives may have been. And I deeply appreciated how critical a fair shake -- free of a judge's political or policy preferences -- was to my clients who often had their businesses, life savings, or fundamental liberty interests at stake. As advocate and counselor, what I wanted most for my clients was a judge capable of putting aside his or her personal views and deciding the case based on the facts in the record, the arguments of counsel, and the controlling legal precedents -- not on the basis of any personal biases or beliefs. If confirmed, that is the sort of judge I would strive to be. The identity of the litigants and the sorts of claims they raise would play no role in my decisions; nor would my personal views or policy preferences. Instead, if confirmed, I would decide each and every case on the facts developed by the parties in the record and law alone.

I also appreciate the chance to clarify my record. My writings on class action lawsuits have expressly recognized the valuable social functions they serve and sought to offer suggestions aimed at, among other things, improving their efficacy so that class members, rather than lawyers, oversee the management of such suits and recoup a greater percentage of settlement funds. With respect to my work as an advocate, I have represented the interests of my clients alone, not my own. Some of those clients have sought to contest class actions or narrow them while others have sought expressly and actively to certify class actions and expand their scope.

950 Pennsylvania Ave., N.W.
Room 5706
Washington, D.C. 20530

June 27, 2006

By Hand Delivery

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Leahy, which were forwarded to me on behalf of Senator Wyden.

Respectfully,

A handwritten signature in black ink, appearing to read "Neil M. Gorsuch".

Neil M. Gorsuch

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

**Response to written questions from Senator Leahy on behalf of Senator Wyden
Neil M. Gorsuch, nominated to be a United States Circuit Judge
for the Tenth Circuit**

1. While the U.S. Supreme Court has not found a clear constitutional right to physician aid in dying, it has encouraged the states to continue to experiment. Do you believe a State has the constitutional right to regulate the practice of medicine within its borders? And if so, do you believe the right to regulate medicine within its own borders extends to a state's right to permit physician aid in dying as acceptable medical practice flowing from its power to license providers, determine their scope of practice, and discipline those providers?

I very much appreciate the chance to answer these questions from Senators Leahy and Wyden.

The Supreme Court has held that the traditional regulatory powers of the States include the regulation of the practice of medicine. Just earlier this year, the Supreme Court of the United States reaffirmed that the "regulation of health and safety is primarily, and historically, a matter of local concern." *Gonzales v. Oregon*, No. 04-623, Slip Op. at 24 (Jan. 17, 2006) (internal quotation marks omitted). In the same decision, the Court further emphasized that the States have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all person." *Id.* at 23 (internal quotation marks omitted).

In the last ten years, the Supreme Court also has twice vindicated the power of States to make their own laws with respect to physician-assisted suicide. Specifically, in 1997, the Court rejected an effort to establish a uniform constitutional rule requiring States to permit physician-assisted suicide, instead emphasizing that "the States are currently engaged in serious, thoughtful examination of physician-assisted suicide and other issues." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). This year, the Court rejected an effort by a federal officer to issue regulations under the Controlled Substances Act that would have "substantially disrupt[ed]" the operation of Oregon's physician-assisted suicide law and "radical[ly] shift[ed]" authority to federal administrative agencies. *Gonzales v. Oregon*, Slip Op. at 7, 28. Concurring in the judgment in *Glucksberg*, Justice O'Connor emphasized that, given the States' "extensive and serious evaluation of physician-assisted suicide and other related issues, . . . the challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the laboratory of the States . . . in the first instance." 521 U.S. at 737 (internal quotation marks omitted).

If confirmed, I would follow the Supreme Court's guidance on these and all matters.

2. Your writings on physician aid in dying appear to conclude that you believe there is no constitutional right to physician aid in dying. Should a case come

before you concerning this issue in any way, would you be able to consider it without that bias?

If confirmed, my personal views on this -- or any -- matter would play no role in my decisions as a judge. A judge's personal policy preferences and politics have no place in the process of deciding cases. Regular and healthy doses of self-skepticism and humility always do.

As a practicing lawyer for many years, litigating matters in state and federal courts across the country on behalf of plaintiffs and defendants, individuals and corporations, I never allowed my personal views and policy preferences to interfere with the zealous representation of my clients. My duty of loyalty meant preferring my clients' interests and objectives to my own views. If confirmed, I would have a new client: the law itself. Just as my personal and political views had no proper place in my job as an advocate and counselor, neither would they have any place in my role as a judge. I would seek only and always to follow the law faithfully and fairly.

From my years in practice, too, I know that, to the litigant before the court, the case at hand often means the world to him or her. A business, property interest, a fundamental liberty interest, may be at stake. Each and every litigant wants and deserves a fair shake from a judge based on the facts in the record, the arguments of counsel, and the controlling legal precedents -- not a decision based on extra-record biases or beliefs. That is what I always hoped for in the judges in front of whom I appeared. And that is what I would always seek, if confirmed, to provide to litigants who appear before me.

3. What weight do you give to legislative history in making a ruling?

The Supreme Court has repeatedly instructed that, when a statute's language is clear, its language alone governs but that, when ambiguities exist in statutory text, legislative history can be employed to resolve those ambiguities. The Court has put the point succinctly: "courts may appropriately refer to a statute's legislative history to resolve statutory ambiguity." *Patterson v. Shumate*, 504 U.S. 753, 761 (1992) (internal quotation marks and citation omitted). If confirmed, I would faithfully follow the Supreme Court's guidance in this area.

4. In the article "the Legalization of Assisted Suicide and the Law of Unintended Consequences: A review of the Dutch and Oregon Experiments and Leading Utilitarian Arguments for Legal Change" you repeat many of the arguments of those who have opposed or do oppose Oregon's law.

In this article you conclude that Oregon's physicians do not know enough about palliative care. However, you appear to overlook several significant facts. For example, Oregon is one of two states that have disciplined physicians for the under treatment of pain, and, historically, more Oregonians die at home than in

hospitals. These facts might point to a different conclusion than the one you draw in your article.

The medical literature is full of studies that demonstrate medical practice differs from state to state. Why do you believe that the treatment of end of life care must be uniform throughout the United States, as you seem to suggest in this article, when it and medicine in general is practiced differently through out the United States?

I do not presume that I have answers to all of the many difficult questions the physician-assisted suicide issue raises, or that my work is even close to the last word on such a complex subject. The Supreme Court has written that the American people are engaged in an "earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide." *Glucksberg*, 521 U.S. at 735. I hope only that I have -- in some very small way -- contributed to a body of scholarship and knowledge that will eventually provide all of us with a fuller, more informed understanding of the issues at stake in this most profoundly difficult arena.

I also appreciate the opportunity to clarify the article referenced in the question. In that article, I did not take the position that all end of life care must be treated uniformly throughout the country. Instead, the article begins by noting that the Supreme Court rejected a uniform right to physician-assisted suicide in its 1997 decisions, choosing instead to leave intact state legislative judgments in this arena. That is to say, the Supreme Court left the matter to the States. The article then proceeds to explain that, since 1997, a number of States have debated whether or not to pursue the legalization of physician-assisted suicide through voter referenda and state legislative processes. Thereafter, the article focuses on just one of the many questions that everyone engaged in such discussions must face: whether or not the benefits flowing from a decision to legalize physician-assisted suicide are likely to outweigh any attendant problems or costs associated with such a change in law. This, the article points out, was a question posed by Justice O'Connor and Justice Souter in *Glucksberg* as an important, but unresolved matter worthy of further consideration. After analyzing the legalization experiments in the Netherlands and Oregon, the article ultimately concludes that "to be sure, benefits would flow from legalization [of physician-assisted suicide]. I do not seek here to discount such benefits or suggest that they are 'outweighed' by attendant costs. Instead, I have sought to show only that legalization may also entail real and material costs" and thus that people of good faith striving to address the assisted suicide question are presented with a "nontrivial choice." 2004 Wisc. L. Rev. at 1418. That is, the article does not suggest that the costs of choosing to legalize assisted suicide would outweigh the benefits of legalization. Nor does it contend that every State must reach a uniform judgment on this question. Instead, the article simply argues that any State's decision to legalize assisted suicide would likely bring with it *both* benefits *and* some attendant costs and, accordingly, the legalization question presents a difficult moral and legal choice.

SUBMISSIONS FOR THE RECORD

Senator Allard's Introduction of Neil M. Gorsuch at Judiciary Committee Confirmation Hearing

June 21, 2006

Chairman Specter, Ranking Member Leahy, distinguished members of the Committee, it is my pleasure to introduce to you today Neil M. Gorsuch, President Bush's nominee to the United States Court of Appeals for the Tenth Circuit. Mr. Gorsuch is an extraordinarily well qualified nominee and, if confirmed, would capably serve the citizens of Colorado, the Tenth Circuit, and, indeed, the United States.

I would like to begin by thanking Chairman Specter for so promptly holding this hearing. I look forward to the Committee's continuing the tone of expediency set by the Chairman by swiftly reporting the nomination to the floor for a timely up-or-down vote. It is critical to the administration of justice that this seat, which has been vacant since last year, be filled immediately. I am pleased that we are joined today by Senator Salazar in what I hope is an early indicator of broad, bipartisan support for this nominee.

I would also like to welcome Mr. Gorsuch's wife, Louise, and his two children, Emma and Belinda, to the United States Senate. All three of you no doubt played an important role in your husband and father's being here today. Speaking from my own experience in public service, your love and support will continue to be instrumental to his ability to perform his public duties. You are embarking on this journey together.

I would also like to welcome Mr. Gorsuch *back* to the United States Senate. Some of you, including the Ranking Member, may recognize Mr. Gorsuch from his service as a Senate page in the early 1980s. It was here in the Senate that he made his foray into public service and developed the passion for it that he exudes today.

As a 5th generation Coloradan, I am pleased that President Bush chose a nominee with deep Colorado roots. Born in Denver, Mr. Gorsuch is a 4th generation Coloradan who, if confirmed, would carry on his family's history of public service in the State. His mother, Anne Gorsuch, served in the Colorado State Legislature and as EPA Director during the Reagan Administration. Moreover, his grandfather founded a successful Denver law firm, Gorsuch Kirgis, where both he and Neil's father were active in the community throughout the firm's 60 year history. Neil, if confirmed, you no doubt look forward to returning to Colorado where family and the Rocky Mountains await.

Mr. Chairman, if I were asked to succinctly characterize Mr. Gorsuch, I would have to say well-rounded. Well-rounded educationally, professionally, and personally.

Mr. Gorsuch pursued a rigorous and geographically diverse course of academic study. He earned his undergraduate degree from Columbia University, including a summer at the University of Colorado; his law degree from Harvard; and a Doctorate in Legal Philosophy from Oxford University.

Mr. Gorsuch began his distinguished professional career as a law clerk to Judge David Sentelle on the U.S. Court of Appeals for the D.C. Circuit. He then went on to clerk for two Supreme Court Justices, Justice Kennedy and Colorado's own Byron White.

Following his prestigious clerkships, Mr. Gorsuch entered private practice and became a partner in the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel. While in private practice, Mr. Gorsuch litigated matters for clients large and small, ranging from individuals to non-profits to corporations. Moreover, he litigated cases on a range of issues from simple contract disputes to complex antitrust and securities fraud matters.

He left private practice in 2005 to return to public service, this time at the United States Department of Justice where he currently serves as the Principal Deputy to the Associate Attorney General.

Looking collectively at his career, the picture of an appellate judge in training emerges. Mr. Gorsuch has served in all three branches of government, including the highest levels of the Judicial and Executive branches. He has represented both plaintiffs and defendants. He has represented both individuals and corporations. He has litigated civil cases and criminal cases. He has litigated in both federal and state courts. In sum, the breadth and depth of Mr. Gorsuch's experience makes him ideally suited to service on the federal appellate bench.

While Mr. Gorsuch is highly qualified, I also promised the people of Colorado that I would support judicial nominees who I believe would rule on the law and the facts before them, not judges who would legislate from the bench. My support of Mr. Gorsuch here today is consistent with that promise.

From my conversations with Mr. Gorsuch, I am certain that he recognizes the proper role of the judiciary. The role of the judiciary is to interpret the law, not make the law. I believe that Mr. Gorsuch is temperamentally and intellectually inclined to stick to the facts and the law in cases that would come before him, and that he would refrain from legislating from the bench.

Moreover, Mr. Gorsuch's personal views would not determine the outcome of cases that come before him. Mr. Gorsuch himself says "personal politics or policy preferences have no useful role in judging; regular and healthy doses of self-skepticism and humility about one's own abilities and conclusions always do."

I believe this statement also speaks to Mr. Gorsuch as a person. He is humble, unassuming, polite, and respectful. This sentiment is reflected in numerous letters pouring into my office from people who have worked with him over the years. Mr. Gorsuch possesses the temperament fitting of an appellate judge.

In conclusion, Mr. Gorsuch is a top-flight nominee who I am proud to introduce to the distinguished members of the Committee. I look forward to a fair and dignified

confirmation process, the outcome of which I am confident will reveal a highly-qualified nominee deserving of confirmation.

Congratulations, Neil, and, on behalf of the citizens of Colorado, thank you for your willingness to serve this great country.

**Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on the Nomination of Neil Gorsuch
June 21, 2006**

Today, we consider the nomination of Neil Gorsuch for a lifetime appointment to the Court of Appeals for the Tenth Circuit. I know that Senator Salazar is pleased that we have been able to expedite the Committee's background review of Mr. Gorsuch's nomination and move quickly to a hearing.

Earlier this week, the Senate confirmed another lifetime appointment, Sandra Segal Ikuta, to a seat on the Court of Appeals for the Ninth Circuit. Judge Ikuta had the support of her home-state Senators, Senator Feinstein and Senator Boxer, and was easily confirmed. I am pleased that the Republican leadership is this month taking notice of the fact that we can cooperate on swift consideration and confirmation of consensus nominations. Working together, we confirmed five judges in one week earlier this month. All of them could have been confirmed last month if the Republican leadership had chosen to make progress instead of picking a fight on a controversial nomination.

I, again, want to commend the Republican Senate leadership for wisely passing over the controversial nominations of William Gerry Myers III, Terrence W. Boyle and Norman Randy Smith to turn to Judge Ikuta's nomination. The Republican leadership was right to have avoided such controversial nominations that were reported out of the Committee on a party-line vote.

During the 17 months I was Chairman of the Judiciary Committee and the Senate was under Democratic control, we confirmed 100 of President Bush's nominees. After Judge Ikuta's confirmation, in the last 17 months under Republican control, the Senate will have confirmed 44. The 22 judicial nominations the Senate has confirmed this year is equal to the total number of nominees we confirmed for all of last year. We could exceed that total if the Republican leadership would schedule debate and consideration of Andrew Guilford, who has been nominated to the United States District Court for the Central District of California.

There are just under 50 judicial vacancies currently, but more than half of these vacancies have no nominee. I urge the White House to work with Senators from both parties to select nominees who can be expeditiously considered and confirmed.

On the basis of his record, Mr. Gorsuch appears to be a very conservative nominee. However, I hope that after hearing his answers to questions from members of this Committee I will be convinced that Mr. Gorsuch is the kind of nominee who understands that the role of the judge is to act as a check and balance to protect the rights and liberties of all Americans. I welcome Mr. Gorsuch and his friends and family to the Committee today. I look forward to hearing his testimony.

#