

Elisebeth Collins Cook
6510 Truman Lane
Falls Church, VA 22043

January 6, 2014

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

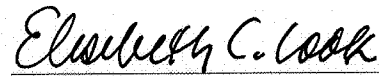
Dear Mr. Chairman:

I reviewed the Senate Judiciary Questionnaire update letter filed on December 19, 2013, in connection with my nomination to serve a second term as a Member of the Privacy and Civil Liberties Oversight Board. I certify that the information contained in that document is and remains, to the best of my knowledge, true and accurate.

I am also enclosing a current Financial Statement (Net Worth).

Thank you and the Committee for consideration of my nomination.

Sincerely,



Elisebeth Collins Cook

Enclosure

cc: The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

**UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES

PUBLIC

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

Elisebeth Collins Cook
Elisebeth Bridget Collins

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

Member, Privacy and Civil Liberties Oversight Board

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

Freeborn & Peters LLP
311 S. Wacker, Suite 3000
Chicago, IL 60606

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

December 1975; Edina, MN

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

Harvard Law School, 1997-2000; J.D. awarded June 2000

University of Chicago, 1993-1997; B.A. awarded June 1997

While at the University of Chicago, I attended classes at Université de Paris, Sorbonne and Université de Paris, Nanterre, through a study abroad program (June 1995 - March 1996).

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

Freeborn & Peters LLP
311 S. Wacker, Suite 3000
Chicago, IL 60606
Partner

May 2009-September 2009
United States Senate, Committee on the Judiciary

152 Senate Dirksen Office Building
First & Constitution, NE
Washington, DC 20002
Republican Chief Counsel, Supreme Court Nominations

March 2005-January 2009
United States Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue, NW
Washington, DC 20530
Assistant Attorney General, June 2008-January 2009
Acting Assistant Attorney General, January 2008-June 2008
Deputy Assistant Attorney General, October 2006-January 2008
Counselor, Spring 2006-October 2006
Senior Counsel, March 2005-Spring 2006

November 2002-March 2005
Cooper & Kirk, PLLC
1500 K Street, NW
Washington, DC 20005
Associate

August 2001-August 2002
United States Court of Appeals for the District of Columbia Circuit
Honorable Laurence H. Silberman
333 Constitution Avenue, NW
Washington, DC 20001
Judicial Law Clerk

August 2000-August 2001
United States District Court for the Southern District of Texas
Honorable Lee H. Rosenthal
515 Rusk Street
Houston, TX 77002
Judicial Law Clerk

Summer 2000
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036
Summer Associate

October 1998-April 2000
Harvard Law School Professors Hal Scott and Charles Fried
1563 Massachusetts Avenue
Cambridge, MA 02138
Research Assistant

Summer 1999
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20007
Summer Associate

Summer 1998
Salès, Vincent & Associés
43 Rue de Faubourg St. Honoré
Paris, France 75008
Summer Associate

Summer 1997
Century Pool Management
5020 Nicholson Ct., Suite 201
Lifeguard/Pool Manager

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

I have not served in the military, and am not required to register for selective service.

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

Legal Times, Washington D.C., "40 Under 40," 2009
Edmund J. Randolph Award for service to the United States Department of Justice
Criminal Division Award, 2008
Intelligence Community Legal Award, 2007
Attorney General Awards (2), 2006
Phi Beta Kappa
Honors in History, French and the College (University of Chicago)
Theodore Neff Prize for Excellence in French Language and Literature (University of Chicago)
Jane Morton Scholar (extracurricular and academic achievement) (University of Chicago)
Cum Laude (Harvard Law School)
Community Service Award (Harvard Law School)

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

American Bar Association

Federalist Society
Co-Chair, Administrative Law (Judicial Review) Practice Group (app. 2004)

10. **Bar and Court Admission:**

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

Virginia, 10/00

District of Columbia, 11/02
Illinois, 06/10

There have been no lapses in membership.

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

Supreme Court of the United States, 11/3/08
District of Columbia courts, 11/02
Supreme Court of Virginia, 10/28/02
United States Court of Appeals for the Second Circuit, 5/1/07*
United States Court of Appeals for the Third Circuit, 2/03/04
United States Court of Appeals for the Fourth Circuit, 10/28/02
United States Court of Appeals for the Ninth Circuit, 4/18/06
United States Court of Appeals for the District of Columbia Circuit, 6/03/03
United States Court of Appeals for the Federal Circuit, 5/03/03
United States District Court for the District of Columbia, 6/02/03
United States District Court for the Eastern District of Virginia, 1/28/04
United States District Court for the Northern District of Illinois, 01/10
United States Court of Federal Claims, 12/09/02

*The Second Circuit membership expired upon departure from government service.

11. Memberships:

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

Harvard Law Society of Illinois, Board of Directors (2010-present)
HLS Women's Alliance of Chicago, Co-Chair (2010-present)
Chicago Republican Women's Network (2010-present)
Harvard Law School Alumni Association (2000-present)
Terrorist Screening Center Board of Governance (July 2006-January 2009)
University of Chicago Alumni Association (1997-present)
McLean Baptist Church (app. 1983-present)

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

None of the organizations listed above discriminate or have discriminated to the best of my knowledge, although the HLS Women's Alliance of Chicago targets female participation at events.

12. Published Writings and Public Statements:

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

July 11, 2008 Letter to the Editor of the *New York Times*: "Justice and Trafficking"

August 11, 2008, *U.S. News & World Report*, "A Media Shield Would Imperil our National Security"

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

None.

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

April 3, 2008 testimony before the Senate Judiciary Committee, Hearing on Nominations (relevant transcript portions attached; complete hearing record (beginning at page 1071) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:47450.pdf)

September 23, 2008 testimony before the Senate Select Committee on Intelligence, New Attorney General Guidelines for Domestic Intelligence Collection (written testimony attached; archived video of hearing at <http://intelligence.senate.gov/hearings.cfm?hearingId=3588>)

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

NAPABA (National Asian Pacific American Bar Association) Southeast Regional Conference, National Press Club, March 18, 2006

PATRIOT Act and civil liberties after 9/11

Houston Federalist Society, Houston, TX, February 23, 2007

Goals and Priorities of the Department of Justice and Office of Legal Policy

Federal Bar Association Panel, Crystal City, VA, March 24, 2007

Courts-specific legislative agenda, court security, judicial pay raises, and judicial nominations.

Fairfax County sponsored panel on Identity Theft, Fairfax, VA, April 12, 2007

Identity Theft, President's Task Force

National Youth Leadership Forum, Washington, DC, November 20, 2007

The Department of Justice and the Office of Legal Policy

Prior to 2008, I did not speak from notes or prepared texts. After 2008, on occasion I would speak from notes or prepared texts; however, I did not take copies of the speeches from the Department of Justice and have been unable to find online versions of those speeches.

August 18-22, Billings, Montana, participation in conference Interdepartmental Tribal Justice, Safety, Wellness consultation, with remarks specifically about implementation of the SORNA registry

September 9, 2008, 2008 National Conference on Human Trafficking, speech on the efforts of the Department of Justice to combat human trafficking

October 23, 2008 (app.) National Congress of American Indians annual conference/trade show, remarks on potential legislation addressing crime in Indian Country

November 18, 2008, remarks on Department of Justice efforts to combat human trafficking, at 9th Annual Gulf States LECC/VW Conference, Tampa, FL

December 2009, remarks and Q&A regarding reauthorization of the USA PATRIOT ACT, phone conference organized by the Federalist Society (outline attached)

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

September 2008, numerous interviews with print media regarding Attorney General Guidelines for Domestic FBI Operations (articles attached)

November 15, 2008 (app.), participation in Seattle press conference on joint Federal, State, Local, and private efforts to combat online child predators

December 2008, interview with ABC News regarding Department of Justice implementation of DNA collection laws (did not air)

January 2009, interview with Fox News regarding Department of Justice implementation of DNA collection laws (did not air, article reflecting interview attached)

January 2009 (app.), interview with Judicature (magazine of the American Judicature Society), excerpts published in May-June 2009 volume (article attached)

13. Public Office, Political Activities and Affiliations:

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

United States Department of Justice
Office of Legal Policy
Assistant Attorney General, June 2008-January 2009
Acting Assistant Attorney General, January 2008-June 2008
Deputy Assistant Attorney General, October 2006-January 2008
Counselor, Spring, 2006-October 2006
Senior Counsel, March, 2005-Spring 2006
Appointed

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

It is possible that I have been a member of the Republican National Committee by virtue of having paid to attend a function in January 2005.
I also contributed legal services in 2004 to Lawyers for Bush/Cheney 2004.

14. Legal Career: Answer each part separately.

- a. Describe chronologically your law practice and legal experience after graduation from law school including:
 - i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I served as a clerk to the Honorable Laurence H. Silberman, United States Court of Appeals for the District of Columbia Circuit, from August 2001-August 2002

I also served as a clerk to the Honorable Lee H. Rosenthal, United States District Court for the Southern District of Texas, August, 2000-August, 2001

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

I have never practiced law alone.

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

January 2010-present
Freeborn & Peters LLP
311 S. Wacker, Suite 3000
Chicago, IL 60606
Partner

May 2009-September 2009
United States Senate, Committee on the Judiciary
Senate Dirksen Office Building, Room 152
First and Constitution, NE.
Washington, DC 20002
Republican Chief Counsel, Supreme Court Nominations

March 2005-January 2009
United States Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue, NW
Washington, DC 20530
Assistant Attorney General, June 2008-January 2009
Acting Assistant Attorney General, January 2008-June 2008
Deputy Assistant Attorney General, October 2006-January 2008
Counselor, Spring 2006-October 2006
Senior Counsel, March 2005-Spring 2006

November 2002-March 2005
Cooper & Kirk, PLLC
1500 K Street, NW
Washington, DC 20005
Associate

Summer 2000
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036
Summer Associate

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

I have not served as a mediator or arbitrator.

b. Describe:

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

After law school, I joined Gibson, Dunn & Crutcher, as a Summer Associate. I worked on a variety of commercial litigation projects—both trial and appellate.

I then clerked for two years—one year at the District Court level, one year at a Court of Appeals. During that time, I performed typical law clerk duties, including observing court proceedings and assisting my judges as they required.

Upon completion of my second clerkship, I joined Cooper & Kirk, PLLC as an associate. While at Cooper & Kirk, I had the opportunity to work on a broad range of litigation, from trial to appellate to Supreme Court. A significant percentage of my practice focused on *Winstar* litigation—litigation that resulted from the Savings and Loan crisis of the 1980s. With respect to the *Winstar* litigation, I performed a wide range of duties, including serving as the sole associate on one trial and second chair in another trial, taking and defending depositions, drafting and arguing motions, and drafting appellate briefs.

At the Department of Justice, my work was primarily policy focused, although I also did significant work with respect to judicial nominations and regulations. The Office of Legal Policy is charged with developing, coordinating, and effectuating major policy initiatives of the Department of Justice. While at the office, I worked on a range of policy issues from national security to the President's Identity Theft Task Force. My work included drafting legislation, commenting on proposed legislation, briefing Administration officials, Members of Congress and congressional staff, and developing policy initiatives. In addition, I worked on the drafting and implementation of the Attorney General Guidelines for Domestic FBI Operations, the Adam Walsh Act, and efforts to expand DNA collection by federal agencies.

As Republican Chief Counsel, Supreme Court Nominations, I was responsible for the day-to-day activities concerning the nomination of now-Justice Sotomayor. My work included review and analysis of cases, articles, speeches, and other materials. I also briefed Senators and staff.

Currently, I am working as a litigation partner in a mid-size Chicago law firm. I have primarily focused on general civil litigation, although I have assisted my partners from time to time as questions relating to federal criminal investigations have arisen. I have also provided counseling to clients regarding a potential defamation lawsuit and a potential declaratory judgment action regarding state agency action, as well as policy advice concerning a potential change to the Illinois Supreme Court Rules.

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

At Cooper & Kirk, PLLC, I spent significant time on a school desegregation case, assisting in the representation of a school district seeking unitary status. Other types of litigation included representation of attorneys who had been called before a grand jury investigating their clients, and counseling of a former Member of Congress concerned about a possible ethics investigation. Typical clients included Ford Motor Company, Bank of America, and Marion County School District.

While at the Department of Justice, I represented the United States in several immigration cases, including serving as counsel of record on briefs in the courts of appeals and arguing two cases in the courts of appeals.

Currently, I represent a range of mid-size companies facing legal challenges. These legal issues include breach of contract and tort claims, and potential involvement in criminal investigations. A typical client is Trustmark Insurance Company.

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

While in private practice, my practice was almost exclusively litigation. I appeared in court fairly frequently, particularly in 2004. While in government service I have appeared in court infrequently. I currently appear in court infrequently.

1. Indicate the percentage of your practice in:

(A)	federal courts:	98%
(B)	state courts of record:	2%
(C)	other courts.	

2. Indicate the percentage of your practice in:

(A)	civil proceedings:	95%
(B)	criminal proceedings:	5%

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

I have tried two non-jury cases to verdict. In the first trial, I was the sole associate counsel, on the second trial I was second chair.

1. What percentage of these trials were:

(A)	jury;	
(B)	non-jury:	100%

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any

oral argument transcripts before the Supreme Court in connection with your practice.

I have not argued before the Supreme Court. I assisted in drafting two amicus briefs, one as a summer associate in *Board of Regents v. Southworth*, 98-1189, and one as an associate at Cooper & Kirk, PLLC, in *Silveira v. Lockyer*, cert. denied. It is possible that I contributed to other petitions for or oppositions to petitions for certiorari, but I do not recall.

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

Citizens Federal Bank v. United States, 92-656; App. April 2004-March 2005
United States Court of Federal Claims; Judge George Miller

Citizens Savings Bank sued the United States for money damages arising out of a breach of contract that was entered into as part of the Savings & Loan crisis of the 1980s. This case is a *Winstar* case. Citizens prevailed in the Court of Federal Claims and was awarded almost \$19 million in damages. I served as second chair during the trial and was heavily involved in all aspects of pre-and post-trial briefing. After I left the firm, Citizens prevailed on appeal, and the damages have been awarded.

Co-Counsel:
David Thompson
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Delisa Sanchez
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-616-0337

2. *American Capital Corporation v. United States*, 95-523C; App. March 2004-March 2005; United States Court of Federal Claims; Judge Braden

In this case, another *Winstar* case, American Capital Corporation and the FDIC sued the United States for money damages arising out of a breach of contract that was entered into as part of the Savings & Loan crisis of the 1980s. American Capital prevailed in the Court of Federal Claims and was awarded almost \$109 million in damages. I was the sole associate on the trial, and participated in all aspects of pre- and post-trial briefing. After I left the firm, the case was argued on appeal, and approximately \$34 million in damages were ultimately awarded.

Co-Counsel:

Michael W. Kirk
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Bill Ryan (now at)
Public Company Accounting Oversight Board
1666 K Street, NW
Washington, DC 20006
202-207-9190

3. *Vodnar v. Gonzales*, 04-74132; May-June 2006; United States Court of Appeals for the Ninth Circuit; Chief Judge Schroeder, Judges Graber and Duffy (SDNY)

Mr. Vodnar, an ethnic Hungarian from Romania, petitioned for review of an order of the Board of Immigration Appeals (BIA) which summarily affirmed an IJ's denial of withholding of removal and relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Court of Appeals held that substantial evidence supported IJ's adverse credibility finding and denied the petition. I argued the appeal on behalf of the Government.

Co-Counsel:
Jonathan Cohn
United States Department of Justice
(now at) Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8110

Opposing Counsel:
Jagdeep Singh Sekhon
Sekhon & Sekhon
601 Montgomery Street, Suite 402
San Francisco, CA 94111-2607
Unknown

4. *Mirza v. Gonzales*, 05-2800-ag; April-May 2007; United States Court of Appeals for the Second Circuit; Judges Walker, Cabranes, and Goldberg (CIT)

Mr. Mirza petitioned for review of order of Board of Immigration Appeals (BIA) denying his motion to reopen removal proceedings. The Court of Appeals held that the I-130 application for immigration of relative, applied for on alien's behalf by his second United States wife, was insufficient to establish alien's eligibility for adjustment of status and denied his petition review. I argued the appeal on behalf of the government.

Co-Counsel:
Thomas Dupree
United States Department of Justice
(now at) Gibson Dunn
1050 Connecticut Ave., N.W.

Washington, DC 20036
202-955-8547

Opposing Counsel:
Matthew L. Guadagno
305 Broadway, Suite 100
New York, NY 10007
212-267-2555

5. *Ford Motor Company v. United States*, 03-5092; App. March 2003-March 2005; United States Court of Appeals for the Federal Circuit; Judges Newman, Schall, and Linn

Ford Motor Company filed suit against United States asserting claim under provisions of World War II contract for its share of cost of environmental clean-up of factory site where it had built bombers. The United States Court of Federal Claims, granted government summary judgment for the United States. On appeal, the Court of Appeals held that the claim was not time-barred and that Ford Motor Company was entitled to recover costs of environmental cleanup. I was very involved in briefing the appeal on behalf of Ford Motor Company. After I left the firm, the case settled.

Co-Counsel:
Michael W. Kirk
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Kyle Chadwick
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-616-0476

6. *Granite Management Company v. United States*, 04-5065; App. February 2004-March 2005; United States Court of Appeals for the Federal Circuit; Judges Mayer, Friedman, and Clevenger

In this *Winstar* case, Granite Management brought a suit for money damages against the United States arising out of the Savings & Loan crisis of the 1980s. The Court of Federal Claims entered summary judgment for company on issue of liability but granted summary judgment for the United States as to damages. After I left the firm, the Federal Circuit largely affirmed as to damages, but remanded for consideration of one theory of recovery. I am unaware of the current status of the claims. I was the sole associate on the case and assisted in the briefing before the trial and appellate courts.

Co-Counsel:
Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW

Washington, DC 20036
202-220-9600

Opposing Counsel:
Tarek Sawi
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-616-0320

7. *United States v. Marion Country School District*, 5:78-cv-22-OC-20; United States District Court for the Middle District of Florida; Judge Schlesinger

The United States originally sued Marion Country School District for civil rights violations, and the parties entered into a Consent Decree. Cooper & Kirk was engaged in 2004 to seek unitary status and release of Marion Country from the Consent Decree. I assisted in preparing the school district for a Unitary Status hearing, which was held after I left the firm. Marion County's Motion for Unitary Status was granted in January, 2007, and the case dismissed.

Co-Counsel:
Michael W. Kirk
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Tamara Kassabian
United States Department of Justice
601 D Street, NW
Washington, DC 20004
202-616-3899

8. *Rozhelyuk v. Gonzales*, 05-75480; App. May 2006–February 2007; United States Court of Appeals for the Ninth Circuit; Judges Beezer, Fernandez, and McKeown

Lidiya Rozhelyuk and her 14-year-old daughter, Nataliya Sorokhan, natives and citizens of the Ukraine, petition for review of the Board of Immigration Appeals' decision that affirmed the Immigration Judge's denial of their applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). The Ninth Circuit denied the petition for review. I served as counsel of record on behalf of the government in the Ninth Circuit and briefed the petition for review.

Co-Counsel:
Jonathan Cohn
United States Department of Justice
(now at) Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

202-736-8110

Opposing Counsel:

Leah W. Hurwitz, Esq.
2727 Camino del Rio South, Suite 110
San Diego, CA 92108
(619) 239-7855

9. *Vasquez-Arellanes v. United States*, 05-76399; App. April 2006-January 2009; United States Court of Appeals for the Ninth Circuit; No Panel Identified by the time I left government service.

In this immigration case, the petitioner sought review of an Immigration Judge's decision to deny her cancellation of removal for nonpermanent residents, and the Board of Immigration Appeals' affirmance of that decision. The petitioner contends that the Immigration Judge erroneously concluded that she lacked the requisite good moral character. I served as counsel of record for the government and briefed the petition for review in the Ninth Circuit.

Co Counsel:

Jonathan Cohn
United States Department of Justice
(now at) Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8110

Opposing Counsel:

Daphna Mendelson
295 89th Street, Suite 201
Daly City, California 94015
650-757-8500

10. *AmBase Corporation v. United States*, 93-531C; App. November 2002-March 2005; United States Court of Federal Claims; Judge Loren Smith

In this *Winstar* suit, a holding company which owned defunct thrift and corporation which owned all of holding company's stock brought suit for money damages against the United States alleging that enactment of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) breached a contract. The Federal Deposit Insurance Corporation (FDIC) intervened as successor to rights of thrift. AmBase filed a motion to dismiss the FDIC, and motion to define the measure of damages. Judge Smith held that there was jurisdiction to review the FDIC's administration of the thrift receivership when determining the value of damages to be awarded to thrift shareholders. I assisted in the briefing before the Court of Federal Claims.

Co-Counsel:

Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
David Levitt
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-307-0309

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

In my current role, a good portion of my legal activities includes counseling regarding potential litigation. As examples, I have counseled a client contemplating a lawsuit based on defamatory statements, as well as a client contemplating a declaratory judgment action concerning a state regulatory agency. Neither have filed suit as of yet.

As Republican Chief Counsel, Supreme Court Nomination, my work did not involve litigation. I analyzed legal materials and briefed Senators and staff as to their import.

While at the Department of Justice, very little of my work involved litigation; instead, I worked primarily on development of legal policy, regulations, and judicial nominations. This work included drafting legislation, analyzing legislative proposals, and implementing statutory requirements.

While in private practice prior to joining the Department of Justice, I was involved in some legal activities that did not involve litigation; for example, I assisted in the representation of a former Member of Congress who was concerned that he could be the subject of an ethics investigation. I also assisted in counseling a client as to the potential ramifications of a legislative proposal for that client's organization.

I have not performed any lobbying.

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

In October 2010, I taught one session of an Evidence seminar at Chicago-Kent School of Law. We discussed various issues relating to the admissibility of evidence and differing standards for private and public actors to obtain admissible evidence. There was no syllabus for the course.

In February 2011, I taught one session of an Evidence seminar at Chicago-Kent School of Law. We discussed the impact of technology on the Rules of Evidence. There is no syllabus for the course.

18. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted

contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

Pursuant to agreement, Cooper & Kirk, PLLC and Freeborn & Peters LLP hold 401(k) accounts for me.

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

Yes. I anticipate continuing my practice as a litigation partner at Freeborn & Peters LLP.

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

Please see attached financial disclosure report.

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

Please see attached Net Worth Statement and SF-450 on file with the Committee.

22. **Potential Conflicts of Interest:**

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

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

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

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

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

While at Cooper & Kirk, I assisted in multiple representations undertaken for reduced fees or pro bono. For example, I assisted in the drafting and filing of a brief on behalf of a public interest organization seeking to protect its First Amendment rights. In addition, I assisted in the representation of an individual challenging a federal regulation that had been construed to prohibit him from sending a bible, political magazines, and other material to his son, who was then serving in Kuwait or Saudi Arabia.

At the Department of Justice, I took the opportunity to provide pro bono services at a legal clinic in Washington, D.C.

I am currently working with a number of my partners to support a range of charitable organizations, including those dedicated to providing reduced rate or pro bono legal services. In addition, I have served as a moot court judge both for Northwestern University Law School and for the American Bar Association. On election day, after participating in relevant training, I provided legal support to poll watchers across Illinois.

AFFIDAVIT

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

March 7, 2011
(DATE)

Elisebeth C. Look
(NAME)

Kathy A. Abbott
(NOTARY)



Question 12(a)

The New York Times
nytimes.com

July 22, 2008

LETTER; Justice and Sex Trafficking

To the Editor:

Re "The Justice Department, Blind to Slavery" (Op-Ed, July 11):

We take issue with John R. Miller's characterization of the Department of Justice's work in the fight against sex trafficking and the department's commitment to rescuing victims of this horrendous crime.

The department has convicted hundreds of sex traffickers for prostituting children and forcing women into prostitution. We have rescued hundreds upon hundreds of victims. And we strongly support Congressional reauthorization of the Trafficking Victims Protection Act, which made these successes possible.

But we oppose provisions in the bill passed by the House of Representatives that would divert our focus away from the worst of the worst cases by making all prostitution a federal crime.

Dozens of law enforcement agencies, women's and immigrants' groups, crime victims' rights organizations and policy experts have written Congress sharing the department's concern.

Elisebeth C. Cook

Assistant Attorney General

Department of Justice

Washington, July 11, 2008

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Monday, June 14, 2010

Two Takes: A Media Shield Would Imperil Our National Security

Protecting people who leak vital information illegally would hurt our national safety

By Elisebeth C. Cook
Posted August 11, 2008

A media shield's appeal is understandable. A free press that informs the public and holds government accountable is a bedrock principle of our society and one that we are committed to defend. But creating a new privilege for journalists to withhold the identity of confidential sources, as Congress is considering, would do more harm than good.

In the real world, such a privilege would adversely affect our ability to keep the country safe from terrorists and other criminals. This impact has led the heads of all federal government agencies in the intelligence community to oppose the proposed legislation. While the media shield bill includes "exceptions" for national security and serious crimes, they are inadequate. First, they are largely prospective and would not apply after a crime has been committed. Second, we would still have to produce classified and sensitive information in order to compel reporters to disclose their sources. Third, even if we meet the bill's exacting standard, judges could still prevent us from obtaining critical source information. This would undermine, if not eviscerate, the government's ability to obtain information that could be necessary to protect national security, investigate acts of terrorism, or identify leakers of classified information.

These defects are compounded by the fact that a shield would apply to a virtually limitless class of people. Indeed, the bill's definition of journalism is so broad that essentially anyone who regularly disseminates information of public interest would qualify—as would his or her supervisor, employer, parent company, subsidiary, or affiliate.

Highly classified. Two real-world examples, cited by supporters of the legislation, underscore the government's concerns about this legislation. The existence of a highly classified program that allowed us to monitor the finances of terrorist organizations and their backers was leaked to reporters who then ran a story detailing its operations. This

disclosure compromised one of our most valuable programs and made harder our efforts to track terrorist financing. There is no credible allegation that the program violated U.S. law, and the newspaper's own ombudsman later concluded that the article should not have been published.

In another case, the government developed a plan to go to court, freeze the assets, and search the premises of two nonprofit organizations suspected of supporting terrorists. Information about the plan was leaked to two reporters, who called the groups seeking comment on the impending searches and asset freezes—alerting them to the government's actions and potentially threatening the safety of the agents executing the search warrants, to say nothing of the harm done to the investigation. The reporters refused to identify their sources and challenged efforts by the government to obtain phone company records indicating who might have leaked the information.

Such cases, in which confidential sources broke the law by leaking classified or other sensitive information, with serious consequences for national security and law enforcement, are telling. Media advocates evidently believe that such leaks ought to and will be protected by a shield law. One of the goals of the legislation, we are told, is to ensure that sources will feel free to talk to reporters—another way of saying that it is designed to ensure that we will have more such leaks. The sources in these cases broke the law in order to reveal information that showed not that the government was acting improperly but that it was doing its job appropriately and effectively. Of course, the fact that these and other leaks made their way into the news media in the absence of a shield law makes them odd examples to cite as evidence for its necessity.

This is a complex issue involving some of our most cherished values and our most important responsibilities as a government. The balance between such interests is not always clear and can lead people of good faith to disagree. But the proposed bill overly restricts the government's ability to obtain information critical to protecting national security and enforcing laws.

Join the debate—tell us what you think about a shield law to protect confidential sources. Post your thoughts here.

Tags: journalism | media | law | national security

Question 12(c)

souri. All four enjoy the strong support of their home State Senators. We will also consider the nominee for Assistant Attorney General for the Office of Legal Policy in the Department of Justice.

We will proceed in the following manner. After opening statements from any Committee members, we would like for the Senators present to introduce their nominees. Then we will invite the nominees themselves to take the oath, as well as present any opening remarks or introduce their family and their friends. Then we will take the time for questions.

Senator Specter is here, and we ask him for his comments.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, thank you very much, Mr. Chairman. I am delighted to see our colleagues, Senator Warner and Senator Bond, here today for purposes of making introductions. Senator Webb has just joined us. We welcome the nominees and their families and we will do our best to process these nominations through the Committee for up-or-down votes.

Earlier today in this room we had an extended discussion on the confirmation process. I think it is only fair to let all the nominees and others interested in what is going on, candidly, about the difficulties of the confirmation process. We have had a practice of slow-downs during the last 2 years of a presidency. It happened in the last 2 years of President Reagan, the last 2 years of President Bush the first, and happened in the tenure of President Clinton, where Republicans were in control for 6 years.

In 2005, we had very extended filibusters and challenge of changing the rules on filibustering with the so-called Constitution, or nuclear, option. It is my hope we'll be able to process these nominees. We're obviously concerned about the qualifications. As the Chairman, Senator Kohl, has commented, lifetime appointments are very, very important. But I do believe we need to proceed with the hearings and evaluation and vote up or down on these nominees. I will do my best to move the process forward.

So, on with the show, Mr. Chairman.

Senator KOHL. Thank you very much, Senator.

Senator SPECTER. Senator Warner is next to you.

Senator KOHL. If you would like to make your introduction, Senator Warner.

PRESENTATION OF MARK DAVIS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA AND DAVID J. NOVAK NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman, and my lifetime friend, Senator Specter. Senator Specter and I have been here, we're going into our 30th year in this institution. I value the friendships that I've had with you, sir, and Senator Specter, and the chairman of this Committee, Chairman Leahy, and many others. I've appeared before this Committee, I'm not sure how many times, Mr. Chairman, but I know that I have either introduced or

sat here on behalf of every member of the Federal judiciary in the Commonwealth of Virginia.

I just think it's one of the most important functions of a United States Senator to work with the President, to work with his colleagues in the Senate, in the advice and consent process. I commend you, Mr. Chairman, for the dedicated work that you had.

Today, our two nominees are from Virginia. It's an unusual situation. I'm privileged to introduce Chief Judge Spencer, the Federal District Court of the Eastern District of Virginia, who has come on behalf of the candidates today. I'd ask if Judge Spencer might rise to be recognized. Thank you, Your Honor.

We also have Judge Morrison of the State Court of Virginia who has come on behalf of—Judge Morrison, we thank you.

Now, Mr. Chairman, I would like unanimous consent to place into the record my statement. I see my colleague is here. I can be very brief, because the records speak for themselves and need not have this old, crackly voice here, which is not working too well today, to cover it.

The first nominee I'd like to address is Judge Davis. He's Chief Judge on a division of our State Court. This young man started in my office as an intern, Mr. Chairman, and then came back and worked on the staff in my office. His whole judicial career, up through his position as Chief Judge, is carefully outlined in this statement. Without any hesitation, I unequivocally back this nomination and am very, very proud to see one of my staff members come before the U.S. Senate to be recognized under the advice and consent constitutional procedures for elevation to the judiciary. I thank you.

Next, is a gentleman, Mr. Novak, whom I have come to know in the process with my good friend, Senator Webb and I. We work together as a team and we interview extensively many, many individuals carefully before we first submit the names to the President, and then before we come here. I wish to thank Senator Webb. I've worked in a similar capacity with all of my partners here in the Senate and the State of Virginia, be they Republican or Democrat, to see that we put forward for the judiciary only those we deem qualified.

Now, this young man, having been a Federal prosecutor myself many, many years ago, I would call him the prosecutor's prosecutor. He has done so much in his lifetime in the prosecutorial work to see that people are fairly prosecuted and to carry out the law of the land, which allegedly has been broken in the various prosecutions. Again, his entire biography and all the important positions that he's held are captured in detail in my statement. Likewise, I put my unequivocal support behind this fine gentleman.

I wish to also bring to the Chairman's attention and that of the distinguished Ranking Member that I have spoken to either the Senators themselves or their senior staff on behalf of this Committee. There is a matter with Mr. Novak. It's being reviewed within the Department of Justice. There's knowledge in here with your staff, and I'm confident that this matter will be completely resolved prior to the action of this Committee.

And last, Mr. Chairman, I introduce Ms. Elisebeth Cook. Now, each of these distinguished candidates has their family here. Per-

haps, I think your protocol is, when they come they introduce their own families. She's joined by members of her family today. This fine nominee is nominated to serve as the Assistant Attorney General responsible for leading the Office of Legal Policy, or the OLP, as we know it. That serves as the principal office for the planning, development, and coordination of high-priority policy initiatives from the Department of Justice, and works closely with the President on the selection process for the Federal judiciary.

Again, Phi Beta Kappa. I need not go further. It's all in here, an extraordinary career for this magnificent female professional.

I thank you, distinguished Chairman and the distinguished Ranking Member, and ask again that my full statement be placed in the record.

Senator KOHL. Thank you, Senator Warner. It shall be done, without objection.

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

Senator KOHL. Senator Webb, would you like to speak?

PRESENTATION OF MARK S. DAVIS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA AND DAVID J. NOVAK, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA BY HON. JIM WEBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WEBB. Thank you, Mr. Chairman and Ranking Member Specter. I would like to begin by associating myself with all the remarks of our senior Senator from Virginia. Actually, as he was giving his remarks, I was sitting here remembering that, 24 years ago this very month, Senator Warner sat next to me during my confirmation hearing to be Assistant Secretary of Defense, and introduced me. So when we're talking about trying to move things forward in a bipartisan manner here in the Senate, that is one example among many of how we have been able to work over many years together.

I would like to add my own strong support for the nominations of Judge Mark Davis and Mr. David Novak, and also I'm pleased to join Senator Warner in introducing Elisebeth Cook Collins, who is a Virginian who has been nominated as Assistant Attorney General for Legal Policy at the Department of Justice. We all know the role that the Constitution assigns the Senate in the advice and consent process with respect to our judgeships. These are lifetime appointments.

Virginians expect our Senators to take very seriously our constitutional duties and to look beyond party affiliations to impartial, balanced, fair-minded criteria in examining those people who we are going to trust in those fiduciary responsibilities.

Senator Warner and I, early on, undertook a careful and deliberative joint process in order to find the most qualified judicial nominees. This process involved a thorough records review, rigorous interviews jointly held, asking for the opinions of the bar associations, many different bar associations in Virginia, and through that process we jointly concurred in the high qualifications of Judge Davis, and also Mr. Novak.

So, without going into any duplicative detail in terms of qualifications, I would ask that my full statement be inserted into the record of this hearing, and I would like to associate myself in full measure with what Senator Warner has already said.

Senator KOHL. Thank you, Senator Webb. Without objection, it will be done.

Senator WEBB. Thank you, Mr. Chairman.

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

Senator KOHL. We have two Senators from Missouri with us at this point. Senior Senator Chris Bond?

PRESENTATION OF DAVID GREGORY KAYS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI AND STEPHEN N. LIMBAUGH, JR., NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI BY HON. CHRISTOPHER S. BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. Thank you very much, Mr. Chairman, Senator Specter.

I, too, would associate myself with the general comments made by the distinguished senior Senator from Virginia. He always says it well, and he did again today. I thank the members of the Committee for holding this hearing to consider the nominations for the Eastern and Western Federal District Court benches in Missouri, the Honorable Stephen Limbaugh and the Honorable Greg Kays, or as he's known in the formal papers, as David Gregory Kays, so there is no confusion about referring to him by his middle name.

Your holding these hearings today, reporting these nominees favorably, and ensuring the full Senate approve their nomination will help show that the Federal judicial nominating process can work to provide Federal judges our courts so desperately need.

I'm so pleased and proud to be able to be here today, along with my colleague, Senator McCaskill, to introduce such outstanding nominees to the Federal bench. Both Judge Kays and Judge Limbaugh share bipartisan support, both have fine judicial minds, and are public servants. They both represent the values and character of my Missouri constituents.

Judge Kays hails from Lebanon, Missouri, a mid-sized city in Southwest Missouri. Folks from Southwest Missouri are hard-working, God-fearing, family loving. Of course, I like to think of all Missourians that way, but they're particularly proud to do so. But you will see today, as I see, that Judge Kays' sharp legal mind and record of experience as a State Circuit Court judge—that's a trial judge—are matched equally by a midwesterner's modesty, earnestness, and commitment to duty and service.

Now, Kansas City is in the Western District of Missouri and produces many big city lawyers and judges, some of whom I was also proud to recommend, but I am especially happy that this occasion will allow the nomination and hopeful confirmation of a judge from Laclede County.

Judge Limbaugh also hails from a mid-sized city, Cape Girardeau, on the Mississippi River in southeastern Missouri. Judge Limbaugh and his entire family, which includes more than

souri, a fairly small community in southwest Missouri that I feel very close to.

As to Judge Limbaugh, I consider him a friend. I think that I would quote briefly from a letter that was sent to me by Judge Wolfe of the Missouri Supreme Court: "Judge Limbaugh has served with distinction on the Missouri Supreme Court for many years, and two judges that are on the court that came to the court through Democratic Governors have expressed publicly what a fine judge he is." This letter is particularly meaningful because not only was he appointed by Governor Carnehan, but he had served in Governor Carnehan's administration. He wrote this letter, referring to Judge Limbaugh, "He is a magnificent judge. He is civil, he is polite, he is extremely conscientious and hardworking. Most of all, he truly cares about the law. He is the kind of judge with whom you can disagree and the matter is never disagreeable."

There have been many kind words said about Judge Stephen Limbaugh in terms of his work, his collegiality, but once again, he is a former trial judge. He came to the Supreme Court, the highest appellate court in our State, from a courtroom. I think it's wonderful that he wants to return to a courtroom, because I think the essence of a trial judge is one who understands that the battle before him is one that it is an honor to be in a position to make decisions as to the law and to try to make sure that law is applied fairly, regardless of who comes to the courtroom.

So I think these are two outstanding nominees and I'm proud of the bipartisan manner in which my colleague, the senior Senator from Missouri-

Senator BOND. Thank you.

Senator MCCASKILL.—has worked with me on these nominations. I recommend them to the Committee, I recommend them to the Senate, and I appreciate your time today.

Thank you very much.

Senator KOHL. Well, we thank both the senior and the junior Senator from Missouri. We appreciate your being here.

At this point we'd like to call all five nominees to come forward and to remain standing. If you'll raise your right hand, I'll administer the oath.

[Whereupon, the nominees were duly sworn.]

Senator KOHL. You may be seated.

Starting with Ms. Cook, we will ask each nominee to introduce themselves, make any brief comments you'd like to make, and introduce members of your family as you may see fit.

Ms. Cook.

STATEMENT OF ELISEBETH C. COOK, NOMINATED TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Ms. COOK. Thank you, sir. First, I wanted to take you for taking the time to chair this hearing today, and Senator Specter, for being here today. I also wanted to thank the Chairman for scheduling this hearing. I wanted to thank the President for this nomination and the Attorney General for the faith that he has placed in me.

I also wanted to take the opportunity to introduce my family members who are here. My parents, Tom and Martha Collins, and

my husband, Jim Cook. Jim's parents, Ron and Maryann, were hoping to come today, but Maryann's mother is not well so they were unable to make it.

Senator SPECTER. Would you ask your relatives to stand so we can greet them?

Ms. COOK. Please stand.

Senator SPECTER. Nice to have you all here.

Ms. COOK. And I also wanted to thank my friends and colleagues who have taken time out of their busy schedules to be here today.

Senator KOHL. Thank you, Ms. Cook.

Mr. Davis.

[The biographical information follows.]

an Assistant D.A. in a very good District Attorney's Office. Not as good as when I was District Attorney, but very good.

[Laughter.]

The vote has started. I'm going to excuse myself, Mr. Chairman. Senator KOHL. Thank you.

Senator SPECTER. I expect to have a replacement Republican Senator arriving shortly.

Senator KOHL. Thank you, Senator Specter.

There is a vote, as he said, so we'll recess for perhaps 10 minutes. I'll get back here as soon as I can and then we'll proceed with questions.

[Whereupon, at 2:49 p.m. the hearing was recessed.]

AFTER RECESS [3:07 p.m.]

Senator KOHL. The hearing will resume. We will commence questioning for Ms. Cook.

Ms. Cook, one of your primary responsibilities at the Office of Legal Policy is the selection of judicial nominees. With time is very short before the next election, what has your office done to encourage the White House to identify consensus nominees like the ones who are before us today who can be confirmed? Do you believe that it is important to consult and get the approval of home State Senators before nominations are made?

Ms. COOK. Thank you for that question. The Office of Legal Policy within the Department of Justice does play a supporting role in the selection process for judicial nominees. Ultimately the decision of whether or not to nominate an individual is the President's decision, but the Department, and my office in particular, does play a supporting role in that process.

You had asked specifically about consultation. The consultation process is one out of the White House council's office. It is not one of the areas where the Department of Justice would play a role.

Senator KOHL. Ms. Cook, during the tenure of Attorney General Gonzales there was a perception that politics played a significant role in the decisions made at the Department. Was there a similar problem at OLP? What will you do to ensure that this does not become a problem, should you be confirmed?

Ms. COOK. Let me explain a little bit about how the Office of Legal Policy is currently staffed. I am the Acting Assistant Attorney General right now, there are three Deputy Attorney Generals, and a Chief of Staff on the senior staff. They are all career attorneys. They have all been at the Department longer than I have. One of my goals, if confirmed, would be to make the Office of Legal Policy a place where they will want to stay long after I am gone. If confirmed, in any of my decisions, I would hope to have their input and their experience in that decision-making process.

Senator KOHL. Thank you.

Ms. Cook, while OLP is known primarily for its role in filling judicial vacancies, it also plays a role at the Justice Department in conducting policy reviews of legislation implementing Department initiatives, among other things. Can you tell us what your priorities will be in that area for the rest of this administration?

Ms. COOK. If confirmed, my priorities would be to institutionalize the gains that we have made in areas such as combatting violent crime, combatting child exploitation, combatting identity theft, and

combatting human trafficking. These are areas where my office has been very involved in the past in the development of initiatives, in assessing legislation, and I would hope to continue to prioritize those, if confirmed.

Senator KOHL. What will be your biggest challenge, do you imagine, over the next several months?

Ms. COOK. I think the biggest challenge that we will face is the fact that the administration is ending. But from my perspective, now is the time to institutionalize the gains that we have made in numerous areas and to make sure that the Department continues to be a place where great professionals want to work.

Senator KOHL. Where do you think you may have some problems that you will have to deal with, that you might warn us?

Ms. COOK. I'm not aware of any specific areas, but I can tell you that, should areas arise where we feel we could use, for example, additional authorities, we would welcome the opportunity to work with this committee.

Senator KOHL. Thank you, Ms. Cook.

Ms. COOK. Thank you.

Senator KOHL. Judge Davis and others, during Chief Justice Roberts' nomination hearing, much was made of his suggestion that his job as a judge was little more than that of an umpire calling balls and strikes. I'm sure you recollect that. Some of us, in response, suggested that this analogy might be a little too simple, because all umpires, after all, have different zones with respect to balls and strikes. That is because they bring their own unique life experiences to the bench. No two people are exactly similar.

So would you comment on the Chief Justice's comparison to the role of a judge being like that of an umpire?

Mr. DAVIS. Well, Senator—

Senator KOHL. Would you agree with him or do you think the Chief Justice was wrong?

[Laughter.]

I dare you to answer that question, yes or no.

[Laughter.]

Mr. DAVIS. Senator, it is a metaphor, I guess, that he chose to use. I would say that I see the role of a judge as to uphold the rule of law. That's what I've tried to do in the past 5 years while I've served, and to look to the Constitution, to look to the statutes that are passed by this body, and to try to do the best job possible to make sure that everybody in the court is heard, they're heard in a fair manner, and that the process plays out in an open and fair manner.

I think that's the way that I see the role of the judge, to make sure that in the courtroom that happens, that everyone in the adversarial process has the opportunity to be heard and to make sure that the rule of law is what governs the outcome.

Senator KOHL. All right.

Judge Kays.

Mr. KAYS. Thank you, Senator. I agree with much of what Judge Davis has stated. You know, one of the challenges that I think people on the bench—judges have is to ensure that when people leave the courtroom they have a sense that they were treated fairly and



Department of Justice

JOINT STATEMENT OF

**ELISEBETH COLLINS COOK
ASSISTANT ATTORNEY GENERAL**

AND

**VALERIE CAPRONI
GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION**

BEFORE THE

**SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES SENATE**

ENTITLED

**"NEW ATTORNEY GENERAL GUIDELINES FOR DOMESTIC
INTELLIGENCE COLLECTION"**

PRESENTED

SEPTEMBER 23, 2008

**Joint Statement of
Elisebeth Collins Cook
Assistant Attorney General, Office of Legal Policy
Department of Justice
and
Valerie Caproni
General Counsel
Federal Bureau of Investigation**

**Select Committee on Intelligence
United States Senate**

“New Attorney General Guidelines for Domestic Intelligence Collection”

September 23, 2008

Mr. Chairman, Vice Chairman Bond, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the Attorney General’s Guidelines for Domestic FBI Operations. We believe that these guidelines will help the FBI continue its transformation from the pre-eminent law enforcement agency in the United States to a domestic intelligence agency that has a national security mission and law enforcement mission.

The new guidelines provide more uniform, clear, and straightforward rules for the FBI’s operations. They are the culmination of prior efforts to revise the FBI’s operating rules in the wake of the September 11 terrorist attacks. They are consistent with and help implement the recommendations of several distinguished panels for the FBI to coordinate national security and criminal investigation activities and to improve its intelligence collection and analytical capabilities.

These guidelines will protect privacy rights and civil liberties, will provide for meaningful oversight and compliance, and will be largely unclassified. Consequently,

the public will have ready access in a single document to the basic body of operating rules for FBI activities within the United States. The guidelines will take the place of five existing sets of guidelines that separately address, among other matters, criminal investigations, national security investigations, and foreign intelligence collection. They are set to take effect on October 1, 2008.

We have greatly appreciated the interest of this Committee and others in these guidelines. Over the past six weeks, we have made a draft of the guidelines available for review to the Members and staff of this Committee, the House Permanent Select Committee on Intelligence, the Senate Judiciary Committee, and the House Judiciary Committee. We have provided briefings (and made the draft guidelines available for review) to a wide range of interested individuals and groups, including Congressional staff, public interest groups ranging from the American Civil Liberties Union (ACLU) to the Arab-American Anti-Discrimination Council (ADC) to the Electronic Privacy Information Center (EPIC), and a broad set of press organizations. The dialogue between the Department and these individuals and groups has been, in our view, both unprecedented and very constructive. We have appreciated the opportunity to explain why we undertook this consolidation, and we are amending the draft guidelines to reflect feedback that we have received.

I. Purpose of the Consolidation Effort

Approximately 18 months ago, the FBI requested that the Attorney General consider combining three basic sets of guidelines—the General Crimes Guidelines, which

were promulgated in 2002, the National Security Investigative Guidelines (NSIG), which were promulgated in 2003, and a set of guidelines that are called the Supplemental Foreign Intelligence Guidelines, which were promulgated in 2006.

This request was made for three primary reasons. First, the FBI believed that certain restrictions in the national security guidelines were actively interfering with its ability to do what we believe Congress, the 9/11 Commission, WMD Commission, and the President and the American people want the FBI to do, which is to become an intelligence-driven agency capable of anticipating and preventing terrorist and other criminal acts as well as investigating them after they are committed. The clear message to the FBI has been that it should not simply wait for things to fall on its doorstep; rather, it should proactively look for threats within the country, whether they are criminal threats, counterintelligence threats, or terrorism threats.

Second, the FBI believed that some of the distinctions between what an agent could do if investigating a federal crime and what an agent could do if investigating a threat to national security were illogical and inconsistent with sound public policy. Specifically, the FBI argued that there was not a good public policy rationale for (a) the differences that existed, and (b) the guidelines that governed national security matters to be more restrictive than those that governed criminal matters.

Third, the FBI concluded that having inconsistent sets of guidelines was problematic from a compliance standpoint. The FBI made its request for consolidation after the Inspector General had issued his report on the use of National Security Letters. That report helped crystallize for the FBI that it needed stronger and better internal

controls, particularly to deal with activities on the national security side, as well as a robust compliance program. The FBI argued that, from a compliance standpoint, having agents subject to different rules and different standards depending on what label they gave a matter being investigated was very problematic. The FBI asserted that it would prefer one set of rules because compliance with a single set of rules could become, through training and experience, almost automatic.

The Department agreed with the merits of undertaking this consolidation project, and the result is the draft guidelines we are discussing today. These guidelines retain the same basic structure of predicated investigations on the one hand, and pre-investigative activity on the other—currently called threat assessments on the national security side and prompt and limited checking of leads on the criminal side. The standard for opening a preliminary investigation has not changed and will not change.

The most significant change reflected in the guidelines is the range of techniques that will now be available at the assessment level, regardless of whether the activity has as its purpose checking on potential criminal activity, examining a potential threat to national security, or collecting foreign intelligence in response to a requirement. Specifically, agents working under the general crimes guidelines have traditionally been permitted to recruit and task sources, engage in interviews of members of the public without a requirement to identify themselves as FBI agents and disclose the precise purpose of the interview, and engage in physical surveillance not requiring a court order. Agents working under the national security guidelines did not have those techniques at their disposal. We have eliminated this differential treatment in the consolidated

guidelines. As discussed in more detail below, the consolidated guidelines also reflect a more comprehensive approach to oversight.

II. Uniform Standards

The guidelines provide uniform standards, to the extent possible, for all FBI investigative and intelligence gathering activities. They are designed to provide a single, consistent structure that applies regardless of whether the FBI is seeking information concerning federal crimes, threats to national security, foreign intelligence matters, or some combination thereof. The guidelines are the latest step in moving beyond a reactive model (where agents must wait to receive leads before acting) to a model that emphasizes the early detection, intervention, and prevention of terrorist attacks, intelligence threats, and criminal activities. The consolidated guidelines also reflect the FBI's status as a full-fledged intelligence agency and member of the U.S. Intelligence Community. To that end, they address the FBI's intelligence collection and analysis functions more comprehensively. They also address the ways in which the FBI assists other agencies with responsibilities for national security and intelligence matters.

The issuance of these guidelines represents the culmination of the historical evolution of the FBI and the policies governing its domestic operations that has taken place since the September 11, 2001, terrorist attacks. In order to implement the decisions and directives of the President and the Attorney General, to respond to inquiries and enactments of Congress, and to incorporate the recommendations of national

commissions, the FBI's functions needed to be expanded and better integrated to meet contemporary realities. For example, as the WMD Commission stated:

[C]ontinuing coordination . . . is necessary to optimize the FBI's performance in both national security and criminal investigations [The] new reality requires first that the FBI and other agencies do a better job of gathering intelligence inside the United States, and second that we eliminate the remnants of the old "wall" between foreign intelligence and domestic law enforcement. Both tasks must be accomplished without sacrificing our domestic liberties and the rule of law, and both depend on building a very different FBI from the one we had on September 10, 2001. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 466, 452 (2005).)

To satisfy these objectives, the FBI has reorganized and reoriented its programs and missions, and the guidelines for FBI operations have been extensively revised over the past several years. For example, the Attorney General issued revised versions of the principal guidelines governing the FBI's criminal investigation, national security investigation, and foreign intelligence collection activities successively in 2002, 2003, and 2006.

Despite these revisions, the principal directives of the Attorney General governing the FBI's conduct of criminal investigations, national security investigations, and foreign intelligence collection have persisted as separate documents that impose different standards and procedures for comparable activities. Significant differences exist among the rules these separate documents set for core FBI functions. For example, even though activities that violate federal criminal laws and activities that constitute threats to the national security oftentimes overlap considerably, FBI national security investigations have been governed by one set of rules and standards, while a different set of rules and

standards has applied to the FBI's criminal investigations generally. These differences have created unfortunate situations where the same kind of activity may be permissible for a criminal investigation but may be prohibited for a national security investigation.

As an example of how the prior guidelines treated comparable activities differently based on how those activities were categorized, consider the question of what the FBI can do in public places. Under the multiple guidelines regime, the rules were different if the FBI received a tip that a building was connected to organized crime as opposed to a tip that the building was connected to a national security matter, such as international terrorist activity. The rules for how long the FBI could sit outside the building, or whether the FBI could follow someone exiting the building down the street, were different; specifically, more restrictive on the national security side and difficult to apply. It makes no sense that the FBI should be more constrained in investigating the gravest threats to the nation than it is in criminal investigations generally.

Similarly, under the prior guidelines, human sources—that is, “informants” or “assets”—could be tasked proactively to ascertain information about possible criminal activities. Those same sources, however, could not be proactively tasked to secure information about threats to national security, such as international terrorism, unless the FBI already had enough information to predicate a preliminary or full investigation.

The consolidated guidelines we are discussing today carry forward and complete this process of revising and improving the rules that apply to the FBI's operations within the United States. The new guidelines integrate and harmonize these standards. As a result, they provide the FBI and other affected Justice Department components with

clearer, more consistent, and more accessible guidance for their activities by eliminating arbitrary differences in applicable standards and procedures dependent on the labeling of similar activities (“national security” versus “criminal law enforcement”). In addition, because these guidelines are almost entirely unclassified, they will make available to the public the basic body of rules for the FBI’s domestic operations in a single public document.

III. Coordination and Information Sharing

In addition to the need to issue more consistent standards, the FBI’s critical involvement in the national security area presents special needs for coordination and information sharing with other DOJ components and Federal agencies with national security responsibilities. Those components and agencies include the Department’s National Security Division, other U.S. Intelligence Community agencies, the Department of Homeland Security, and relevant White House agencies and entities. In response to this need, the notification, consultation, and information-sharing provisions that were first adopted in the 2003 NSIG are perpetuated in the new guidelines.

IV. Intelligence Collection and Analysis

Additionally, the new guidelines carry out a significant area of reform by providing adequate standards, procedures, and authorities to reflect the FBI's character as a full-fledged domestic intelligence agency—with respect to both intelligence collection and intelligence analysis—and as a key participant in the U.S. Intelligence Community.

In relation to the collection of intelligence, legislative and administrative reforms expanded the FBI's foreign intelligence collection activities after the September 11, 2001, terrorist attacks. These expansions have reflected the FBI's role as the primary collector of intelligence within the United States—whether it is foreign intelligence or intelligence regarding criminal activities. Those reforms also reflect the recognized imperative that the United States' foreign intelligence collection activities inside the United States must be flexible, proactive, and efficient in order to protect the homeland and adequately inform the United States' crucial decisions in its dealings with the rest of the world. As the WMD Commission stated in its report:

The collection of information is the foundation of everything that the Intelligence Community does. While successful collection cannot ensure a good analytical product, the failure to collect information . . . turns analysis into guesswork. And as our review demonstrates, the Intelligence Community's human and technical intelligence collection agencies have collected far too little information on many of the issues we care about most. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 351 (2005).)

The new guidelines accordingly provide standards and procedures for the FBI's foreign intelligence collection activities that are designed to meet current needs and

realities and to optimize the FBI's ability to discharge its foreign intelligence collection functions.

In addition, enhancing the FBI's intelligence analysis capabilities and functions has consistently been recognized as a key priority in the legislative and administrative reform efforts following the September 11, 2001, terrorist attacks. Both the Joint Inquiry into Intelligence Community Activities and the 9/11 Commission Report have encouraged the FBI to improve its analytical functions so that it may better "connect the dots."

[Counterterrorism] strategy should . . . encompass specific efforts to . . . enhance the depth and quality of domestic intelligence collection and analysis [T]he FBI should strengthen and improve its domestic [intelligence] capability as fully and expeditiously as possible by immediately instituting measures to . . . significantly improve strategic analytical capabilities (Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. Rep. No. 351 & H.R. Rep. No. 792, 107th Cong., 2d Sess. 4-7 (2002) (errata print).)

A "smart" government would *integrate* all sources of information to see the enemy as a whole. Integrated all-source analysis should also inform and shape strategies to collect more intelligence The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to "connect the dots." (Final Report of the National Commission on Terrorist Attacks Upon the United States 401, 408 (2004).)

The new guidelines accordingly incorporate more comprehensive and clear authorizations for the FBI to engage in intelligence analysis and planning, drawing on all lawful sources of information. The guidelines will allow the FBI to do a better job of being an intelligence-driven agency.

To be an intelligence-driven agency, the FBI needs to be asking questions. What is the threat within our environment? To give an example, without the new guidelines, if the question were asked of a Special Agent in Charge (SAC) of an FBI field office, "Do you have a problem of theft of high technology or theft of classified information within your domain?" the answer would be phrased in terms of how many cases were open. But the number of cases open is a reflection only of what has already been brought to the FBI's attention; it is not an accurate measure of the true scope of a given risk.

The new guidelines will allow the FBI fundamentally to change who it approaches in answering the types of questions that we believe this Committee and the American people would like it to be answering. If a field office is seeking to assess whether it has a substantial threat within its area of responsibility of theft of classified or sensitive technology, it might begin the analytic work necessary to reach a conclusion by considering whether there are research universities in the area that are developing the next generation of sensitive technology or doing basic research that will contribute to such technology and considering whether there are significant defense contractors in the area. From there, the field office should compare those potential vulnerabilities with specific intelligence regarding the intentions of foreign entities to unlawfully obtain sensitive technology.

If an SAC determines that, within his or her area of responsibility, sensitive technology is being developed at a local university that is of interest to foreign powers, the SAC should then determine whether there are individuals within the field office's area of responsibility that pose a threat to acquire that technology unlawfully. In this

example, a logical place to start would be to look at the student population to determine whether any are from or have connections to the foreign power that is seeking to obtain the sensitive technology.

Under existing guidelines, agents are essentially limited to working overtly to narrow the range of potential risks from the undoubtedly over-inclusive list of students with access. They can talk to existing human sources, and they can ask them: "Do you know anything about what's going on at the school? Do you know any of these students?" If the agent does not have any sources that know any of the students, then the assessment is essentially stopped from a human source perspective, because recruiting and tasking sources under the national security guidelines is prohibited unless a preliminary investigation is open. Similarly, the agent also cannot do a pretext interview without a preliminary investigation open, but the agent does not have enough information at that point to justify opening a preliminary investigation. An overt interview in the alternative may be fine in a wide range of scenarios, but could result in the end of an investigation by tipping off a potential subject of that investigation.

At the end of the day, the inability to use techniques such as recruiting and tasking of sources, or engaging in any type of interview other than an overt one, was inhibiting the FBI's ability to answer these types of intelligence-driven questions.

The ability to use a wider range of investigative techniques at the assessment stage, prior to the opening of a predicated investigation, is a critical component of the FBI's transformation into an intelligence-driven organization. Since 2003, we have had the ability to conduct threat assessments to answer questions such as whether we have

vulnerabilities to or a problem with the theft of sensitive technology in a particular field office. With the new consolidated guidelines, the FBI will now have the tools it needs to ascertain the answer to those questions more efficiently and effectively.

V. Oversight and Privacy and Civil Liberties

The new guidelines take seriously the need to ensure compliance and provide for meaningful oversight to protect privacy rights and civil liberties. They reflect an approach to oversight and compliance that maintains existing oversight regimes that work and enhances those that need improvement.

As a result of the stand up of the National Security Division, and the reports by the Inspector General on the use of National Security Letters, the Department and the FBI have been engaged in extensive efforts to reexamine and improve our oversight and compliance efforts in the national security area. Our assessment has been that oversight in the criminal arena is provided through the close working relationship between FBI agents and Assistant U.S. Attorneys (AUSAs), as well as the oversight that comes naturally in an adversarial system for those investigations that ripen into prosecutions. Oversight on the national security side is different because of more limited AUSA involvement and because ultimate criminal prosecutions are less frequent in this area.

Traditionally, on the national security side, oversight was accomplished through two primary means: notice and reporting to then-Office of Intelligence Policy and Review, now a part of the National Security Division, and through filings with the FISA Court. We believe that conducting oversight in this manner was not as effective as the

system set forth in the new guidelines. The prior oversight system was based primarily on reporting and generated many reports from the FBI to the Department that did not provide meaningful insight into the FBI's national security investigations. Thus, the Department's oversight resources were not focused on those activities that should have been the highest priority—namely, those activities that affected U.S. persons. Moreover, to the extent that the process relied in part in filings with the FISA court for more in-depth oversight, it was under-inclusive. Many national security investigations proceed without ever seeking or obtaining an order from the FISA Court. The guidelines establish an approach to oversight that focuses the Department's oversight efforts on protecting the civil liberties and privacy rights of Americans in all national security investigations.

The new guidelines accomplish oversight on the national security side in a number of ways. The guidelines require notifications and reports by the FBI to the National Security Division concerning the initiation of national security investigations and foreign intelligence collection activities in various contexts. They also authorize the Assistant Attorney General for National Security to requisition additional reports and information concerning such activities. Additionally, many other Department components and officials are involved in ensuring that activities under the guidelines are carried out in a lawful, appropriate, and ethical manner, including the Justice Department's Office of Privacy and Civil Liberties and the FBI's Privacy and Civil Liberties Unit, Inspection Division, Office of General Counsel, and Office of Inspection and Compliance. A significant component of the oversight that will be provided by the

National Security Division will come in the form of “National Security Reviews,” which are the in-depth reviews of national security investigations that the National Security Division and the FBI’s Office of General Counsel commenced following the Inspector General’s report on National Security Letters in 2007.

Moreover, the new guidelines carry over substantial privacy and civil liberties protections from current investigative guidelines. They continue to prohibit the FBI from investigating or maintaining information on United States persons in order to monitor activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. In connection with activities designed to collect foreign intelligence in response to Intelligence Community requirements, where the lawful activities of U.S. persons can be implicated, the guidelines require the FBI to operate openly and consensually with U.S. persons, if feasible. Additionally, as the Attorney General emphasized when he testified before the Senate Judiciary Committee, the guidelines prohibit practices (such as racial or ethnic “profiling”) that are prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

The issue of how investigators may take race, ethnicity, or religion into account during an investigation is a difficult question, but it is not a new question. We have long recognized that it is not feasible to prohibit outright the consideration of race, ethnicity or religion—the description of a suspect may include the race of the perpetrator, and groups (such as Aryan Brotherhood, La Cosa Nostra, or the IRA) that are under investigation may have membership criteria that tie to race, ethnicity, or religion. But it is also the case that it cannot be, and should not be, permissible to open an investigation based only on an

individual's perceived race, ethnicity, or religion. We believe that the balance struck in 2003 in this regard—reflected in the Attorney General's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies—is the appropriate one, and we have not changed that balance.

These guidelines continue to require notice to appropriate Department officials when investigations involve domestic public officials, political candidates, religious or political organizations, or the news media. Moreover, as a matter of FBI policy, the FBI imposes higher levels of approval on many activities that have an academic nexus, reflecting the American tradition of academic freedom in our institutions of higher learning.

Finally, these guidelines operate in conjunction with numerous privacy and civil liberties officials and components within the FBI and Department of Justice. As mentioned earlier, the vast majority of the new guidelines will be made available to the public, thereby providing the public with more ready access to the rules governing FBI activities within the United States. Before the consolidated guidelines take effect, the FBI will carry out comprehensive training to ensure that their personnel understand these new rules and will be ready to apply them in their operations. Indeed, this training is already underway. The FBI is also developing appropriate internal policies to implement and carry out the new guidelines. These policies cannot afford agents or supervisors more flexibility than the guidelines themselves but can, and in several cases do, set forth additional restrictions.

VI. Conclusion

Over the last seven years, the FBI has altered its organizational structure, and the Attorney General has issued new policies to guide the FBI as it seeks to protect the United States and its people from terrorism, intelligence threats, and crime, while continuing to protect the civil liberties and privacy of its citizens. The changes reflected in the new guidelines are necessary in order for the FBI to continue its important transformation to being an intelligence-driven organization. We believe that using intelligence as the strategic driver for the FBI's activities will improve its ability to carry out its national security, criminal law enforcement, and foreign intelligence missions.

Thank you again for the opportunity to discuss these issues with you, and we will be happy to answer any of your questions.

Question 12(d)

December 2009 Call Regarding USA PATRIOT ACT Reauthorization

Lone Wolf

- Allows intelligence investigators to use FISA authorities where they can provide probable cause that the target is a terrorist, but cannot demonstrate a connection to a specified foreign power or terrorist organization.
- Available only with respect to non-USPers, and there must be a link to “international terrorism” as defined by FISA
- Added in 2004, by section 6001 of the Intelligence Reform and Terrorism Prevention Act
- Before 2004, had to demonstrate that the target was an agent of or acting on behalf of a foreign power
- Often called the Moussaoui fix because there were widespread reports that agents did not get a FISA search warrant for his computer because they could not show the link.
- The Department of Justice has indicated that this authority has not been used. However, the Department supports reauthorization of the provision, given the potential consequences of unavailability should it sunset. Two scenarios come to mind: a falling out among thieves where an individual severs ties with a terrorist organization, or an individual who “self-radicalizes”
- The Senate Judiciary version would extend the sunset to 2013, the House Judiciary version would allow the provision to sunset.

National Security Letters

Background

- Very valuable tool for national security investigators, comparable to an administrative subpoena. They are almost invariably accompanied by a nondisclosure requirement.
- Outset of investigations, allow investigators to obtain specified information from specified institutions.
- There are a number of NSL provisions, but most focus is on the provision in ECPA-- non-content information such as subscriber information related to a telephone number and toll billing information--the numbers that have been dialed.
- The current standard is relevance to an authorized national security investigation--comparable to a grand jury subpoena. Prior to the Patriot Act, a higher standard than the relevance standard, and very high sign-off requirements.
- Patriot Act made the National Security Letters a “bread and butter” tool for national security investigators. No sunset was provided.

- One of the few tools that can be used absent a grand jury or AUSA. But, not self-executing.
- As part of the reauthorization process, numerous civil liberties safeguards were provided with respect to the use of NSLs, including most notably providing a means for challenging the nondisclosure requirement that generally accompanies an NSL. The 2006 reauthorization also clarified that recipients could consult with a lawyer, required some public reporting, and directed the Inspector General to review the FBI's use of NSLs.
- The Inspector General's report identified significant deficiencies related to the FBI's use of NSLs—most notably the use of so-called “exigent letters,” with internal tracking, and with overcollection.
- As a result of the IG report, the FBI made significant changes to the way that it used NSLs—starting with eliminating the use of “exigent letters.” The FBI has updated its tracking information, so there is a better sense of how and when NSLs are being used.
- In the context of overhaul of internal oversight—new compliance division within FBI, dedicated oversight in Main Justice—oversight not confined to FISA authorities.

Divide into three separate aspects—the standard for the NSL, the nondisclosure requirement, and other issues such as minimization.

First, both bills would impose a sunset in 2013, returning to pre-Patriot language

Second, both bills would have the effect of changing the substantive standard for issuance of the NSL:

- Current standard is relevance to an authorized national security investigation—this does not include threat assessments, instead it must be a preliminary or full investigation
- Senate requires separate writing for the files, with specific facts indicating that the information sought will be relevant to an authorized investigation
- House states that no NSL shall issue absent certification for files with specific and articulable facts giving reason to believe information sought will pertain to a terrorist or a spy.
- The House bill will effectively be a return to the pre-Patriot days—significant operational difficulties.

Third, both bills would amend the judicial review provisions for the nondisclosure requirement, leaving intact the review provisions for the NSL itself

- Currently, recipient must challenge. A high-ranking official must certify that one of the enumerated harms (e.g., to national security, an investigation, or to a person) may occur. Judge required to defer to this judgment absent bad faith.
- Senate bill—recipient gives notice to the government, government files for an order. Bill requires a certification from high-ranking official that one of the delineated harms may occur. Judge must give this certification substantial weight. Then shall enter the nondisclosure order if makes such a finding.

- House bill requires certification supported by specific and articulable facts. There is no deference required to the judgment of the Executive branch official.
- The government has historically argued that some measure of deference must be accorded. [That said, the process aspects are similar to what the Second Circuit imposed in 2008 through a panel decision—one that was not taken en banc and no Supreme Court review sought.]

Fourth, both bills would impose minimization procedures regarding the acquisition, retention, and dissemination of information obtained through NSLs.

- Minimization historically applied to things like full-content surveillance or search warrants, given the privacy interests at stake. Over time, a movement to impose statutory minimization requirements—in 2006, it was with respect to business records. This year, with respect to pen registers and NSLs.
- Currently, there are no statutory requirements. However, after IG reports, FBI done a good deal of thinking about how to treat NSL information—regarding overcollection and stale information. That said, NSLs tend to provide the classic dots to be connected—a phone number that seems like the pizza delivery guy this time suddenly becomes relevant when it turns out the next cell just happens to use the same delivery service.
- Interesting to see what the government will say about these procedures—historically been loathe to destroy information it has

Civil Immunity for Electronic Communications Services Providers

- Added to FISA as part of the FISA Amendments Act of 2008, after a good deal of discussion
- Designed to offer retroactive immunity to companies that had assisted the government with a good faith basis that their actions were legal
- Numerous companies facing difficult civil litigation
- As was explained throughout the process, the government depends upon the assistance of third parties, and it seems inherently unfair to then leave those companies subject to law suits. It will also have a chilling effect going forward.
- Not carte blanche for the companies -- Need a certification from the AG to this effect--A court then reviews the certification
- limited to the period between September 11 and January 2007; in cases without a court order, needs to be activities that were done pursuant to a written directive from the AG (or comparable official) indicating that the activities were authorized by the President and were lawful.
- Some want to roll back the immunity and simply let the cases proceed; others would substitute the government for the private parties. Both have raised concerns about disclosure of information and the fairness point.

Question 12(e)

Judge John Roberts appears before the Senate Judiciary Committee during his confirmation hearings in September 2005.

W. BUSH'S JUDICIAL LEGACY

by SHELDON GOLDMAN, SARA SCHIAVONI, and ELLIOT SLOTNICK



DEANIS BRACK

MISSION ACCOMPLISHED

George W. Bush's legacy includes the appointment of like-minded Supreme Court justices and lower court judges selected by a process structured to achieve that result.

George W. Bush left the White House on January 20, 2009, with an overall legacy that is sure to be debated for some time. That legacy includes the worst financial crisis since the Great Depression, a country at war on two fronts, a crushing deficit, and much unfinished business on the domestic policy front ranging from health care to tax policy. He left office with Democrat Barack Obama winning the White House in the 2008 presidential election with a decisive electoral college and popular vote margin, in marked contrast to the elections of 2000 and 2004 and with Democrats firmly in control of both houses of Congress. He left office with a presidential approval rating that, according to a CBS tracking poll, was the lowest of any president since polling began.¹ Yet, George W. Bush left a judicial legacy that even his political opponents concede has had a major impact in the reshaping of the federal judiciary. Indeed, as we suggest here, his judicial legacy may well be Bush's most enduring accomplishment.

The last two years of the Bush presidency were different than his first six years. The congressional elections of 2006 saw the Republicans lose control of both houses of Congress. Ongoing crises both international and domes-

tic no doubt took their toll on the President's ability to pursue his agenda. Democratic control of the Senate, although by a slim margin, meant that it would be harder for the President to

gain confirmation of his judicial nominees, especially those perceived by Democrats and liberal interest groups as too ideologically committed to an activist conservative agenda.

Nevertheless, when the last two years of the Bush presidency were over, 58 of the 79 nominees to the federal district courts and 10 of the 22 nominees to the appeals courts of general jurisdiction submitted to the 110th Congress were confirmed by the Senate. In percentages, 73 percent of the district court nominees and 46 percent of the appeals court nominees were confirmed. This was

The authors would like to thank the dedicated staffs of Senators Patrick Leahy and Arlen Specter at the Senate Judiciary Committee. We deeply appreciate their taking the time to speak with us. In addition, members of the Bush administration, and several people outside government gave generously of their time and offered valuable help. We are especially thankful to Nan Aron, Elisebeth Cook, Curt Levey, Nicholas Rossi, Kate Tordt, and Jay Sekulow. Thanks are due to Dustin Koenig for transcribing the interviews. Errors of fact and interpretation are solely the responsibility of the authors.

1. See <http://latimesblogs.latimes.com/presidentbush/polls/viewed> May 2, 2009.

a confirmation rate that modestly exceeded the historic low rates during Clinton's last two years in office (also with an opposition controlled Congress).²

This article continues the story of W. Bush's judicial appointments, a story that follows the format of previous articles in our biennial accounting of judicial selection during each previously completed Congress.³ We pay particular attention to the demographic portrait of the Bush appointees to the lower federal courts and appointment and confirmation processes during Bush's last two years in office (that is, during the life of the 110th Congress). We also consider the broader question of Bush's judicial legacy.

Our sources of data include personal interviews with officials in the White House, Department of Justice, and the Senate who played a role in either the nomination or confirmation process (or both) and interest group observers who ranged across the ideological spectrum. For the demographic data on the appointees, we relied on the questionnaires that judicial nominees complete for the Senate Judiciary Committee. Other sources of demographic or background data include newspaper articles and biographical directories.⁴ Data on political party affiliation or preference was collected not only from the just mentioned sources but in some instances from the Registrar

of Voters or Boards of Elections for the counties in which the appointees maintained their primary residence.

We first examine the selection process, particularly during the President's last two years in office, followed by a consideration of the confirmation process during this period of divided government. Subsequent sections consider the demographic portrait of the last two years' appointees to the district and appeals courts compared to the appointees from the first six years; a comparison of the nontraditional to the traditional appointees; and then a comparison of the demographic profile of the entire cohort of Bush appointees for each of those courts compared to the demographic profiles of the judiciaries of Bush's four immediate predecessors. We conclude with a summary assessment of Bush's judicial legacy followed by our take on what we can expect from the Obama presidency.

The politics of selection

While the politics surrounding judicial selection and confirmation during the final two years of the W. Bush presidency were not without interest, for a number of reasons it would be fair to say that the excitement, drama, and attention by the American public and the media waned significantly from the previous six years. This was the case for a number of inter-related and quite understandable reasons.

Some of these were historical and institutional in nature. First, any lame duck president is unlikely to enjoy the cache to press forward with large numbers of nominees when the Senate is controlled by the opposition party hopeful of winning the presidency in the upcoming election and enjoying its judicial spoils.

Indeed, under the ill-defined "Thurmond Rule" (discussed below), so named for the South Carolina Senator who is said to have originated the norm when he was ranking minority member of the Senate's Judiciary

Committee, there comes a time in a presidency, which has generally fallen at an undetermined date in the late Spring or early Summer, prior to a national election, when the curtain comes down on Judiciary Committee processing of presidential nominees and all judicial vacancies remain open for the next occupant of the White House to fill. Beyond such historical and institutional reasons for a restrained pace of advice and consent in a lame duck presidency there are a number of circumstances somewhat unique to the context in which the W. Bush administration found itself in its last two years that created an especially challenging judicial selection environment.

For one, the administration had enjoyed extraordinary success in nominating and seating two strong conservative courts of appeals judges to the Supreme Court vacancies created by the death of Chief Justice Rehnquist and the retirement of Justice O'Connor. The relatively swift and smooth confirmation processes enjoyed by John Roberts and Samuel Alito were major triumphs for the W. Bush presidency and, despite the misstep of the ill-fated nomination of Harriet Miers, when all was said and done, the President's political base had gotten all, perhaps more, than they could have hoped for. Successfully appointing Chief Justice Roberts and Justice Alito, in short, energized the conservative Republican base and appeared to be such striking selection successes that, almost by definition, they would be difficult if not impossible acts to follow in the President's last two years in office, particularly absent a third opportunity to seat a justice on the Supreme Court.

Relatedly, the President had also enjoyed extraordinary success in seeing numerous prominent conservatives, many with a strong Federalist Society pedigree, successfully seated on the U.S. courts of appeals. Indeed, throughout the W. Bush presidency, while a good deal of

2. The figures for Clinton's last two years were 57 of 83 district court nominees (68.7%) and 15 of 32 (46.9%) appeals court nominees confirmed.

3. An accounting of the W. Bush administration's selection of judges and the accompanying confirmation politics during the three previous sessions of Congress is recounted in Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Cary Zuk, and Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?* 86 JUDICATURE 282 (2003); Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244 (2005); and Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *Picking Judges in a Time of Turmoil: W. Bush's Judiciary during the 109th Congress*, 90 JUDICATURE 252 (2007).

4. See THE AMERICAN BENCH, WHO'S WHO (national and regional editions), MARTINDALE-HUBELL LAW DIRECTORY, and THE JUDICIAL STAFF DIRECTORY.

political gain could be made by highlighting the relatively few appellate nominees who could not get confirmed, with the Democrats being accused of utilizing unprecedented obstruction and delay tactics, the reality is that a veritable all-star team of conservative judges with strong appeal to the Republican base had been seated on the appellate bench during the first six years of the W. Bush presidency.

Among the many examples are Janice Rogers Brown, Jay Bybee, Brett Kavanaugh, Michael McConnell, Priscilla Owen, Jeffrey Sutton, and William Pryor. In the wake of such an impressive roster, only partially documented here, it is little wonder that the selection momentum would slow down in the administration's lame duck period that corresponded, as well, to a relatively low judicial vacancy rate and a selection pool that, perhaps, was not as wide and deep as that available earlier in the W. Bush presidency.

Additional political and institutional factors also played a significant part in ratcheting down the pace and expectations for judicial selection politics in the 110th Congress. The Democratic majority controlling the Senate was now relatively consolidated and strong and Patrick Leahy, the Judiciary Committee Chair, found in ranking minority committee member Arlen Specter an arguably more congenial "leader of the opposition" than had existed for several years in the Leahy-Orrin Hatch pairing.

Indeed, there had been several storms and dramas in the earlier W. Bush years, such as debates over the propriety of Democratic filibustering of judicial nominees, the appropriateness of Republicans resorting to the "nuclear option" as a mechanism to break any filibusters with a "simple" majority, instead of the required 60 votes for attaining cloture, and the pivotal role of the bipartisan "Gang of Fourteen." The "Gang" was composed of seven nominally moderate Democrats and seven like-minded Republicans whose agreement led to the survival of the filibuster power while also seating a number of con-

servative W. Bush nominees. This was accomplished while bypassing the Senate leadership in an effort to keep the institution from, literally, shutting down. Such events now seem from a distant past, with limited relevance for the judicial selection processes that were played out in the altered context of the 110th Congress.

All of these observations and related concerns were the subjects of our intensive field interviews conducted in early December, 2008, and January 2009, with key judicial selection participants in the W. Bush White House Counsel's office, the Justice Department's Office of Legal Policy, Senate Judiciary Committee staff, and interest group advocates both supportive and critical of the administration's judicial selection behavior. While the multiple perspectives shared with us ran a wide spectrum, we think the weight of the documentation provided well sustains our analysis and conclusions.

The selection process

The central role judicial appointments played in the administration's domestic policy agenda must be highlighted as the judicial selection processes put in place at the outset of W. Bush's tenure were structured to achieve a lasting legacy on the federal bench. Despite the above mentioned events of the past two years, what did not change was this administration's continued focus on their overarching goal of staffing the federal bench with judges, "who would faithfully interpret the Constitution... and not use the courts to invent laws or dictate social policy." This was patently obvious from our conversations with individuals inside the administration—their message was clear. As Assistant Attorney General Beth Cook noted, "it has been business as usual... judicial nominations have continued to be a priority for this President, we have maintained the same standards and approach to judicial selection and confirmation."⁶

The fundamental structures and processes by which judicial nominees were selected remained remarkably stable across the eight years W. Bush was in office. Judicial selection activ-

ity was centered in two different locales, the Department of Justice's Office of Legal Policy (OLP) and the White House Counsel's office.

However, the majority of the actors changed as the Justice Department encountered higher than usual turnover just prior to and shortly after Attorney General Alberto Gonzales resigned mid-way through 2007. Former district court judge Michael Mukasey was nominated and subsequently confirmed as his replacement, and shortly thereafter former Deputy Beth Cook assumed the responsibilities of Rachel Brand as Assistant Attorney General, Office of Legal Policy.⁷ Cook confirmed her predecessor's description of the division of labor between the OLP and White House, "Selection is an area where we work together very closely.... OLP does continue to have the day-to-day responsibilities for specific vets and background, but... it's an area where we make sure the White House is up-to-date." When consultation with home state senators is necessary, "the White House is in the lead." Subsequent confirmation "is a collaborative effort." When asked directly about who takes the initiative in seeking out nominees, Cook reiterated that, "the consultation process has been run out of the White House, and as far as I know that's been the case throughout this administration."

The internal advisory group at the heart of judicial selection starting with the Reagan presidency and continuing during the Bush years was

5. George W. Bush, *President Bush Discusses Judicial Accomplishments and Judicial Philosophy*. Speech given at the Hilton Cincinnati Netherland Plaza, Cincinnati, OH, October 6, 2008.

6. Interview with Beth Cook, December 15, 2008. This citation and all undocumented citations throughout the remainder of this article are taken from extensive field interviews conducted in December, 2008 and January 2009 in Washington and/or in telephone interviews conducted after our return from the field. In some instances, as per our agreement when granted an interview, the names of our sources will not be included in the citation. We have, however, included an accurate characterization of the judicial selection involvement of all interviewees whether they are identified by name or not.

7. Mukasey is the first federal court judge to serve in the position since Griffin Boyett Bell served as President Carter's Attorney General.



Bush appointee Priscilla Owen (Fifth Circuit Court of Appeals).

the Judicial Selection Committee, a joint enterprise between the White House and Justice Department. Echoing her previous sentiment that there has been no diminution to the attention paid to judicial selection, Assistant Attorney General Cook affirmed, "The Judicial Selection Committee... has continued to exist throughout the end of this President's time for background and review... It's a regularly scheduled meeting, and it does meet as needed."

When asked about the specific participants on the committee, Cook, similar to her predecessors, described the players, though not in great detail, "It's the same as it has been throughout the Administration, which is those individuals with a voice in the process, and with equity in the process are at the table. It is the Attorney General and the White House Counsel who are the primary participants of the Judicial Selection Committee." Rumors to the contrary, Associate White House Counsel Kate Todd reiterated that it's, "Only government folks, not third parties in those meetings."

The third parties Todd evoked include the so-called "four horsemen"—Jay Sekulow of the American Center for Law and Justice (ACLJ), Leonard Leo of the Federalist Society, C. Boyden Gray, former White House Counsel to President H.W. Bush and former head of the Committee for Justice, and Edwin Meese, III, Attor-

ney General during the Reagan years and now at the Heritage Foundation. These actors were a guiding force for the judicial selection processes in the W. Bush White House.

While reaffirming their participation, Sekulow offered a glimpse at the level of presidential involvement even at this late stage of the game. "At the end of the day, these were his picks. The President makes his selection and then we were kind of outside counsel, if you will, shepherding them through. But it was really handled internally, inside the White House." When specifically asked about how involved the President was, Sekulow responded, "Very.... He was in the loop the entire way through. He took it very seriously." It even appears that the President was quite active in the selection not only of Supreme Court nominees but of circuit court judges as well. Jay Sekulow confirmed, "Yes, absolutely. He relied on his staff for information and expertise, but yes." Clearly W. Bush's continued involvement in the selection of judges for the courts of appeals, even after the successful confirmations of Roberts and Alito, demonstrated his full commitment to the selection of like-minded jurists.

Winding down

Throughout our examination of the selection processes during Bush's tenure, a few issues persisted year after year—questions surrounding consultation with senators and renomination of controversial nominees—but these seemed to lose import as the curtain fell on the Bush administration's time in office. The thrust of our most recent interviews centered around the question of how the winding down of W. Bush's term impacted the judicial selection process during the 110th Congress, both in terms of the quality of the nominees and the continued commitment of the administration. This, of course, depends somewhat on the vantage point from which the selection process is viewed.

Summarizing the administration's position, Beth Cook argued,

It's absolutely our experience that we have sought quality candidates, that we have maintained the same positions in what this President is looking for, in terms of judicial philosophy and in terms of the caliber of potential nominees. The process of consultation and the importance of consultation have also been the same throughout the administration. So from our perspective certainly nothing has changed. I don't think we've seen a ratcheting down. Certainly folks within the administration continued to approach the issue of nominations and confirmations with equal levels of commitment and enthusiasm. This remains a priority.

Reaffirming this sentiment, Jay Sekulow, when asked if he saw a change in the types of nominees put forth in the last two years, responded, "No, this President was very consistent in the way he viewed the judicial philosophies of the people he was trying to get confirmed. He never wavered from that commitment."

Not all of the participants saw the administration's actions in such absolutist terms. Intimating that recognition of the changed political context did alter how the administration approached judicial selection and the resulting nominees, Curt Levey, Executive Director of the conservative Committee for Justice, opined,

Maybe there was a slight diminution in the quality of the nominees, but that could have been for a lot of reasons. It could have been you've already appointed the best people. It could be that his popularity sunk so low that he had very little leverage.... I'm not sure he ever had leverage with the Democratic senators, but much of the ballgame from our perspective is energizing the Republican senators.... It could have to do with the fact that, after you see your nominees get demonized, it makes you a little shy. If you're asking me, do I think every nominee was great, no. But I think you have to be realistic. And I think given the roadblocks that he faced, both in terms of ideological opposition and in having to work with [certain] senators.... at least to some degree, I really can't find a lot to criticize.

Further, as Levey's comments underscore, any changes in the kind of nominees the administration put

forward during this period reflected different political imperatives than had been in play at the beginning of the administration nearly eight years earlier. "I know a lot of people in the base are not happy with him having nominated Gregory and Parker. A lot of people still criticize that. I think it was a good try. It didn't work and the Democrats gave nothing in return." This reference is, of course, to judges who were Democrats that President Bush nominated to the circuit courts, as part of his first set of nominees, perhaps as an "olive branch" to the opposition.

In perhaps the most pragmatic assessment of how the political landscape impacted the selection process in the 110th Congress, Jay Sekulow acknowledged, "The President had a specific judicial philosophy he was looking for in his nominees, which is his prerogative according to the Constitution.... I think you have to be realistic. When the Senate leadership changed, it changed the equation." For the administration's harshest critics, however, such as Nan Aron, President and founder of the liberal Alliance for Justice, this was a simple matter:

What we saw was typical of the last two years of an administration—a president who is weaker, has less support, can no longer claim a mandate... a tired Republican army, and excitement about Democratic candidates—so a whole number of factors created a tempered political environment for the Republicans. What you also see at the end of an administration is the pushing of the bottom of the barrel. Those nominees at the bottom of the barrel, those who have no support from senators, and those are always the most problematic.

Even though the administration denied they altered their selection processes over the last two years, there is some evidence to the contrary. At the end of the 109th Congress there were a number of controversial courts of appeals nominations languishing in the Senate Judiciary Committee, and the pattern in prior congressional sessions had been for the administration to simply renominate them. However, W. Bush did not

push forward with renomination and in fact withdrew the names of four ideologically extreme nominees in January, 2007.

Staff members of senators on the Judiciary Committee, both Democratic and Republican, acknowledged this attempt to "ratchet down the controversy" surrounding judicial selection. A senior staffer on the Democratic side commented, "We could sense a change, they sort of saw the time winding down, and finally came around to, 'let's start working out some deals.'... They pulled a very controversial nominee in Virginia for the Fourth Circuit that both Webb and Warner opposed... and put in somebody they could confirm." Aides to senators on the other side of the aisle concurred. "We certainly saw, like the Helene White situation, where there was more of an effort to compromise and try to work out some deals. But I think overall, Bush was realistic in a lot of ways trying to nominate people—if you had two Democratic home-state senators, often trying to work with those senators."

However, there remains some disagreement over who should get the most credit for lowering the temperature and, indeed, some believe the closer working relationship between Specter and Leahy made a real difference. Democratic staffers opined,

There was, in the last two years, I thought, less fighting and skirmishing about judicial nominations and much more... working together, solving problems, salving old wounds... not with the administration, with the minority in the Senate. I thought we ended on a different note and actually had done a good job of ratcheting down the conflicts and ratcheting up cooperation, and it shows in the successes over the period of [these last two] years.

Regardless of whether or not one views the last two years of the Bush administration through the lens of divided government, or where one lies on the continuum of evaluating the most recent nominees, the outcome is essentially the same—Bush was able to fulfill his electoral promises of filling the federal bench with ideologically similar jurists. Curt

Levey characterized W. Bush's successes as even more impressive than Reagan's given the context in which Bush labored.

He may not have equaled the total numbers of a Reagan. But Reagan had, except for his Supreme Court nomination [of Robert Bork], no opposition, whereas Bush had tremendous opposition. So if you are going to factor that in, one could argue that he has been the most effective president on judicial nominations in, certainly, the last fifty years.

When asked if she viewed judicial selection as one of the major accomplishments of the administration, Assistant Attorney General Cook replied,

Yes, absolutely. Speaking for myself, it's been a privilege to work for this President on this issue. I think his record has been outstanding. I think he came in saying he was looking for folks with a particular judicial philosophy and approach to judging... and I think he's done a remarkable job... I think the President is rightfully proud of his record.

Clearly he is—in a speech to the Federalist Society on the eve of the 2008 election he was quite reflective as he described his judicial legacy.

The lesson should be clear to every American: Judges matter. And that means the selection of good judges should be a priority for us all.... I made a promise to the American people during the campaign that if I was fortunate enough to be elected, my administration would seek out judicial nominees... who would faithfully interpret the Constitution... And with your support, we have kept that pledge. I have appointed more than one-third of all the judges now sitting on the federal bench, and these men and women are jurists of the highest caliber, with an abiding belief in the sanctity of our Constitution.⁸

Confirmation processes and politics

Perhaps the initial focal point for discussion of the W. Bush administration's confirmation record is the distinction that might be drawn between the overall success enjoyed by Bush, based largely on a record

8. *Supra* n. 5.

developed during his first six years in office, and allegations of diminished success during the 110th Congress. For its part, the administration argued forcefully that its diminished confirmation success was primarily a consequence of the imposition of the so-called Thurmond Rule by the majority Democrats. According to Beth Cook, "We're proud of the work that has been done. I think the President is rightfully proud of the quality of the nominees that he has continued to send up. Do we believe that each one of them should have gotten a hearing, should have gotten an up or down vote? Absolutely."

In Cook's view, much as had been argued during the final year in the Clinton Administration before it, nominees were not being moved even in instances where the constellation of confirmation considerations were aligned in their favor.

In the beginning of 2007, if you looked at the criteria that were set forth for nominees that should move, nominees with strong state support, ABA well qualified ratings, people who met all of the criteria for what Senator Leahy said would move, Bob Conrad comes immediately to mind, I don't think it's surprising to anyone that we're disappointed that extremely well qualified folks like that didn't even get a hearing.

A similar view was held by Nicholas Rossi, Chief Counsel to ranking Judiciary Committee minority member Arlen Specter.

Though the vacancy rates are relatively low, and when folks look back at this in terms of historical perspective, the difference of four or five seats may not be the kind of thing that folks view with as much ire as we do in the moment—particularly when we know of specific candidates who have been passed over, it's tough not to personalize the argument. When you have someone like Peter Keister, the candidate for a seat on the DC Circuit, someone like Glen Conrad, a consensus pick of Senators Warner and Webb, and he couldn't get a hearing, it's hard for us to say we're not disappointed.

In Rossi's view, Judiciary Committee Chairman Patrick Leahy's interpretation of the Thurmond Rule, one with which he took issue, added to the dif-

Notable Bush appointees

Among the 68 federal judges confirmed by the Senate of the 110th Congress were a number of individuals with outstanding credentials, of which a sampling is presented here. All of those profiled unanimously received the "Well Qualified" rating by the Standing Committee on the Federal Judiciary of the American Bar Association.

G. Steven Agee, born in Roanoke, Virginia, received his undergraduate education at Bridgewater College in Virginia and his legal training at the University of Virginia. From 1977 to 2000 he was in private practice and from 1982-1994 he served in the Virginia House of Delegates. He was very active in Republican politics. In 1993 he was unsuccessful in his bid for the Republican nomination for state attorney general. From 2001-2003 he served on the Virginia state court of appeals and in 2003 he was elected to the Supreme Court of Virginia for a 12-year term. He was nominated on March 13, 2008, for a seat on the U. S. Court of Appeals for the Fourth Circuit, and was confirmed unanimously May 20.



Sharon Aycock has the distinction of being the first woman named to a federal district court judgeship in Mississippi. Judge Aycock was born in Tupelo, Mississippi, graduated from Mississippi State University (undergraduate) and Mississippi College School of Law where she was co-editor-in-chief of the law review. From 1984-1992 she served as prosecuting attorney for Itawamba County. She was active in the Mississippi bar, serving as Mississippi Bar Foundation President during 2000-

2001. In 2003, she began service as a state judge, the post she held when nominated on March 19, 2007, for a federal district judgeship for the Northern District of Mississippi. She was confirmed unanimously October 4. Judge Aycock had not been active politically and has been a political independent.



Phillip A. Brimmer, born in Rawlins, Wyoming, received his undergraduate education at Harvard and his legal training at Yale. Upon graduation, he clerked for federal district judge Zita L. Weinshienk for 18 months. He practiced law in the private sector until he began work in 1994 in the Denver District Attorney's office where he rose through the ranks to become Chief Deputy District Attorney. In 2001, he joined the U.S. Attorney's office and served as an assistant U.S. Attorney until his confirmation as a

federal district court judge for the District of Colorado. Although a Republican, Judge Brimmer was not active in politics. His father is Wyoming federal district court judge Clarence A. Brimmer, now on senior status.

Timothy D. DeGiusti, born in Oklahoma City, was educated at the University of Oklahoma (both undergraduate and law school). After graduating from law school in 1988, he entered private practice, from which he took three years off to serve as an Army prosecutor in the Judge Advocate General's Corps. At the time of his nomination to the federal district bench for the Western District of Oklahoma, Judge DeGiusti was a partner in a small law firm he helped found seven years earlier. He was nominated and confirmed in 2007, the same year he was listed in *Best Lawyers in America*. Although a Republican, he was not politically active.



Philip S. Gutierrez was born in Los Angeles, did his undergraduate work at Notre Dame, and then received his legal education at UCLA. He was in private practice for 11 years before joining the Los Angeles Superior Court in 1997. He was first nominated to a position on the U.S. District Court for the Central District of California on April 24, 2006, but his nomination was delayed in the partisan wrangling over judgeships that year, although he did have a hearing

the following August and was favorably reported out of committee in September. He was renominated on January 9, 2007, favorably reported out of committee on January 25, and unanimously confirmed on January 30. Although a Republican, Judge Gutierrez was not actively involved in politics.



Thomas Michael Hardiman was born in Winchester, Massachusetts. He received his undergraduate education at Notre Dame and his law school education at Georgetown. He was in private practice and also active in Pennsylvania Republican politics when tapped in 2003 by George W. Bush for the United States District Court for the Western District of Pennsylvania. He was elevated to the United States Court of Appeals for the Third Circuit in 2007

following his unanimous confirmation by the Senate.

Richard A. Jones, born in Seattle, received his undergraduate education at Seattle University and his legal education at the University of Washington School of Law. He served as a King County prosecuting attorney for three years. He later served as an assistant U.S. Attorney for about six years before joining the King County Superior Court bench in 1994. On March 19, 2007, he was nominated for the federal district bench for the Western District of Washington. He was confirmed unanimously the following October. A political independent, Judge Jones had not been active in politics.

difficulties in moving circuit nominees in the 110th Congress.

Rossi continued,

Our position was that the Thurmond Rule was more myth than reality.... And as far as it went, it should not have limited some of the consensus nominees that were teed up towards the latter half of this session.... Certainly Senator Leahy maintained that he was being faithful to the rule in insisting upon consensus not only by the home state senators and the ranking member and Chair of the Judiciary Committee, but also by the minority leader and the majority leader.... At the end of the day, I suspect that Senator Leahy may suggest that the reason more circuit nominees were not moved has to do with the Thurmond Rule and the fact that winning the approval of the majority leader in a tight election year was not likely to happen.

Rossi also anticipated and disputed the notion that the reason for the President's diminished success could be traced to the amount of time and resources spent seeking confirmation of difficult, sometimes unconfirmable nominees instead of seeking to augment its sheer numbers. "They will point to our efforts on Southwick and others as things that slowed the process. They'll say, 'well, had you not spent so much time on him, we maybe could have gotten three or four more done.' We don't accept that argument, but it's one that they will likely make."

True to Rossi's prediction, senior staff members of Democratic senators on the Judiciary Committee indicated their satisfaction with what had been accomplished in the 110th Congress while also noting that those accomplishments could have been greater if the administration had taken a different approach.

According to one such staffer, "It was weird because they knew what time of the year it was. They know how we work.... Even if we wanted to send everybody over, they were getting them to us after the August recess. They were trying to run up the numbers on those we hadn't confirmed as opposed to a real effort to work together and get them through." Another aide added that, "there was a time very early in the

year when the Chairman even said publicly, 'Look, this is the time. Let's get together....' So while we made significant progress, did we accomplish everything we could have working together? No. We all could have done a better job."

The long view

Importantly, the broader the lens focused on assessing the administration's appointment record across its eight years in office, the more impressive the characterization of its accomplishments. According to Nan Aron, W. Bush, "cemented the modern day revolution started by Reagan to pack the courts with judges who seek less government intervention in the lives of ordinary people.... To some extent he helped fulfill a dream of Ronald Reagan's which was to leave behind a federal bench packed with like-minded judges."

Also taking the long view, Jay Sekulow was effusive in his assessment.

Concerning the overall...eight year period, from my philosophical position it's hard to be anything but enthusiastic about Roberts and Alito.... I think he [President Bush] has had a lasting mark on the Supreme Court.... The same is true for some of the appellate courts.... Knowing who the nominees are, most of them are young. They'll be around for a long time.... You take a look at people like Janice Rogers Brown, Bill Pryor, Priscilla Owen, these are very bright intellects. They're very good judges and they are going to be leaders. So I think it is going to be a long-term legacy. When the President is eighty five, judges like Bill Pryor will be in their sixties. So they're going to be around a long time.

Nicholas Rossi offered a very similar assessment.

He'll actually be viewed as relatively successful over the eight years.... You can't underestimate the importance of being able to place two Supreme Court nominees on the Court and, too, whether you're supportive of them or not, two very qualified nominees.... I think beyond the numbers, when you look at his imprint on the judiciary, I think he'll be seen as successful in appointing the kind of judges he wanted to appoint, and reasonably successful in having them processed, even with the opposition party controlling the Senate the last two years.

C. Darnell Jones II was born in Claremore, Oklahoma, received his undergraduate education at Southwestern College, and his legal training at American University. He settled in Philadelphia following graduation from law school and worked as a public defender for 12 years before becoming a judge on the Philadelphia Court of Common Pleas. In 2007, he was an unsuccessful candidate for the Democratic Party nomination for Justice on the Pennsylvania Supreme Court. On July 24, 2008, he was nominated for a seat on the federal district court bench for the Eastern District of Pennsylvania. The following September 26 he was confirmed unanimously.

KIRK SHEPHERD PHOTOGRAPHY, CHICAGO, IL



Frederick J. Kapala was born in Rockford, Illinois. He went to Marquette University and then received his legal education at the University of Illinois. For about one year he served as an assistant state's attorney before entering private practice for about five years. In 1982, he embarked upon a judicial career, serving on various state courts. He was an Illinois appellate court judge when he was nominated to the federal district bench for the Northern District of Illinois on December 5, 2006. He was renominated in 2007, and confirmed unanimously on May 8, 2007. Prior to his judicial career, he was involved in Republican politics.



Stephan N. Limbaugh, Jr., son of now retired federal district judge Stephen N. Limbaugh Sr. and cousin to Rush Limbaugh, was born in Cape Girardeau, Missouri, which is still his home. He earned both his undergraduate and law school degrees at Southern Methodist University. Upon graduation, he did a four-year stint as a prosecutor. His career as a judge began in 1987 with service as a state circuit judge and placement on the Supreme Court of Missouri in 1992, the post he occupied

when named to the federal district court for the Eastern District of Missouri on December 6, 2007. He was confirmed unanimously the following June 10. Prior to his judicial career he was active in Republican politics, including serving as an alternate delegate to the Republican National Convention in 1984.

Debra Ann Livingston was named to the U.S. Court of Appeals for the Second Circuit, coming to the bench from serving as a law professor at the Columbia University School of Law. Judge Livingston was born in Waycross, Georgia, did her undergraduate work at Princeton University, and her law school training at Harvard where she was an editor of the law review. After completing law school she clerked for federal appeals court judge J. Edward Lumbard in 1984-1985. She had prosecutorial experience as an assistant U.S. Attorney for the Southern District of New York from 1987-1994 before joining the faculty at Columbia. Although a registered Republican, she was not active in politics. On June 28, 2006, she was nominated for a seat on the Second Circuit. She was renominated in 2007, and confirmed unanimously on May 9.

Kiyo A. Matsumoto was born in Raleigh, North Carolina. She earned her undergraduate degree from Georgetown and her law degree from the University of California at Berkeley. From 1983 to 2000 she was an assistant U.S. Attorney. In 2004, she was appointed a U.S. Magistrate Judge, the position she held when nominated to the federal district bench for the Eastern District of New York on March 11, 2008. She was confirmed unanimously on July 16. Although a registered Democrat and Democratic Senator Schumer's candidate, Judge Matsumoto had no history of political activity.

John A. Mendez was born in Oakland, California, and graduated from Stanford University and Harvard Law School. His wide-ranging legal experience included a two-year stint as an assistant U.S. Attorney from 1984-1986 and serving as U.S. Attorney from August 1992 until July 1993. In June of 2001 his judicial career began with his placement as a Superior Court judge in Sacramento County, the post he held when named to the federal district court bench for the Eastern District of California on September 6, 2007. He was confirmed unanimously the following April 10. Judge Mendez is not affiliated with any political party and has no history of party activity.

Reed Charles O'Connor comes from Texas (he was born in Houston). He received his undergraduate education at the University of Houston and his legal training at South Texas College of Law. Before his nomination to the federal district court for the Northern District of Texas in 2007, he was a career prosecutor. He served as an assistant district attorney for Tarrant County from 1994-1998 and then became an assistant U.S. Attorney, the position he held when nominated to the federal bench. At the time of his nomination he was on assignment to the Subcommittee on Immigration, Border Security, and Citizenship, working closely with Republican Texas Senator John Cornyn for the previous almost two and one-half years. A Republican, Judge O'Connor had not been active in politics.

Mary Stenson Scriven was born in Atlanta, Georgia, received her undergraduate education at Duke, and her legal training at Florida State. After graduation she was in private practice for 10 years before becoming a U.S. Magistrate in 1997, the post she held when named to the Middle District of Florida. She was nominated on July 10, 2008, and was confirmed unanimously on September 26. Active in the Federal Magistrate Judges Association, she was slated to become President-Elect for 2008-2009. A Democrat, she did not have a history of prominent partisan activism, although she served as a legislative assistant to the House Majority Office in the Florida House of Representatives in 1985-1986.



Cathy Seibel was born in West Islip, New York. She did her undergraduate work at Princeton and received her legal education at Fordham University where she was editor-in-chief of the law review. Upon graduating law school, she was a law clerk for federal district judge Joseph M. Laughlin. In 1987, she became an Assistant U.S. Attorney, and held the post of First Assistant United States Attorney when nominated for the Southern District of New York on March 11, 2008. She was

Successes and failures

Indeed, one might even argue that the administration had its fair share of unanticipated successes, even during its weakest confirmation context, the last two years corresponding to the 110th Congress. Specifically, three interesting events during this period warrant exploration in greater detail. These are the late term confirmations of 10 district court judges on September 26, 2008, well after the Thurmond Rule would have been invoked, regardless of whose definition of the day for its implementation was utilized; the seating of an extremely controversial nominee, Leslie Southwick, on the U.S. Court of Appeals for the 5th Circuit, while strong allegations of racism swirled around him; and the successful ending of the struggle over the filling of circuit court judgeships on the U.S. Court of Appeals for the 6th Circuit, a controversy that spanned the better part of the two term presidencies of Bill Clinton and George W. Bush.

Regarding the seating of 10 district court nominees in late September, on the cusp of a presidential election that the Democrats were favored to win, a senior aide to a senior Democrat on the Judiciary Committee volunteered that, "There was flak from our own party to move anybody at that time when the thinking is, 'shut this down, you've already done...more than the Republicans did.' We had done at that point 158; the Republicans had done 159 for Bush so we ended up doing ten more."

Not happy with what could be perceived as the Democrats giving more to the Republicans than was necessary under the circumstances, a spokesperson for a liberal interest group with a long history of activity in judicial selection politics was critical of Senator Leahy for what was characterized as somewhat self-serving behavior:

This is a man who sees himself as ... a great hero to both sides of an issue.... He talks about how many judges he had confirmed.... 'Now be nice to me, Republicans, because I have been nice to you.' I think he probably saw a real chance for Obama to win the election, and, therefore, he'd be owed thanks

from the Republicans. Fat chance.

On the other side of the political spectrum, considerably less surprise was expressed about the 10 late term confirmations and, as well, they were afforded considerably less significance. Jay Sekulow simply commented, "I think it was the right thing to do to get them through.... No one pays, or very few people pay attention [to the district courts], certainly nowhere near the level of appellate [courts] or the Supreme Court." The Committee for Justice's Curt Levey elaborated further:

Leahy, I think, only wanted to let a few through, and I think McConnell played a bit of hardball. But Leahy never put up a big fight.... The Democrats didn't put up a big fight against the district court judges. That was basically their strategy. Run up the numbers with the district court judges and then fight on the more conservative circuit court nominees. So I certainly don't remember being surprised; if anything, I thought maybe we'd get a couple of more after that.

A similar view was held by the administration. Assistant Attorney General Cook noted, "I think they went five or six months without having a circuit court hearing, the last circuit hearing was in June.... I wouldn't call it a surprise. There were, at that point, forty-some nominees who were waiting for a hearing.... So the fact that they were still working in September I don't think was a surprise." Associate White House Counsel Kate Todd agreed. "I don't think it's a surprise. It's a disappointment that there weren't more." Finally, as an aide to a senior Republican member of the Judiciary Committee noted of the ten, "Some of them were ones that had Senator Hatch's strong support...and in some cases there were agreements between home-state senators. So in that respect, it wasn't that surprising."

The Southwick confirmation

Perhaps in need of greater explanation was the successful confirmation of Leslie Southwick to the 5th Circuit approximately one year prior to the presidential election, despite substantial opposition. Explaining

confirmed unanimously on July 22. A political independent with no history of party activity, Judge Seibel was recommended to the Bush Administration by Democratic New York Senator Charles Schumer.



G. Murray Snow was born in Boulder, Nevada. His undergraduate and legal education was at Brigham Young University, where he was editor-in-chief of the law review. After graduating law school he clerked for U.S. Court of Appeals Judge Stephen Anderson. He was in private practice in Phoenix, Arizona, until 2002 when he joined the Arizona Court of Appeals. He was nominated to the federal district court in Arizona on December 11, 2007, and was confirmed unanimously the following June 26. Although a Republican, he did not have a record of prominent partisan activism.

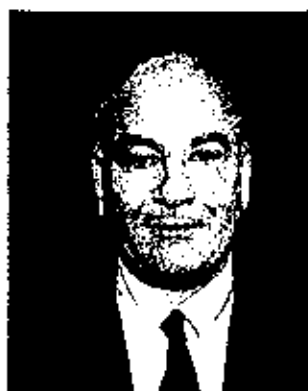


Richard Joseph Sullivan was raised in Glen Head, New York, attended the College of William and Mary, and received his law degree from Yale. He served as a law clerk to the Honorable David M. Ebel of the Tenth Circuit before becoming an associate at Wachtell Lipton Rosen & Katz in New York. In 1994, he assumed the post of assistant U. S. Attorney for the Southern District of New York, where he served until 2005. In 2005, he became Deputy General Counsel for Marsh & McLennan Companies, Inc. and in 2006, General Counsel for Marsh, Inc. He was nominated for the Southern District of New York bench on February 15, 2007, and was unanimously confirmed on June 28, 2007. Although a registered Republican, he did not have a record of previous party activity.



Anul R. Thapar, the son of immigrants from India, was born in Detroit, Michigan, did his undergraduate work at Boston College, and received his legal education at the University of California at Berkeley. He clerked on a federal district court for Judge S. Arthur Spiegel and on the U.S. Court of Appeals for Judge Nathaniel R. Jones. He served as an Assistant U.S. Attorney, first in the District of Columbia, and then in the Southern District of Ohio. He was appointed U.S. Attorney for the Eastern

District of Kentucky in March 2006, the position he held when nominated to the federal district court for the Eastern District of Kentucky on May 24, 2007. He was confirmed unanimously on December 13. At 38, he was the youngest judicial appointee of the Bush Administration confirmed by the 110th Congress and the fifth youngest of all Bush's judicial appointees. When he was younger, he worked on campaigns for Republican candidates.



Anthony John Trenga comes from Wilkesburg, Pennsylvania. He was an undergraduate at Princeton and earned his law degree at the University of Virginia. He was a law clerk for federal district judge Ted Dalton and then entered private practice in Virginia. In the 1980s he was active in Democratic party politics. In 1998, he joined the prestigious Washington, D.C. law firm of Miller & Chevalier, where he remained until nominated for a seat on the Eastern District of Virginia on July 16, 2008. On September 26 he was con-

firmed unanimously by the Senate. He is a fellow of the American College of Trial Lawyers.

Lisa Godbey Wood was born in Lexington, Kentucky. She completed both her undergraduate and legal education at the University of Georgia, where she was managing editor of the law review. Upon graduation she clerked for federal district judge Anthony Alaimo in the Southern District of Georgia, the court she would join in 2007. She was in private practice in Georgia and became U.S. Attorney in 2004, the position she held when named to the federal district court bench on June 12, 2006. She was renominated early in 2007, and unanimously confirmed on January 30. Before becoming U.S. Attorney, Judge Wood was active in Republican politics, including both Bush presidential campaigns. She also worked with Democrats and received bipartisan support when she was nominated.

George H. Wu was born in New York City, educated at Pomona College and the University of Chicago School of Law, and was a law clerk for U.S. Court of Appeals Judge Stanley Barnes. Judge Wu had a varied career before joining the federal bench. He was in private practice, was an assistant professor of law at the University of Tennessee College of Law for three academic years beginning in 1979, was an assistant U.S. Attorney for a total of 11 years, a Los Angeles Municipal Court judge, and then a Los Angeles Superior Court judge starting in 1996. This last position was the one he held when nominated to the federal district court for the Central District of California on September 5, 2006. He was renominated in 2007, and unanimously confirmed on March 27. Judge Wu was not politically active and was not affiliated with any political party.

Aron's shock at it going forward. According to Levey, "A lot of ...times, it is reactive.... I don't want to trumpet...isn't it great that the President just nominated this strong conservative?" The Southwick case was a situation where Levey called this "reactive" strategy into question.

The only case in which I...regretted that...was with Southwick, where we probably could have done more early on. But I just thought that the charges there were just so...trumped up that they're not going to get all of the Democrats to buy in.... So, there, I probably should have been a little more proactive. But, generally, we would wait to see what People for the American Way did, what happened in the hearing. You can definitely tell from the questions in the hearing.... You know after the hearing if it's going to be a difficult nomination.

From the perspective of a group leader on the other side of the political spectrum there was a similar concern that, organizationally, they had not done enough. In this instance, however, the failure was not one of being insufficiently reactive to the nomination, as alluded to by Levey, but, rather, failing to pay close enough attention to the playing out of confirmation politics in the Judiciary Committee.

It occurred, I think...because of a failure on our part to work more closely with Dianne Feinstein. She was the one. She was the key. Leahy doesn't talk to her...and so the Republicans play her like a fiddle. They throw out Leslie Southwick, they pay attention to Dianne Feinstein...and when one side is playing you and the other side is ignoring you, and you're a senator who likes attention? (It's unacceptable what she did, it's an excuse for what she did, but...we just didn't work hard enough... And that was a huge loss, because he was so clearly unqualified.

What Democratic Senator Feinstein of California "did" in this instance was vote "yes" on Southwick in Committee, assuring that the nomination would be sent to the Senate floor and sending a signal to the Democratic rank and file that this was a nominee on whom their fellow partisans disagreed and one, therefore, who engendered fewer constraints on

Southwick's confirmation, one that "surprised" Nan Aron who characterized it as "the big nomination of the past few years" where it was "just stunning to see, for the Democrats, for that to occur," is a story somewhat more complex than Jay Sekulow's observation that, "You get a pass every once in a while." Rather, as is often the case in unraveling judicial selection politics, one must

focus on group activity both in support of, and in opposition to, the nomination, as well as on the role of the Senate Judiciary Committee to better understand the nomination's eventual outcome.

For his part, the Committee for Justice's Curt Levey was taken somewhat by surprise when the Southwick nomination ran into difficulty, in effect, the mirror image of Nan

their confirmation vote. A senior Senate Republican Committee aide expressed some surprise at Southwick's confirmation, underscoring Feinstein's role in the outcome.

It was surprising...in the sense that...a circuit court nominee who was opposed by a large number of the majority party [was] confirmed, but not surprising in the sense that he was a qualified candidate. And the arguments against him seemed very thin; the suggestion that... his concurrence on two opinions during his long tenure on the state appellate court should disqualify him or allow him to be labeled as a racist. I think, when scrutinized, those arguments didn't stand up. And they didn't stand up, thankfully, with Senator Feinstein.... In our view it was a brave move and a great decision on her part to favor Southwick.... I think credit goes to Senator Feinstein for actually looking at the merits of the case and the individual, rather than just listening to rhetoric.

The aide's sense that the case against Southwick was "thin" resonated with Curt Levey who asserted that there was always a need for "something more" than simply ideology to derail a candidacy.

I always thought he would be confirmed.... The real motivation for the Democrats opposing the person is ideology, but they always need one extra thing.... With Boyle it could be ethics.... Myers, what he did in the Interior Department. But they would never, when the Republicans were willing to fight, and the nominee was willing to fight... stop someone unless they had one extra thing. And that was lacking in Southwick.

For his part, an aide to a Democratic senator on the Judiciary Committee saw in the Southwick scenario a situation where a good process had simply reached a bad result.

The civil rights community is still very upset about Southwick, with good reason. Senator Leahy was against this nomination, voted against the nomination.... Now he did something that he has gotten beaten up on. On different occasions, nominees have moved that he has personally voted against. That he has given more process instead of just burying it.... This was just one of those situations where there was a Democratic member of the Committee that voted a different way than, I think, earlier, we had expected to vote. I think

it was one that could have easily been voted down. Not buried, not never brought up, but voted down.... Groups on the left, very upset about it, groups on the right were upset that they even had to sweat for it. You're not going to win them all. The process, though, of having someone come up and he voted on was a good process.

The sense that Southwick was, ultimately, "one that got away" did, indeed, not sit well with left leaning interest groups, one of whose spokespersons not only blamed themselves for not doing a better job of courting Senator Feinstein but, in addition, held the Judiciary Chair, Patrick Leahy, responsible for not scheduling a vote at the most propitious time. "When he could have scheduled, he held him; and then when he knew he didn't have the votes, he brought it up for a vote.... What was the thinking behind the scheduling of those votes?"

A failure

While Leslie Southwick's nomination ended in confirmation it was the case, of course, that several of President Bush's appellate court nominees were stalled in their quest for confirmation during the last two years of the administration. And, at times, the failure to confirm a nominee might be as counterintuitive as was Southwick's success. Such was the case in the failed nomination of Gene Pratter, a sitting district court judge and a candidate favored by ranking Judiciary Committee minority member Arlen Specter for a Pennsylvania vacancy on the Third Circuit. Pratter was nominated on November 15, 2007, a full year before the presidential election. By the time her nomination was eventually withdrawn and a substitute candidate, Paul Diamond, was named, it was late July, 2008 and the calendar, not the candidate per se, left the vacancy unfilled.

Interestingly, the Pratter nomination initially appeared to be a non-contentious one as characterized by a senior aide to a high ranking Judiciary Committee Democrat.

Here's a funny story. When this year began I thought the first circuit hear-

ing would have been Pratter, because I'm an idiot. I thought, well, she's from Pennsylvania; the ranking member is from Pennsylvania. Specter's guys were saying 'Casey supports her, Casey supports her. Casey supports the nomination.' And, I thought, if this is what Arlen really wants, and Casey is going to support, and it's supported by a Democrat and a Republican, why wouldn't we do that one?

Discussion on the Committee as it mapped out timelines for nominees focused on whether the ranking minority member wanted Pratter to be the first, second, or third circuit nominee confirmed in the session. "And the reaction was, well, 'Arlen doesn't want her to go first because he doesn't want to appear too piggy.' Well, it turned out Arlen didn't want her to go first because he didn't have the clearance yet."

Such are the vagaries of Senate advice and consent processes and the difficulties that can be encountered within a state's Senate delegation, particularly when, as in this instance, the senators involved come from different parties. As explained by Nicholas Rossi,

There was a lot of discussion about that seat.... We have the benefit of hindsight now but, at the time she was tapped for that, she was a district court judge who had been confirmed by the Senate unanimously.... She wasn't viewed as a particularly controversial pick. Maybe there should have been a little more conversation with Casey, but I think that's one where we hoped to be able to secure Casey's support all along. It was only after groups in the state began to raise more concerns that it gave him pause. And relatively quickly, Senator Specter met with the outside groups that raised concerns about her. He brought them into his office, he sat down with the groups... asked for the specifics about the cases they were concerned with, had staff going through and evaluating the merits of the arguments, forwarded information to Senator Casey. So there was a real effort to try to reach consensus there and to move forward on her nomination. It wasn't until it became very clear that that wasn't going to happen that they started focusing on other options.

The administration's change in direction in this instance, as in others, simply came too late for a lame

duck president facing his final months in office. As noted by a senior aide to a Judiciary Committee Democrat, the seat could have been filled "had the White House heeded the realities and not waited to the summer to nominate Paul Diamond, who Casey could sign off on and work with. They insisted on this pick that Casey wasn't going to sign off on. They wasted a year and a half and then held our feet to the fire like it was 2002-2003. It was unproductive."

Obviously, Pratter was a nominee who had blue slip problems underscoring the lack of support by a home state senator, in this instance Democratic Senator Robert Casey of Pennsylvania. What frustrated the minority Republicans during the 110th Congress was a situation in which, in their view, the majority was sensitive to home state opposition and respected the blue slip yet, at the same time, did not necessarily move those circuit nominees who lacked home state opposition. As portrayed by an aide to a senior Republican Judiciary Committee senator,

Generally speaking, Senator Leahy has clearly respected the blue slip in the sense that he has not granted hearings to candidates who do not have the blue slip but, by the same token, he has not given hearings even to some nominees whose blue slips were returned....Glen Conrad and Paul Diamond are examples, and in the case of Peter Keisler, he'd already had a hearing and blue slips weren't really an issue. Robert Conrad is another example of another 4th circuit nominee who had the support of both home state senators. It does create sort of a bad feeling for us. It does create some questions about whether or not blue slips tendered, particularly tendered by the minority, are given as much weight, and whether or not it is a break with traditional practices not to grant hearings in those cases.... Looking at the numbers, one can debate whether the President got fair treatment for his nominees in these last two years. We really did have an extraordinarily small number of circuit court hearings in the past year. And one of those was for the package on the 6th circuit which included Helene White, who was a Clinton nominee and was nominated by President Bush.

during the 110th Congress, represents another facet of confirmation politics during the final two years of the W. Bush presidency warranting a closer look. The saga of the multiple Michigan based vacancies on the 6th Circuit Court of Appeals and the failed attempt to fill them for the better part of the Clinton years and for much of the W. Bush presidency is a familiar one.

At bottom, four 6th Circuit vacancies from Michigan were inherited by the W. Bush administration because the Republican controlled Senate failed to confirm a slate of Clinton nominees whose confirmation was obstructed for years. The Republicans argued that their actions were warranted because of the failure of the Clinton administration and Senator Levin to consult appropriately with then Republican Michigan Senator Spencer Abraham about the vacancies. W. Bush subsequently nominated four people of his own, with none confirmed during his first term in office as Senators Carl Levin and Debbie Stabenow, Michigan Democrats, united in their resolve to not allow the Bush administration to benefit from the sins of the Republican controlled Senate during the Clinton years. Interestingly, while hearings were held on all four nominees, despite the Levin/Stabenow blue slip holds, floor action on the nominations was successfully obstructed.

The 6th Circuit logjam began to ease when Henry Saad, the most controversial of the Bush nominees, was not explicitly protected by the Gang of Fourteen's agreement to oppose judicial filibusters (unless there were "extraordinary circumstances") and his nomination was ultimately withdrawn. Three 6th Circuit nominees (Richard Griffin, David McKeague, and Susan Neilson) were allowed to go through, a district court nominee (Dan Ryan) was withdrawn, and the Democrats would be given a large say in designating a replacement nominee for Ryan. This turned out to be Janet Neff, a candidate supported by both Senators Levin and Stabenow.

Ironically, Republican Senator Sam Brownback of Kansas placed a

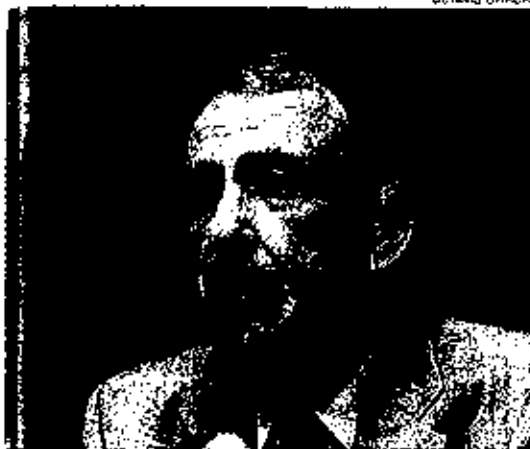
hold on the Neff confirmation processes because of the nominee's attendance at a civil commitment ceremony. Eventually, Brownback withdrew his hold, partly responding to pressure from his own party colleagues because he had become the proverbial fly in the 6th Circuit's agreement ointment. While Neff would eventually be confirmed to the district court seat in the following congressional session, it took a little over a year from her initial nomination to her confirmation vote, seemingly with an agreement in hand. The damage had been done and, during this period, the Michigan senators proceeded to turn their attention to stalling two subsequent Michigan 6th Circuit nominees, Raymond Kethledge and Stephen Murphy III. It would take virtually two more years, the term of the 110th Congress, to finally reach an accord and unravel the 6th Circuit mess.

As is often the case in instances of confirmation gridlock, a solution requires delicate negotiation and bargaining among the principals, with an 11th hour agreement that, arguably, could have been struck years before. In this instance, as in others, it took the winding down of a presidency and a willingness to bargain to serve as an important catalyst for getting a deal done. Indeed, as Assistant Attorney General Cook noted, "We're somewhat disappointed that the 6th Circuit hearing was the last circuit court hearing that was held... We did the 6th Circuit hearing and that was it."

Despite their frustration that the 6th Circuit deal was the administration's appellate court swan song, the President's team, nevertheless, was highly supportive of the deal itself. Beth Cook noted that, "the real beneficiaries are the people of Michigan and the people of the 6th Circuit who, for the first time in... years have a full complement of judges on the circuit." In characterizing the mechanics of the deal, Nicholas Rossi indicated that, "the credit should really go to the White House and to the Michigan senators for working out some arrangement. I don't know to what extent

The 6th Circuit solution

The 6th Circuit solution, reached



Senator Arlen Specter was Ranking Judiciary Committee minority member during the 110th Congress.

Senator Leahy's office was involved in brokering that deal, but we were not involved in brokering the deal." Indeed Senator Specter voted against Judge White's confirmation.

The deal, which withdrew Bush 6th Circuit nominee, Stephen Murphy III, and placed him in nomination for a district court judgeship, while retaining Raymond Kethledge's circuit nomination, also included substituting Helene White, a former Clinton nominee who was first nominated to the Sixth Circuit in 1997.

In a scenario that could not have more resembled a political quid pro quo, the administration continued, nevertheless, to stay on its prime judicial selection message. Both Cook asserted that, "The President sent up two circuit nominees who we thought were both well qualified and would be assets to the 6th Circuit... What we can tell you from our perspective is that both Ray and Helene White should absolutely get a hearing, get a vote, and be confirmed." Associate White House Counsel Kate Todd added, "Our job is to be supportive of all the President's nominees and nominations are not sent up there for show. They were genuinely put up there and we work hard to support our nominees through the confirmation process."

On one level, the 6th Circuit outcome underscores the power of individual senators in confirmation

politics over the long haul. As Nan Aron commented, "that deal might have been a result of ... two years [of] politics, Bush feeling in a less powerful role. But the fact of the matter is Carl Levin dug in his heels and was not going to relent, so he got his nominee on the bench."

While Levin emerged a "winner" in the outcome, this does not necessarily mean that the deal was a Democratic victory writ large. As a spokesperson for a prominent liberal interest group active in judicial politics commented, "It's heart-breaking.... We were opposed to that deal because Helene White isn't half as strong as this guy. We thought it was a terrible deal." Curt Levey confirmed the thrust of this assessment from the opposite side of the political spectrum. "Some people in the base were unhappy, but I thought it was the right move, because you were either going to have a Democratic president or a Republican president who wasn't very conservative with increased Democratic margins in the Senate... Even people who were involved in holding up Helene White thought it was a good deal."

Major issues and controversies

A thorough assessment of confirmation processes and politics in the 110th Congress necessitates moving beyond these case studies of specific administration successes and failures to include a look at some of the major issues and controversies that dominated selection politics earlier in the Bush presidency with an eye towards how they fared as the presidency wound down. Specifically, what can we say about the role, if any, of the Gang of Fourteen in the 110th Congress as compared with their centrality in earlier advice and consent outcomes? Similarly, what became of the so-called "nuclear option" that threatened to paralyze the Senate, but not for the maneuvers of the Gang of Fourteen?

Even more broadly, what can we say about the seemingly diminished importance of the judicial selection issue, especially for the Republicans in

the 110th Congress and, indeed, the role the issue played (or failed to play) in the 2008 presidential election?

The agreement fashioned among the bipartisan and moderate Gang of Fourteen that saved the filibuster while avoiding the Republican detonation of the so-called nuclear option was explicitly fashioned for and limited to breaking judicial confirmation gridlock during the remainder of the 109th Congress, in the Spring of 2005, soon after the start of W. Bush's second term. Nevertheless, the agreement of the Gang has reverberated ever since and, inevitably, remained a valid reference point for the playing out of judicial confirmation politics through the 110th Congress.

Reflecting on the importance of the Gang of Fourteen and its legacy, Nan Aron opined that its real significance

was its ability to work with the Bush administration and confirm their appointees... The day that they announced that deal it was a bright day for the Senate and a dark day for the judiciary. Because, in essence, it took power away from the Senate Judiciary Committee and granted it to a group of senators who had really no knowledge or interest in the judiciary, and no experience.... That Gang is a large part of the story of the last eight years, because for several years they wrested control from the Committee to themselves.

Fast forwarding to today, Aron explained that, in her view, the legacy of the Gang of Fourteen helps to explain the forgiving treatment that the Obama administration and the Senate Democrats have afforded Senator Joe Lieberman, a prominent member of the Gang.

The Senate dynamic is very interesting going forward, particularly given the fact that the Democrats went out of their way to keep Lieberman in the party. He was a key broker during the Bush administration in bringing Democrats and Republicans together, not just to avoid the filibuster, but to help the Bush administration confirm their judges... Certainly it would behoove the Democratic leadership to look to Senator Lieberman to bring some Republicans together to help confirm Obama judicial picks, and I suspect that may have been a factor in keeping

Senator Lieberman in the caucus.

Clearly, the work of the Gang of Fourteen had, as Curt Levey noted, "ratcheted things down a bit. And it certainly took the filibuster off the table." The legacy of that reality for Republicans today in the "post-Gang" environment, according to Levey, is that, "If we were going to support a filibuster, it would be under the bipartisan conditions agreed to by the Gang of Fourteen. I realize that's not necessarily binding anymore, but it's instructive, which is for 'extraordinary circumstances.'"

As noted by a senior aide to a Republican member of the Judiciary Committee, the "legs" of the Gang of Fourteen might have been evident in the Southwick confirmation discussed earlier. "You might see it a little bit.... There's Southwick, and you certainly could look to the members of that group and, I think, all of them voted for Southwick. They certainly all voted for cloture.... I think they left that group with a certain understanding of how nominations should be treated, particularly in getting people to a vote."

It is impossible to talk about the Gang of Fourteen and its impact without, of course, referencing the phenomenon the Gang's action was meant to prevent, specifically, the imposition of the nuclear option to alter Senate rules in an effort to break filibusters and seat controversial judges. Today, in the altered political map of the 111th Congress, with a comfortable Democratic Senate majority, and a Democratic president, the dynamic that created the "nuclear threat" in years past may simply no longer be present. To the question of whether the bolstered Democratic strength would lead to a confirmation role reversal with Democrats threatening to end filibustering of judicial nominees through resort to the nuclear option Jay Sekulow underscored,

I don't think they have to. They've got...fifty-nine Senate seats. Then you've got some Republicans who would go with the Democrats on it, like Collins and Snowe. So I don't see the nuclear option as an option this go-

round.... The Democratic leadership is not going to be facing the same obstacles that others have. They've got an overwhelming majority in the Senate, almost filibuster proof.

For others, such as Specter aide Nicholas Rossi, it is not simply a matter of numbers but, as well, a sense that partisan positions on the nuclear tactic will hold even under changed circumstances.

I tend to agree with those who think the parties have somewhat locked themselves into their positions on this issue. I've seen some comments from the Republican leadership suggesting that if President Obama really sends up people they think aren't qualified they are not willing to take the option of the filibuster off the table. But do I think that Democrats now would consider a rule change if it came to the nuclear option? I don't think so.

Nan Aron, too, was of the view that the Democrats wouldn't and shouldn't resort to nuclear tactics to break filibusters.

I don't think the Democrats should follow what the Republicans did. It was unwarranted, it was illegitimate, it was phony in every way. It was a tactic to put the Democrats on the defensive, grab some power in the Senate, and help Bush confirm his judges.... Filibusters have been around since the beginning of the Republic. And it's... fascinating to me that as soon as this showdown was averted... as soon as the Democrats took control of the Senate, the Republicans resorted to the use of filibusters on a regular basis.

A decrease of interest

Completing our account of confirmation processes in the 110th Congress requires some consideration of the apparent decrease of interest by actors other than the White House in judicial selection politics during this period and, as well, the role of this issue, or relative lack thereof, in the electoral processes of 2008, particularly in the presidential election.

We have already alluded to the difficulties all presidents face seating judges during the winding down of their administrations and, as well, to some of the specific factors that took a special toll on W. Bush's undiminished efforts in this regard. In such

an environment, which included Democratic takeover of the Senate, Nicholas Rossi concluded that, "With the Chairman's gavel, Senator Leahy was able to process just enough nominees to quiet critics and not too many to upset his caucus." Jay Sekulow admitted that,

We had these meetings. We would discuss how do you get your base energized? When it's a Supreme Court vacancy, it's easy. When it's an appellate nominee it was easy too, until you had Supreme Court vacancies.... Although the base understood the significance of it, it was hard to get the attention drawn to the appellate courts. And it really did come to pretty much a screeching halt in the last eighteen months.

For his part, Curt Levey attributed the waning enthusiasm for the judicial selection issue to "just the events on the ground. The filibusters were dramatic, that was off the table after the spring of 2005. Obviously, Supreme Court battles, the showdown with the nuclear option.... I think we all felt exhausted...and burned out for a few months, but that lasted way too long."

While one cannot know with certainty, it is at least possible that the diminution of interest in and attention paid to judicial selection by the media, the public, and perhaps Republicans in Congress during W. Bush's final two years in office played some role in limiting the issue's importance in the electoral politics of 2008, particularly in the presidential contest. Two years ago our interviews revealed considerable consensus about the prospects for judicial selection being a major campaign battleground for the candidates. Yet with the ongoing war on terror, continued war in Iraq, and a failing economy, that prediction failed to materialize. In the opinion of both Jay Sekulow and Curt Levey, this was a failure of the Republican campaign strategy. Indeed, in Sekulow's view,

it was a strategic mistake for the Republicans to not make it an issue. I don't recall, other than one or two passing comments, John McCain ever mentioning it. And I think that's unfortunate. I can't underscore that enough. It was a

galvanizing issue for our base and the base, as you could tell by the elections, did not get enthusiastic. I do not know if it would have been a game changer because I'm not sure if any one issue would have beaten President-elect Obama.... But it did not become the issue it should have been. I think that was unfortunate.

To some extent, the keeping of the issue under election year wraps may be credited not to Republican failures to energize their base but, rather, the success of Obama's efforts to not engage the opposition squarely and continuously on the matter of courts. Nan Aron pointed

candidates and not their differences. According to Nicholas Rossi,

Some of the credit or blame... may...rest with the Supreme Court itself, and some of the recent decisions it has handed down. If you had seen the *Heller* case decided differently, for example, that could have changed the dynamic dramatically. But the fact that it was decided as it was, that you had both Obama and McCain coming out and saying that they thought the decision was right, and both coming out and saying that they thought the Court's decision about the death penalty for child rape was suspect. They were in somewhat of an agreement. And had some of those cases

made it to the lower federal courts during W. Bush's final two years.

District court appointees

During the 110th Congress, the President submitted 79 nominations to lifetime judgeships on the federal district courts, of which 58 were confirmed. (For brief biographies of some of those confirmed, see "Some notable Bush appointees," page 263).

Table 1 compares the demographic portrait of those confirmed by the 110th Congress to the Bush appointees confirmed by the previous three congresses. The differences are small but hint that the changed political environment may have to a limited extent affected the profile of Bush's last two years' worth of appointees. Among the findings of special interest are:

- A clear majority of the most recent group of appointees came to the bench with previous prosecutorial experience and that proportion was noticeably larger than the proportion for the earlier group of appointees. Interestingly, as we will see in Table 3, the overall figures still show a higher proportion of the Bush cohort with judicial than prosecutorial experience.

- Along the same lines of the appointees' credentials, the most recent group of Bush appointees had the fewest with neither judicial nor prosecutorial experience.

- Educational differences were not pronounced. However, 40 percent of the most recent cohort had a prestigious legal education compared to 28 percent of the district court appointees from the previous six years.⁹

- There were proportionately more women, African Americans, and Asian Americans appointed in the last two years than during the first six years. This meant that the corresponding proportion of white male appointees was the lowest for the Bush presidency, and the overall proportion was second lowest only to the Clinton proportion (as seen in Table 3).

- The ABA ratings of the appointees confirmed by the 110th Congress were higher than for

When the dust settled on the 110th Congress, that Congress confirmed 58 to the district courts and 10 to the appeals courts.

out that Obama

referred to the war on courts, referred to judges with empathy, judges who bring diverse, different experiences and viewpoints, and...that was very helpful. But there was no engagement by him on this issue and many other hot-button issues.... Every hot-button social issue presented to him he pivoted and defused it as quickly as he could: death penalty, abortion, guns, gay marriage.... He deflected any criticism and avoided making the Court an issue.

In the end, in the eyes of most analysts, there was really not much to explain about the issue's lack of electoral prominence. As Nan Aron underscored, "There was no other issue in the election except the economy.... No other issue came to the fore, including the Iraq War, health-care, the environment, and education." For its part, even the Supreme Court's own decision-making behavior ended up highlighting some similarities between the presidential

been decided differently, I think that might have changed the degree to which the Court played a role in the elections.

Before leaving the electoral connection issue, two more perspectives should be brought into play. For one, an argument can be made, as it was by a high ranking Democratic staff aide serving a Judiciary Committee member, "When there are huge issues out there, judges fall to the back, and that's really where they should be." Thus, in an ideal world, "the president consults, picks really, really smart well qualified people, and they are by and large confirmed." And, finally, another senior Democratic staff aide offered a contrarian note and query for pondering. "When Senator McCain chose Sarah Palin, were some of the things that led women voters not flocking to Sarah Palin the issues that we talk about with judges? So I think it did play a role in a way."

When the dust settled on the 110th Congress, that Congress confirmed 58 to the district courts and 10 to the appeals courts. We turn now to an examination of those who

9. The non-Ivy League law schools attended by the appointees considered prestigious are: Berkeley, Chicago, Duke, Fordham, Georgetown, Illinois, Indiana, Michigan, NYU, North Carolina, Ohio State, Stanford, Texas, Vanderbilt, and Virginia.

appointees confirmed by the previous three congresses. During the last two years, no appointee rated "not qualified" by the ABA was confirmed. In the previous six years, four rated "not qualified" were confirmed. In general, it is unclear whether Bush's eliminating the ABA from the pre-nomination stage (which he did at the start of his first term) tended to elevate such ratings across his administration. Some have argued that this is the case because of the likely reticence of the ABA's interview subjects to criticize nominations that have already been submitted and made public.

- Perhaps the findings for the party variable best suggest the change in the appointment climate. The proportion of Democrats named during the last two years almost doubled from the previous six years. The proportion of Republicans, while still an overwhelming majority, dipped below 80 percent. But, interestingly, the proportion with a record of previous party activism increased, in part because some of the Democrats named had previously been active Democrats.

- The cohort from the last two years was also wealthier than the cohort from the previous six years. Some 62 percent had a net worth in excess of \$1 million compared to some 53 percent of those from the previous six years.

- Finally, and surprisingly, the average age of those appointed by George W. Bush during the last two years was noticeably older than those appointed in the first six years, almost two years older on average.¹⁰

Twenty-two nontraditional appointees to the district courts were confirmed during the 110th Congress. Added to the 63 from Bush's first six years, there were a total of 85 nontraditional district court appointees. Thirty-six traditional appointees (white males) were confirmed by the

Table 1. How the Bush appointees to the federal district courts confirmed during the 110th Congress compare to those confirmed during his first six years

	110th Congress		107th-109th Congresses	
	%	(N)	%	(N)
Occupation				
Politics/government	17.2%	(10)	12.3%	(25)
Judiciary	53.4%	(31)	46.8%	(95)
Large law firm				
100+ members	6.9%	(4)	9.8%	(20)
50-99	5.2%	(3)	4.9%	(10)
25-49	—	—	5.9%	(12)
Medium size firm				
10-24 members	3.4%	(2)	5.4%	(11)
5-9	5.2%	(3)	4.9%	(10)
Small firm				
2-4	3.4%	(2)	4.4%	(9)
solo	1.7%	(1)	2.0%	(4)
Professor of law	—	—	1.5%	(3)
Other	3.4%	(2)	2.0%	(4)
Experience				
Judicial	53.4%	(31)	51.7%	(105)
Prosecutorial	58.6%	(34)	43.8%	(89)
Neither	20.7%	(12)	28.1%	(53)
Undergraduate education				
Public	43.1%	(25)	43.3%	(98)
Private	44.8%	(26)	45.3%	(92)
Ivy League	12.1%	(7)	6.4%	(13)
Law school education				
Public	50.0%	(29)	48.8%	(99)
Private	39.7%	(23)	38.9%	(79)
Ivy League	10.3%	(6)	12.3%	(25)
Gender				
Male	75.9%	(44)	80.3%	(163)
Female	24.1%	(14)	19.7%	(40)
Ethnicity/race				
White	77.6%	(45)	82.8%	(168)
African American	10.3%	(6)	5.9%	(12)
Hispanic	6.9%	(4)	10.8%	(22)
Asian	5.2%	(3)	0.5%	(1)
Percentage white male	62.1%	(36)	69.0%	(140)
ABA rating				
Well Qualified	74.1%	(43)	69.0%	(140)
Qualified	25.9%	(15)	29.1%	(59)
Not Qualified	—	—	2.0%	(4)
Political identification				
Democrat	12.1%	(7)	6.9%	(14)
Republican	77.6%	(45)	84.7%	(172)
None	10.3%	(6)	8.4%	(17)
Past party activism	58.6%	(34)	50.7%	(103)
Net worth				
Under \$200,000	1.7%	(1)	5.9%	(12)
\$200-499,999	17.2%	(10)	18.2%	(37)
\$500-999,999	19.0%	(11)	22.7%	(46)
\$1+ million	62.1%	(36)	53.2%	(108)
Average age at nomination	50.6		48.7	
Total number of appointees	58		203	

10. Note that Table 2 of our 2007 article mistakenly put the average age of the first six years of appointees at 50. The average age should have been recorded as 48.7. This error was only discovered when preparing for this article.

Senate during the 110th Congress and their numbers were added to those of traditional appointees from the first six years for a total of 176 traditional appointees during Bush's two terms in office.

A comparison of nontraditional to traditional appointments is found in Table 2 and the differences between the two groups suggest that in some important respects nontraditional candidates tended to follow a different path to a career on the federal bench.

- Almost 7 in 10 nontraditional appointees came from a judicial position, typically on the state bench. But only 4 in 10 traditional appointees came from such a judgeship.

- Over 40 percent of traditional appointees came from private law practice compared to slightly over 15 percent of nontraditional appointees.

- Over 7 in 10 nontraditional appointees had judicial experience before ascending the federal district court bench, compared to only about 4 in 10 traditional appointees.

- Nontraditional appointees had more prosecutorial experience than traditional appointees. The nontraditional cohort had markedly fewer appointees lacking both prosecutorial and judicial experience.

- White women were the largest proportion of nontraditional appointees.

- The ABA ratings of both groups of appointees were similar.

- The party variable showed the most dramatic differences between the nontraditional and traditional appointees. About 9 in 10 traditional appointees were Republicans compared to under 7 in 10 nontraditional appointees. There were almost four times the proportion of nontraditional appointees with no party identification than there were traditional appointees and almost three times the proportion of nontraditional appointees who were Democrats than were traditional appointees.

- The traditional appointees had close to double the proportion of nontraditional appointees with a record of previous party activity.

- A majority of both groups had a

Table 2. How the Bush non-traditional appointees compared to his traditional appointees to the federal district courts

	Nontraditional appointees		Traditional appointees	
	%	(N)	%	(N)
Occupation				
Politics/government	11.8%	(10)	14.2%	(25)
Judiciary	67.0%	(57)	39.2%	(69)
Large law firm				
100+ members	5.9%	(5)	10.8%	(19)
50-99	1.2%	(1)	6.8%	(12)
25-49	1.2%	(1)	6.2%	(11)
Medium size firm				
10-24 members	3.5%	(3)	5.7%	(10)
5-9	1.2%	(1)	6.8%	(12)
Small firm				
2-4	3.5%	(3)	4.5%	(8)
solo	—	—	2.8%	(5)
Professor of law	1.2%	(1)	1.1%	(2)
Other	3.5%	(3)	1.7%	(3)
Experience				
Judicial	72.9%	(62)	42.0%	(74)
Prosecutorial	52.9%	(45)	44.3%	(78)
Neither	11.8%	(10)	31.2%	(55)
Undergraduate education				
Public	48.2%	(41)	48.6%	(82)
Private	42.4%	(36)	46.6%	(82)
Ivy League	9.4%	(8)	6.8%	(12)
Law school education				
Public	45.9%	(39)	50.6%	(89)
Private	42.4%	(36)	37.5%	(66)
Ivy League	11.8%	(10)	11.9%	(21)
Gender				
Male	36.5%	(31)	100.0%	(176)
Female	63.5%	(54)	—	—
Ethnicity/race				
White	43.5%	(37)	100.0%	(176)
African American	21.2%	(18)	—	—
Hispanic	30.6%	(26)	—	—
Asian	4.7%	(4)	—	—
ABA rating				
Well Qualified	70.6%	(60)	69.9%	(123)
Qualified	27.1%	(23)	29.0%	(51)
Not Qualified	2.4%	(2)	1.1%	(2)
Political identification				
Democrat	14.1%	(12)	5.1%	(9)
Republican	68.2%	(58)	90.3%	(159)
None	17.6%	(15)	4.5%	(8)
Past party activism	34.1%	(29)	61.4%	(108)
Net worth				
Under \$200,000	8.2%	(7)	3.4%	(6)
\$200-499,999	21.2%	(18)	16.5%	(29)
\$500-999,999	18.8%	(16)	23.3%	(41)
\$1+ million	51.8%	(44)	56.8%	(100)
Average age at nomination	47.4		49.9	
Total number of appointees	85		176	

Diversity on the bench

From the outset, the Bush administration set a goal of adding to the diversification of the federal bench. In fact, Assistant Attorney General Beth Cook commented that,

this President... came in saying he was looking for folks from all walks of life. If you look at his first set of nominees, the diversity of the set of nominees was, I think striking. And if you look at what he has continued to do throughout his administration in terms of an even playing field, looking at the number of courts where he's had the privilege of appointing the first woman or appointing the first African-American woman, or appointing the first Turkish American or Southeast Asian American, I think he should be proud of it and I'm certainly proud to be a part of it.¹

The attention to diversity is clear as the percentage of nontraditional judges in active service totaled 38.8 percent at the end of the 110th Congress, an increase of 5.2 percent.² (See Table 1) This is a change from the previous two years where bench diversification decreased (-.96 percent), but similar to Bush's first term (6.7 percent and 8.7 percent during the 107th and 108th congresses, respectively). Notably, four of the five nontraditional groups made gains;³ when considering all three court levels, women increased their presence by 6.5 percent (13 seats), African Americans by 2.2 percent (2 seats), Hispanics by 5.3 percent (3 seats) and Asian Americans by 60 percent (3 seats).⁴

During Bush's two terms in office, Hispanics achieved unprecedented success as their representation increased by almost 45 percent—they began 2001 with 42 judgeships and ended 2008 with 60. Women, too, made great strides, adding 45 seats to the 167 occupied at the start of Bush's tenure, an increase of over 25 percent. African Americans and Asian Americans did not enjoy as much success during the last 8 years, adding only 7 and 2 seats, respectively.

Examining the district courts specifically, when not double counting women who also belong to a racial minority group, the proportion of nontraditional judges is 39.3 percent, an increase of 4.8 percent (12 seats) from the previous two years. Even though diversity increased on the district courts, 9 states remain without any women judges, 20 without any African-American judges, and 35 without any Hispanic judges, compared to 10, 21 and 36, respectively, at the end of the 109th Congress. These data suggest that although the nontraditional groups increased their presence, the majority were added to courts in states already represented by the relevant group. Asian Americans are present only on district courts in New York, California, Hawaii, and Kentucky (with the confirmation of Judge Amul Thapar). In addition, the eight states that had never seated a nontraditional judge remain undiversified at the close of this

Table 1: Proportion of nontraditional lifetime judges in active service on courts of general jurisdiction on January 1, 2007, and on January 1, 2009

	2007		2009		% Increase
	%	(N)	%	(N)	
U.S. district courts*					
Women	23.6	157	25.0	166	5.7
African American	11.1	74	11.4	76	2.7
Hispanic	6.8	45	7.2	48	6.7
Asian American	0.8	5	1.2	8	60.0
Native American	0.0	0	0.0	0	-
U.S. courts of appeals**					
Women	24.5	41	26.9	45	9.8
African American	8.3	14	8.3	14	0.0
Hispanic	7.2	12	7.2	12	0.0
Asian American	0.0	0	0.0	0	-
U.S. Supreme Court***					
Women	11.1	1	11.1	1	0.0
African American	11.1	1	11.1	1	0.0
All three court levels					
Women	23.7	199	25.2	212	6.5
African American	10.6	89	10.8	91	2.2
Hispanic	6.8	57	7.1	60	5.3
Asian American	0.6	5	1.0	8	60.0
Native American	0.0	0	0.0	0	-
Total nontraditional****	37.0	310	38.8	326	5.2

* Out of 664 authorized lifetime positions on the U.S. district courts. Some double counting is inevitable. In 2009, 37 women also were either African American, Hispanic, or Asian American.

** Out of 167 authorized lifetime positions on the numbered courts and the U.S. Court of Appeals for the District of Columbia Circuit, all courts of general jurisdiction. Some double counting is inevitable. In 2009, 8 women also were either African American or Hispanic.

*** Out of 9 authorized positions on the U.S. Supreme Court.

**** This percentage and total does not double count those who were classified in more than one category.

Congress (Alaska, Idaho, Maine, Montana, New Hampshire, North Dakota, Vermont, and Wyoming). As we discussed previously, this result is unremarkable since appointments are contingent upon vacancies and due to the small size of these states, fewer appointment opportunities arise. In fact, during the past two years, only one vacancy occurred on a district court within these states.⁵

1. Interview with Beth Cook, Assistant Attorney General, December 15, 2008.

2. Note that Table 1 of the sidebar on diversity in our 2007 article mistakenly calculated the number of women who were also either African American, Hispanic, or Asian American as 91 on the district courts and 8 on the courts of appeals. The number on the district courts should have been 92, which changes the total nontraditional judges, when not double counting, from 311 to 310. Thus, the calculation of the percent decrease in nontraditional judges in 2007 should have been -.96.

3. Historically, Native Americans have been represented only in district courts in Oklahoma. There have been no Native American judges in active service since 2003 when Frank Howell Seay took senior status.

4. Data are from the *History of the Federal Judiciary*, <http://www.fjc.gov/web/siteofthefederaljudicialcenter/washingtondc>. This database contains biographical information on all Article III judges confirmed by the Senate since 1789, but lists only five classifications for race—African American, Asian American, Hispanic, Native American, and White.

5. Joseph Laplante was nominated and confirmed to the District of New Hampshire. He is a white, male. Additionally, a vacancy from September 7, 2006 remains unfilled in Wyoming.

Table 2: Diversity on the district courts, January 1, 2009: Active judges aggregated by circuit

Circuit	% Female district courts	% African American general population	% African American district courts	% Hispanic general population	% Hispanic district courts
First, ¹	21.4	6.1	3.6	30.3	25.0
First, ^{2*}	19.1	5.4	4.8	6.9	0.0
Second	35.0	15.9	11.7	15.3	3.3
Third	28.1	12.6	14.0	9.1	5.3
Fourth	16.0	22.7	16.0	6.9	0.0
Fifth	24.1	17.1	7.6	28.3	15.2
Sixth	23.0	13.1	11.5	3.1	0.0
Seventh	24.4	11.4	11.1	10.1	4.4
Eighth	26.3	7.6	15.8	4.1	0.0
Ninth	25.5	5.5	11.3	28.4	9.4
Tenth	31.0	4.6	8.3	16.4	13.9
Eleventh	30.8	21.5	13.8	14.3	9.2
D.C.	25.0	55.2	33.3	8.3	8.3

Data on general population compiled from the Statistical Abstract found at: <http://www.census.gov/compendia/statab> * Excluding Puerto Rico

When not double counting women who also belong to a racial minority group, the proportion of nontraditional judges on the courts of appeals is 37.7 percent, an increase of 6.7 percent (4 seats) over the last two years. However, this is somewhat misleading since the courts remained largely the same in terms of diversity—only women increased their representation. Presently, all of the geographic circuits have a sitting female judge, and all but the First and Eighth Circuits have more than one woman, with the Ninth Circuit having the most at nine.⁶ The racial balance on the geographic circuit courts remained the same, with no increase in the number of Hispanic or African-American jurists. Notably, the First Circuit remains the only court yet to seat an African American. Hispanic judges, both currently and historically, have yet to serve on 6 of the 12 circuit courts of general jurisdiction (Fourth, Sixth, Seventh, Eighth, Eleventh, and DC). While Asian Americans have served on courts of appeals in the past, none does now. No Native American has ever served at this court level.

Given the number of vacancies left at the end of Bush's term, in addition to those created by judges leaving active service since January 1, 2009 (57 district court, 15 courts of appeals, 1 Supreme Court) Obama will have ample opportunity to increase the number of nontraditional judges represented on the federal bench.

Certainly, if his initial nominations to both the Supreme Court and courts of appeals are indicative of his commitment to diversity, underrepresented groups will realize substantial gains.⁷

Table 2 aggregates district courts by circuit and lists the percentage of women in each district. It also compares the percentage of African Americans and Hispanics to the percentage of each group in the circuit's general population, since we may expect states with more diverse populations to also have more diverse courts.⁸ Women have the greatest presence on district courts within the Second and Tenth circuits, and the lowest within the First and Fourth. The Second Circuit saw the largest increase as 4 of the 14 new female judges appointed to district courts are within that jurisdiction. As in years past, the highest concentration of African-American district judges is in the Fourth Circuit; and, not surprisingly, it is the circuit with the largest population of African Americans. However, in comparing overall representation on the federal bench to the general population, African American representation on the courts exceeding population concentration occurs in only four circuits (Third, Eighth, Ninth, Tenth). The converse is true in the most Southern circuits (Fifth and Eleventh), and the disparity is much greater, nearly 10 percent. Despite the proportion and number of Hispanic appointees over Bush's eight years in office, surpassing that of any previous president, under-representation is even more acute for this group; the states of the First, Fourth, Sixth, and Eighth Circuits have no Hispanic district judges and relative to the population concentration, the Second, Fifth and Ninth Circuits have very few. The highest congruence between population and judicial representation is on the Third and Seventh Circuits.

— Sara Schiavoni

6. In relative terms, with the confirmations of Jennifer Elrod and Catharina Haynes, the Fifth Circuit has a slightly higher concentration of women, 6 of 17 (35.3 percent) than the Ninth Circuit, 9 of 27 (33.3 percent).

7. Of his five nominations to the courts of appeals, as of mid-June, two are African American and one is a woman. If confirmed, Judge Sonia Sotomayor would be the first Hispanic woman to serve on the U.S. Supreme Court.

8. Asian Americans and Native Americans are omitted given the small (or nonexistent) numbers of judges. Calculations for the First Circuit are performed with and without Puerto Rico to get a more reliable view of the congruence between the Hispanic population in that jurisdiction and its representation on the district bench.

net worth of \$1 million or more but the proportion for traditional appointees was somewhat higher. Conversely the proportion of nontraditional appointees with a net worth under \$500,000 was about 3 in 10 compared to about 2 in 10 for the traditional appointees.

- Nontraditional appointees were on the whole younger than traditional appointees—on average two and one-half years younger.

Table 3 offers a portrait of all of W. Bush's district court appointees during his presidency compared to those appointed to the district bench by his four immediate predecessors in office. Among the noteworthy findings:

- The W. Bush appointees' profile was consistent with the trend of the continued professionalization of the federal judiciary. The majority of Bush appointees had judicial experience, a proportion similar to that for the Clinton appointees. In a previous article in this series, we noted that during his first term, W. Bush had continued the trend of promoting within the federal judiciary, that is, promoting U.S. magistrates or bankruptcy judges to the district court bench.¹¹ This trend began with the Ford administration (8 percent came from these ranks), and continued with subsequent presidents, with proportions ranging from 5 percent for Carter and Reagan to Bush Sr.'s 11 percent and Clinton's 12 percent.

Promotion from within the federal judiciary rose to 17 percent during W. Bush's first term when he named 26 who were serving as U.S. magistrates and 3 who were U.S. bankruptcy judges. During the second term, an additional 14 U.S. magistrates were named, thus maintaining the historic W. Bush proportion at close to 17 percent. Half of the promotions from within the federal judiciary were nontraditional appointees, which compares to the 45 percent of the first term appointees.

- Bush's appointees had the largest proportion of all five administrations with prosecutorial experience. Overall, continuing the trend that began with Carter, there was a

larger proportion with judicial than prosecutorial experience.

- W. Bush's appointees had the lowest proportion of all five administrations with neither judicial nor prosecutorial experience, thus, arguably, characterizing the W. Bush appointees on the whole as having the strongest professional credentials since and including the Roosevelt appointees. This is reinforced by the findings of the ABA ratings, which show that 7 in 10 received the highest rating, the best record since ratings began.

- The proportion of Bush appointees with an Ivy League law school education was the lowest since the Reagan appointees. Taking into account the non-Ivy prestige law schools, about 31 percent of the Bush appointees had a prestige legal education compared to 38 percent of the Clinton appointees.

- In terms of gender diversity, Bush's record was second only to Bill Clinton's. Prior to Jimmy Carter's administration there were only token numbers of women appointed. The first George Bush set a historic record for a Republican president, exceeded only by his son. But it was Democrat Bill Clinton who set the bar at its highest point with women constituting close to 30 percent of his district court appointments. Although W. Bush did not match Clinton's record, it should be noted that he nominated a woman, his White House Counsel Harriet Miers, to replace Sandra Day O'Connor in 2005, but the nomination was withdrawn after heavy conservative opposition.¹²

- In terms of race, although Jimmy Carter's administration was the breakthrough presidency for the appointment of African Americans to the district court bench, Bill Clinton once again raised the bar (17 percent). George W. Bush's record of African-American appointments was far from Clinton's and in terms of proportions, matched the record of his father with just under 7 percent of his total appointments.

- With the appointment of Hispanics, however, W. Bush set a new record with an overall proportion of

10 percent, pointedly better than the Clinton and Carter record. The Hispanic vote was important to Bush's victories in 2000 and 2004 and the selection of highly qualified jurists with Hispanic heritage was one way of acknowledging a vital component of Bush's electoral coalition. The same could be said for Bush's Democratic predecessors in terms of their appointments of women and African Americans. (In general, see "Diversity on the bench," page 276).

- As for Asian Americans, as seen in Table 3, only token appointments have been made and W. Bush's proportion was about the same as Clinton's.

- Overall, the percentage of Bush's traditional (white male) appointments was 67 percent, second lowest only to Clinton's 52 percent.

- The findings for political identification in Table 3 show that of all five administrations, W. Bush appointed the lowest proportion from his political party and the highest proportion from the opposing party. He also appointed the highest proportion of those not affiliated with any party. To be sure, more than 8 out of 10 appointed by W. Bush were Republicans. And, of course, the changed political environment of Bush's last two years likely was largely responsible for the numbers and proportions of Democrats and nonaffiliateds appointed. (In general, see "Partisan makeup of the bench," page 282).

- The proportion of appointees with prominent prior party activism was slightly larger than the proportion of Clinton appointees, but noticeably smaller than the proportions of the other three presidents, and, indeed, markedly lower than all other administrations since and including the Roosevelt administration.¹³ As we observed

11. Goldman, et. al., *W. Bush's Judiciary*, *supra* n. 3, at 268.

12. See the account in Jan Crawford Greenburg, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 247-285 (New York: Penguin Books, 2008).

13. Sheldon Goldman, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 349 (New Haven: Yale University Press, 1997).

Table 3. U.S. district court appointees compared by administration

	W. Bush		Clinton		Bush		Reagan		Carter	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
Occupation										
Politics/government	13.4%	(35)	11.5%	(35)	10.8%	(16)	13.4%	(39)	5.0%	(10)
Judiciary	48.3%	(128)	48.2%	(147)	41.9%	(62)	38.9%	(107)	44.6%	(90)
Large law firm										
100+ members	9.2%	(24)	6.6%	(20)	10.8%	(16)	6.2%	(18)	2.0%	(4)
50-99	5.0%	(13)	5.2%	(16)	7.4%	(11)	4.8%	(14)	5.9%	(12)
25-49	4.6%	(12)	4.3%	(13)	7.4%	(11)	6.9%	(20)	5.9%	(12)
Medium size firm										
10-24 members	5.0%	(13)	7.2%	(22)	8.8%	(13)	10.0%	(29)	9.4%	(19)
5-9	5.0%	(13)	6.2%	(19)	6.1%	(9)	9.0%	(26)	9.9%	(20)
Small firm										
2-4	4.2%	(11)	4.6%	(14)	3.4%	(5)	7.2%	(21)	11.4%	(23)
solo	1.9%	(5)	3.6%	(11)	1.4%	(2)	2.8%	(8)	2.5%	(5)
Professor of law	1.1%	(3)	1.6%	(5)	0.7%	(1)	2.1%	(6)	3.0%	(6)
Other	2.3%	(6)	1.0%	(3)	1.4%	(2)	0.7%	(2)	0.5%	(1)
Experience										
Judicial	52.1%	(136)	52.1%	(159)	46.6%	(69)	46.2%	(134)	54.0%	(109)
Prosecutorial	47.1%	(123)	41.3%	(126)	39.2%	(58)	44.1%	(128)	38.1%	(77)
Neither	24.9%	(65)	28.9%	(88)	31.8%	(47)	28.6%	(83)	31.2%	(63)
Undergraduate education										
Public	47.1%	(123)	44.3%	(135)	46.0%	(68)	37.9%	(110)	55.9%	(113)
Private	45.2%	(118)	42.0%	(128)	39.9%	(59)	48.6%	(141)	34.2%	(69)
Ivy League	7.7%	(20)	13.8%	(42)	14.2%	(21)	13.4%	(39)	9.9%	(20)
Law school education										
Public	49.0%	(128)	39.7%	(121)	52.7%	(78)	44.6%	(130)	52.0%	(105)
Private	39.1%	(102)	40.7%	(124)	33.1%	(49)	43.4%	(126)	31.2%	(63)
Ivy League	11.9%	(31)	19.7%	(60)	14.2%	(21)	11.7%	(34)	16.8%	(34)
Gender										
Male	79.3%	(207)	71.5%	(218)	80.4%	(119)	91.7%	(266)	85.6%	(173)
Female	20.7%	(54)	28.5%	(87)	19.6%	(29)	8.3%	(24)	14.4%	(29)
Ethnicity/race										
White	81.6%	(213)	75.1%	(229)	89.2%	(132)	92.4%	(268)	78.2%	(158)
African Amer.	6.9%	(18)	17.4%	(53)	6.8%	(10)	2.1%	(6)	13.9%	(28)
Hispanic	10.0%	(26)	5.9%	(18)	4.0%	(6)	4.8%	(14)	6.9%	(14)
Asian	1.5%	(4)	1.3%	(4)	—	—	0.7%	(2)	0.5%	(1)
Native American	—	—	0.3%	(1)	—	—	—	—	0.5%	(1)
Percentage white male	67.4%	(176)	52.4%	(160)	73.0%	(108)	84.8%	(246)	67.8%	(137)
ABA rating										
EWQ/WQ	70.1%	(183)	59.0%	(180)	57.4%	(85)	53.5%	(155)	51.0%	(103)
Qualified	28.4%	(74)	40.0%	(122)	42.6%	(63)	46.6%	(135)	47.5%	(96)
Not Qualified	1.5%	(4)	1.0%	(3)	—	—	—	—	1.5%	(3)
Political Identification										
Democrat	8.0%	(21)	87.5%	(267)	6.1%	(9)	4.8%	(14)	91.1%	(184)
Republican	83.1%	(217)	6.2%	(19)	88.5%	(131)	91.7%	(266)	4.5%	(9)
Other	—	—	0.3%	(1)	—	—	—	—	—	—
None	8.8%	(23)	5.9%	(18)	5.4%	(8)	3.4%	(10)	4.5%	(9)
Past party activism	52.5%	(137)	50.2%	(153)	64.2%	(95)	60.3%	(175)	61.4%	(124)
Net worth										
Under \$200,000	5.0%	(13)	13.4%	(41)	10.1%	(15)	17.9%	(52)	35.8%*	(53)
\$200-499,999	18.0%	(47)	21.6%	(66)	31.1%	(46)	37.6%	(109)	41.2%	(61)
\$500-999,999	21.8%	(57)	26.9%	(82)	26.4%	(39)	21.7%	(63)	18.9%	(28)
\$1+ million	55.2%	(144)	38.0%	(116)	32.4%	(48)	22.8%	(66)	4.0%	(6)
Average age at nomination	49.1		49.5		48.2		48.6		49.6	
Total number of appointees	261		305		148		290		202	

* These figures are for appointees confirmed by the 96th Congress for all but six Carter district court appointees (for whom no data were available).

two years ago: "This reflects in large part the impact of the relatively non-political nontraditional appointees but also the relatively nonpolitical backgrounds of the traditional appointees whose professional careers were on the state bench or federal magistrate/bankruptcy positions. It would appear that party affiliation rather than past party activism was of greater importance."¹⁴

• Findings for net worth reveal that for the first time, a clear majority of appointees were millionaires. There has been a steady increase of the proportion of millionaires from 4 percent of Carter appointees to 23 percent of Reagan appointees to 32 percent of Bush 1 appointees, to 38 percent of Clinton appointees to W. Bush's 55 percent. Inflation may account for some of the increase, but the conclusion is inescapable that relatively stagnant judicial salaries have made it more affordable for the well-to-do to go on the bench than for the less well-to-do. If Congress does not substantially raise the salaries of federal judges, it is likely that the profile of the federal judiciary increasingly will be skewed to the wealthy.

• Of the three Republican administrations represented in Table 3, George W. Bush's appointed on average the oldest cohort. But his cohort was still on average younger than the appointees of the two Democrats, Carter and Clinton.

Appeals court appointees

During the 110th Congress, President George W. Bush nominated 22 individuals to lifetime judgeships on the federal circuit courts of general jurisdiction, of which 10 were confirmed. (Three are profiled in "Some notable Bush appointees," page 263). Table 4 compares the demographic portrait of those 10 to the Bush appointees confirmed by the previous three congresses. Table 5 compares all the non-traditional appointees during W. Bush's two terms in office (a total of 21) to the traditional appointees (a total of 38). Table 6 aggregates all of Bush's appeals court appointees and compares them to the appointees of

Table 4. How the Bush appointees to the appeals courts confirmed during the 110th Congress compare to those confirmed during his first six years

	110th Congress		107th-109th Congresses	
	%	(N)	%	(N)
Occupation				
Politics/government	—	—	22.4%	(11)
Judiciary	60.0%	(6)	46.9%	(23)
Large law firm				
100+ members	10.0%	(1)	4.1%	(2)
50-99	—	—	8.2%	(4)
Medium size firm				
10-24 members	10.0%	(1)	6.1%	(3)
Small firm				
2-4	—	—	2.0%	(1)
solo	—	—	2.0%	(1)
Professor	20.0%	(2)	4.1%	(2)
Other	—	—	4.1%	(2)
Experience				
Judicial	80.0%	(8)	57.1%	(28)
Prosecutorial	30.0%	(3)	34.7%	(17)
Neither	10.0%	(1)	28.6%	(14)
Undergraduate education				
Public	30.0%	(3)	36.7%	(18)
Private	50.0%	(5)	46.9%	(23)
Ivy League	20.0%	(2)	16.3%	(8)
Law school education				
Public	30.0%	(3)	40.8%	(20)
Private	40.0%	(4)	34.7%	(17)
Ivy League	30.0%	(3)	24.5%	(12)
Gender				
Male	60.0%	(6)	77.6%	(38)
Female	40.0%	(4)	22.4%	(11)
Ethnicity/race				
White	100.0%	(10)	81.6%	(40)
African American	—	—	12.2%	(6)
Hispanic	—	—	6.1%	(3)
Percentage white male	60.0%	(6)	65.3%	(32)
ABA rating				
Well qualified	90.0%	(9)	67.3%	(33)
Qualified	10.0%	(1)	32.7%	(16)
Political identification				
Democrat	10.0%	(1)	6.1%	(3)
Republican	90.0%	(9)	91.8%	(45)
None	—	—	2.0%	(1)
Past party activism	80.0%	(8)	55.3%	(32)
Net worth				
Under \$200,000	—	—	6.1%	(3)
\$200-499,999	—	—	20.4%	(10)
\$500-999,999	30.0%	(3)	26.5%	(13)
\$1+ million	70.0%	(7)	46.9%	(23)
Total number of appointees	10		49	
Average age at nomination	49.2		49.7	

his four predecessors in office. With Tables 4 and 5 we are dealing with relatively small numbers, thus percentage differences must be treated cautiously.

In examining Table 4, there are several findings worth highlighting:

14. Goldman, et. al., *Picking judges in a time of turmoil*, supra n. 3 at 276.

Table 5. How the Bush non-traditional appointees compared to his traditional appointees to the U.S. appeals courts

	Nontraditional appointees		Traditional appointees	
	%	(N)	%	(N)
Occupation				
Politics/government	9.5%	(2)	23.7%	(9)
Judiciary	71.4%	(15)	36.8%	(14)
Large law firm				
100+ members	9.5%	(2)	2.6%	(1)
50-99	4.8%	(1)	7.9%	(3)
Medium size firm				
10-24 members	—	—	10.5%	(4)
Small firm				
2-4	—	—	2.6%	(1)
Solo	—	—	2.6%	(1)
Professor of law	4.8%	(1)	7.9%	(3)
Other	—	—	5.3%	(2)
Experience				
Judicial	85.7%	(18)	47.4%	(18)
Prosecutorial	33.3%	(7)	34.2%	(13)
Neither	4.8%	(1)	36.8%	(14)
Undergraduate education				
Public	42.9%	(9)	31.6%	(12)
Private	42.9%	(9)	50.0%	(19)
Ivy League	14.3%	(3)	18.4%	(7)
Law school education				
Public	38.1%	(8)	42.1%	(16)
Private	38.1%	(8)	31.6%	(12)
Ivy League	23.8%	(5)	26.3%	(10)
Gender				
Male	28.6%	(6)	100.0%	(38)
Female	71.4%	(15)	—	—
Ethnicity/race				
White	57.1%	(12)	100.0%	(38)
African American	28.6%	(6)	—	—
Hispanic	14.3%	(3)	—	—
ABA rating				
Well Qualified	66.7%	(14)	73.7%	(28)
Qualified	33.3%	(7)	26.3%	(10)
Political identification				
Democrat	14.3%	(3)	2.6%	(1)
Republican	81.0%	(14)	97.4%	(37)
None	4.8%	(1)	—	—
Past party activism	38.1%	(8)	84.2%	(32)
Net worth				
Under \$200,000	9.5%	(2)	2.6%	(1)
\$200-499,999	14.3%	(3)	18.4%	(7)
\$500-999,999	23.8%	(5)	28.9%	(11)
\$1+ million	52.4%	(11)	50.0%	(19)
Average age at nomination	49.7		49.7	
Total number of appointees	21		38	

• Those confirmed during the 110th Congress were more likely to come from the judicial ranks or have judicial experience than the appointees confirmed during the previous three congresses.

• A larger proportion of appointees confirmed during the 110th Congress were women but none were of an ethnic or racial minority.

• Nine out of 10 of the most recent appointees received the highest ABA

rating compared to under 7 in 10 confirmed during the previous three congresses.

• Seven in 10 of the most recent appointees had a net worth over \$1 million compared to under 5 in 10 confirmed during the previous three congresses.

Over his two terms in office George W. Bush appointed 38 white males (traditional appointees) and 21 who did not fit this profile—racial or ethnic minority males and women, some of whom also were from a racial or ethnic minority (nontraditional appointees). Table 5 compares the two groups:

• About twice the proportion of nontraditional appointees were already judges when appointed to the circuit courts. The proportion of nontraditional appointees with judicial experience was close to twice that for traditional appointees.

• Whereas about one third of the traditional appointees had neither judicial nor prosecutorial experience, the proportion for the nontraditional appointees was under 5 percent.

• Both groups had close to the same proportions given the highest ABA rating with the edge leaning towards the traditional appointees.

• Democrats and Independents, although few in number, were more likely to be found among the nontraditional appointees.

• Traditional appointees were much more likely to have a record of past partisan activism than nontraditional appointees.

• The net worth for the nontraditional and traditional groups of appointees was approximately the same.

• The average age at time of nomination was the same for both groups of appointees.

Table 6 presents the composite portrait of all W. Bush's appeals court appointees during his two terms in office compared to the composite portraits of the appointees of Presidents Carter, Reagan, Bush Sr., and Clinton. The findings reveal:

• Almost 1 in 5 Bush appointees

Partisan makeup of the bench

From the beginning of 2001 to the end of 2006, we saw little impact of the Bush appointments to the federal bench. When he took office in 2001, 51 percent of the judges sitting on lower federal courts were appointed by Republican presidents; at the end of the 109th Congress (2007) that percentage had increased marginally to 52.6. Despite the Democrats gaining a majority in the Senate and the associated claims by Republicans that there was a slowdown in acting on Bush nominees, this trend strengthened during the 110th Congress.¹ When it ended in December of 2008, 56.1 percent of active judges on the lower federal courts were appointed by Republican presidents.² In effect, from 2007 to 2008, Bush increased the percentage of Republican-appointed judges by 3.5 percent, compared to just 1.6 percent for the previous 6 years.

This change in partisan makeup of the bench can be explained by two factors. First, a greater number of vacancies—especially on the district courts—came from Democratic appointees.³ From 2001 to 2006, 169 judges left active service and only 41 (24 percent) were appointed by Democratic presidents. By contrast, from 2007 to 2008, this percentage increased to 39 percent overall, with 42 percent coming from district courts. While still remarkably strong, this is the first sign the Clinton cohort is starting to age as 33 percent of all vacancies came from Clinton appointees.

Second, during his last two years in office, Bush made more federal judicial appointments. Even with the partisan change in the Senate and his lame duck status, Bush nominated and obtained confirmation for 68 judges (58 district court and 10 circuit court)—18 more than the previous two years. This is partially because he had more judicial positions to fill; nonetheless, the impact is the same.

Regarding these last two years of Bush's judicial appointments, there was a marked shift in judicial openings in terms of the party of the appointing president. Historically, the bulk of appointment opportunities come from judges taking senior status or retiring. One explanation is that they do so under a partisan-compatible president and Congress since their replacement is more likely to be ideologically similar. In addition, the "generational effect" dictates that the overall complement of departing judges in any given administration is dominated by the appointees of a specific predecessor of the same party as the sitting president. Combining these two phenomena resulted in Reagan and H. W. Bush judges being replaced by George W. Bush appointees during the first six years of his tenure.

However, from 2007 to 2008, we saw a substantial increase in the retirements of Clinton appointees, partic-

ularly at the district court level. Forty Clinton district court judges left while W. Bush was president and half of them left active service from 2007 to 2008. Although they did not leave with a partisan-compatible president, the Democrats controlled the majority in the Senate, thus those judges left knowing it would be more difficult for the president to nominate someone too ideologically conservative. The data support this conclusion, as the proportion of Democrats nominated to district court positions during the last two years almost doubled from the previous six.⁴

Despite the increase in retirements from the district courts, Table 1 illustrates that the Clinton cohort remains strong on both the district courts and the courts of appeals, where it accounts for 38 percent and 32.3 percent of judges respectively. This is just shy of the 38.1 percent and 32.9 percent of Bush appointees, a difference of one judge at both levels. However, this may change in the near future, as the historical pattern suggests that accelerated departures from the bench (especially retirements) follow changes in partisan control of the White House.⁵ In fact, since January 1, 2009, 22 judges have left active service, of which 45 percent were Clinton appointees.

Given this pattern, unless there is an omnibus judges bill similar to Senate Bill 2774, which would have created 48 new judgeships (38 district court, 10 courts of appeals), it will be difficult for Obama to shift the partisan composition of the bench in any considerable way for a number of years. In fact, assuming no additional Clinton or Carter judges retire, which is very unlikely, it would require nearly 45 percent of the judges appointed by Reagan and H. W. Bush to leave active service to bring partisan equity back to the courts.

The data in Table 1 also underscore the impact of judges opting to take senior status, since the number of senior judges is more than half the number of active judges on each court level. Republican appointees make up a clear majority of senior judges—64 percent and 71 percent on the district courts and courts of appeals, respectively. While senior judges have reduced caseloads, they nonetheless are a critical component of the judiciary and certainly the strong Republican majority has an impact on judicial decision making. Even with the increase in Clinton judges taking senior status, absent a dramatic rise in the number of full retirements by senior judges, Republicans will have the numerical advantage for many years to come.

Looking at the courts separately, the trend of partisan disagreement over district court nominees continued

1. Politico, March 5, 2008 "Nominations slowdown in the Senate."

2. This calculation is for authorized judgeships, and thus includes vacancies.

3. Vacancy data include judges who left the bench due to retirement, resignation, elevation, and death—the overwhelming majority, of course, took senior status.

4. See Table 3 in text.

5. See Deborah Barrow, Gary Zuk and Gerard Cieski, *THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE* (Ann Arbor: University of Michigan Press, 1998).



Table 1. Make-up of federal bench by appointing president, January 1, 2009 (lifetime positions on lower courts of general jurisdiction).

	District courts				Courts of appeals			
	Active		Senior		Active		Senior	
	%	(N)	%	(N)	%	(N)	%	(N)
Bush, G.W.	38.1	253	0.0	0	32.9	55	1.0	1
Clinton	38.0	252	8.1	30	32.3	54	3.0	3
Bush	10.5	70	12.7	47	10.8	18	14.1	14
Reagan	7.2	48	35.2	130	11.4	19	42.4	42
Carter	1.7	11	23.8	88	4.2	7	20.2	20
Ford	0.2	1	4.3	16	0.6	1	3.0	3
Nixon	0.2	1	11.4	42	0.0	0	10.1	10
Johnson	0.2	1	3.3	12	—	—	5.1	5
Kennedy	—	—	0.8	3	—	—	1.0	1
Eisenhower	—	—	0.3	1	—	—	—	—
Vacancies	4.1	27	—	—	7.8	13	—	—
Total	100.2%	664*	99.9%	369	100%	167	99.9%	99

*Does not include the 11 temporary district court judgeships

mitted nominations).⁸ This is a vast improvement over the 35 confirmations from the 108th Congress, but Bush still left 27 vacancies as his term expired.

Owing primarily to the decrease in appointment opportunities during the last four years⁹ and an increase in contention over district court nominees, by the end of the 110th Congress, Bush appointed 261 judges—significantly fewer than Clinton's record of 305. However, the impact of Bush's appointments is clear. Overall, Republican appointees now constitute 56.2 percent of the total authorized

positions, and 58.6 percent of active judges. This is considerably more than the 52.4 percent of authorized positions and 55 percent of active judges from just two years ago.

During his first six years in office Bush had a difficult time getting his appointees to the courts of appeals confirmed and this trend continued during the 110th Congress. At the start of the congressional term there were 16 appellate court vacancies, with 7 additional positions left by 5 judges taking senior status, 1 retirement, and 1 death. In total, Bush had 23 appointment opportunities to the courts of appeals for which he submitted 22 nominations. He succeeded in getting 10 nominees confirmed.

Despite the strength of the Clinton cohort (only one Clinton appointee took senior status) Republican appointees now comprise 55.7 percent (93) of the 167 seats authorized for the courts of

during the 110th Congress.⁸ Even though Republicans claimed that Democrats' Invocation of the Thurmond Rule impeded progress on Bush's judicial nominees,⁹ Bush obtained confirmation of 58 district court judges out of 85 appointment opportunities (but only 79 sub-

appeals, which is 2.4 percent more than two years ago. However, taking into account only active judges, the Republican majority swells to 60.4 percent, illustrating that it is firmly in the Republican column for the foreseeable future.

The Republican advantage widens upon factoring senior status judges into the mix. Combining both court levels, 61.3 percent of all judges currently hearing cases were appointed by Republican presidents.¹⁰ The Republican edge is more pronounced at the appellate level where 64.4 percent were appointed by Republicans, as compared to 60.5 percent on the district courts. Reagan appointees dominate the group of senior judges—they comprise more than one third of the district and appellate courts. ¹¹

— Sara Schiavoni

8. Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Cary Zuk, and Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?* 85 JUDICATURE 282 (2003) and Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244 (2005). Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni, *Picking Judges in a Time of Turmoil: W. Bush's Judiciary during the 109th Congress*, 90 JUDICATURE 252 (2007).

9. See page 263 for a discussion of the rule.

10. Of the 85 opportunities, 43 (50%) came from judges taking senior status, 28 from inherited vacancies, 6 from resignations, 2 from elevations to the courts of appeals, 2 from retirements, and 4 from death.

11. Bush did not benefit from any judgeship legislation during the 108th, 109th or 110th Congresses.

12. Adding senior judges to those in active service totals 1259 judges, which increases to 1299 when including vacancies.

Table 6. U.S. appeals court appointees compared by administration, Carter through W. Bush

	W. Bush		Clinton		Bush		Reagan		Carter	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
Occupation										
Politics/government	18.6%	(11)	6.6%	(4)	10.8%	(4)	6.4%	(5)	5.4%	(3)
Judiciary	49.1%	(29)	52.5%	(32)	59.5%	(22)	55.1%	(43)	46.4%	(26)
Large law firm										
100+ members	5.1%	(3)	11.5%	(7)	8.1%	(3)	5.1%	(4)	1.8%	(1)
50-99	6.8%	(4)	3.3%	(2)	8.1%	(3)	2.6%	(2)	5.4%	(3)
25-49	—	—	3.3%	(2)	—	—	6.4%	(5)	3.6%	(2)
Medium size firm										
10-24 members	6.8%	(4)	9.8%	(6)	8.1%	(3)	3.9%	(3)	14.3%	(8)
5-9	—	—	3.3%	(2)	2.7%	(1)	5.1%	(4)	1.8%	(1)
Small firm										
2-4	1.7%	(1)	1.6%	(1)	—	—	1.3%	(1)	3.6%	(2)
solo	1.7%	(1)	—	—	—	—	—	—	1.8%	(1)
Professor	6.8%	(4)	8.2%	(5)	2.7%	(1)	12.8%	(10)	14.3%	(8)
Other	3.4%	(2)	—	—	—	—	1.3%	(1)	1.8%	(1)
Experience										
Judicial	61.0%	(36)	59.0%	(36)	62.2%	(23)	60.3%	(47)	53.6%	(30)
Prosecutorial	33.9%	(20)	37.7%	(23)	29.7%	(11)	26.2%	(22)	30.4%	(17)
Neither	25.4%	(15)	29.5%	(18)	32.4%	(12)	34.6%	(27)	39.3%	(22)
Undergraduate education										
Public	35.6%	(21)	44.3%	(27)	29.7%	(11)	24.4%	(19)	30.4%	(17)
Private	47.4%	(28)	34.4%	(21)	59.5%	(22)	51.3%	(40)	51.8%	(29)
Ivy League	17.0%	(10)	21.3%	(13)	10.8%	(4)	24.4%	(19)	17.9%	(10)
Law school education										
Public	39.0%	(23)	39.3%	(24)	32.4%	(12)	41.0%	(32)	39.3%	(22)
Private	35.6%	(21)	31.1%	(19)	37.8%	(14)	36.9%	(28)	19.6%	(11)
Ivy League	25.4%	(15)	29.5%	(18)	29.7%	(11)	23.1%	(18)	41.1%	(23)
Gender										
Male	74.6%	(44)	67.2%	(41)	81.1%	(30)	94.9%	(74)	80.4%	(45)
Female	25.4%	(15)	32.8%	(20)	18.9%	(7)	5.1%	(4)	19.6%	(11)
Ethnicity/race										
White	84.7%	(50)	73.8%	(45)	89.2%	(33)	97.4%	(76)	78.6%	(44)
African American	10.2%	(6)	13.1%	(8)	5.4%	(2)	1.3%	(1)	16.1%	(9)
Hispanic	5.1%	(3)	11.5%	(7)	5.4%	(2)	1.3%	(1)	3.6%	(2)
Asian	—	—	1.6%	(1)	—	—	—	—	1.8%	(1)
Percentage white male	64.4%	(38)	49.2%	(30)	70.3%	(26)	92.3%	(72)	60.7%	(34)
ABA rating										
EWQAWQ	71.2%	(42)	78.7%	(48)	64.9%	(24)	59.0%	(46)	75.0%	(42)
Qualified	28.8%	(17)	21.3%	(13)	35.1%	(13)	41.0%	(32)	25.0%	(14)
Political identification										
Democrat	6.8%	(4)	85.2%	(52)	2.7%	(1)	—	—	82.1%	(46)
Republican	91.5%	(54)	6.6%	(4)	89.2%	(33)	96.2%	(75)	7.1%	(4)
Other	—	—	—	—	—	—	1.3%	(1)	—	—
None	1.7%	(1)	8.2%	(5)	8.1%	(3)	2.6%	(2)	10.7%	(6)
Past party activism	67.8%	(40)	54.1%	(33)	70.3%	(26)	66.7%	(52)	73.2%	(41)
Net worth										
Under \$200,000	5.1%	(3)	4.9%	(3)	5.4%	(2)	15.6%*	(12)	33.3%**	(13)
\$200-499,999	16.9%	(10)	14.8%	(9)	29.7%	(11)	32.5%	(25)	38.5%	(15)
\$500-999,999	27.1%	(16)	29.5%	(18)	21.6%	(8)	35.1%	(27)	17.9%	(7)
\$1+ million	50.8%	(30)	50.8%	(31)	43.2%	(16)	16.9%	(13)	10.3%	(4)
Total number of appointees	59		61		37		78		56	
Average age at nomination	49.6		51.2		48.7		50.0		51.8	

*Net worth was unavailable for one appointee.

**Net worth only for Carter appointees confirmed by the 96th Congress with the exception of five appointees for whom net worth was unavailable. Note that the two recess appointments by President Bush and the one by President Clinton are not included in the statistics.

came to the courts of appeals from positions in government, typically the U.S. Attorney's office. This was

the largest proportion by far for all five administrations.

• Slightly under half the Bush

appointees were elevated from a lower court judgeship. Only the proportion for the Carter appointees

was lower. On the other hand, the proportion with judicial experience was the second highest for all five administrations. And, significantly, the Bush appeals court appointees had the lowest proportion of all five administrations with neither judicial nor prosecutorial experience. Clearly, the Bush Administration was concerned with naming people with a track record that aligned with the judicial philosophy of the President.

- About one in four had an Ivy League law school education. However, when we add those who attended such prestigious non-Ivy league law schools as Chicago, Duke, Georgetown, Indiana, Michigan, Stanford, Texas, and Virginia, the proportion attending the most prestigious law schools came to over 50 percent, close to the same proportion as that of the Clinton appointees and larger than the 45 percent of Reagan and Bush Sr. appointees.

- The proportion of women appointed by W. Bush to the appeals courts was exceeded only by Clinton. The proportion of African Americans was higher than that of Bush's Republican predecessors but lower than the proportions for Carter and Clinton. Similarly, the proportion of traditional appointees was higher than the proportions for Carter and Clinton but lower than that of Bush's Republican predecessors.

- About 7 in 10 Bush appointees received the highest ABA rating. This was better than his Republican predecessors but lower, although close, to the Carter and Clinton proportions.

- Bush, Clinton, and Carter named approximately the same proportion of appointees affiliated with the opposition party, but Bush appointed the lowest proportion of those unaffiliated with a political party.

- About two-thirds of the Bush appointees had some record of pre-

vious party activism. The Clinton cohort had the smallest proportion but even for the Clinton judges, over half had a documented history of party activity.

- The Bush and Clinton cohorts were on the whole the wealthiest group of appointees of all five presidents. The same proportion (51 percent) of both presidents' appointees had a net worth of \$1 million or more.

- Bush's appointees were the second youngest of all five presidents. Only Bush's father appointed younger appeals court judges in terms of average age at the time of nomination.

W. Bush's judicial legacy

From the outset of the Bush presidency, judicial selection was targeted as a high priority and administration officials were quite candid about this. Viet Dinh, when he was Assistant Attorney General for Legal Policy during the early years of the presidency told us: "The legal legacy that the Pres-

ident leaves [is as] important as anything else we do in terms of legislative policy . . . [W]e want to ensure that the President's mandate to us that the men and women who are nominated by him to be on the bench have his vision of the proper role of the judiciary." He also noted that judicial nominations should not be thought of "as something apart from and secondary to [the] policy agenda but as an integral part of it."¹⁵

The then Associate White House Counsel Brett Kavanaugh, later named and confirmed to the U.S. Court of Appeals for the District of Columbia Circuit, also told us that the President "is very interested in this [selecting judges] and thinks it is one of his most important responsibilities...."¹⁶ Two years later Kavanaugh's successor, Associate White Counsel Dabney Friedrich, told us that the President "has given a great deal of attention to judgeships over the past four years, and he will continue to do so."¹⁷ Two years subsequently Friedrich's succe-

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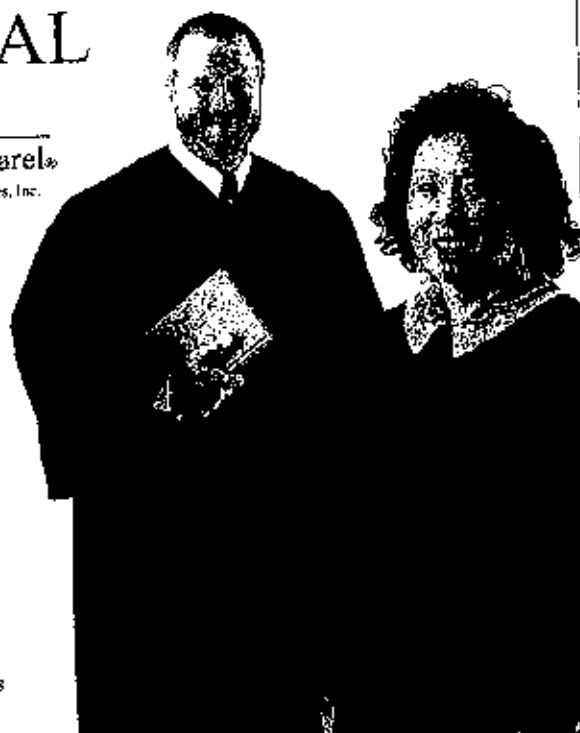
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15. Interview with Viet Dinh on January 6, 2003.

16. Interview with Brett Kavanaugh on January 7, 2003.

17. Interview with Dabney Friedrich on December 8, 2004.

sor, Jennifer Brosnahan, assured us that "the President will continue to nominate the same kind of people that he has nominated in the past—people with extraordinary credentials and integrity, and who share his judicial philosophy."¹⁸

In recent decades, starting with the Reagan Administration, ideological/philosophical screening has been de rigueur for Republican administrations. As a result, the lower court appointees of Reagan and both presidents Bush have generally been more conservative in the exercise of their discretion than have the appointees of Democratic presidents. The Carp et al. study of the voting behavior of W. Bush's district court judges in this issue of *Judicature* (see page 312) provides empirical support for this statement. After eight years of Bush appointments to the appeals courts, the ideological mix on those courts is thought to have sharply tipped to the conservative end of the ideological spectrum.¹⁹

The impact of Bush appointments on judicial policy is most dramatically illustrated by the sharp divisions on the Supreme Court where Bush appointees Associate Justice Samuel Alito and Chief Justice John Roberts have helped push the Court even further to the right and whose support of civil liberties claims is relatively low. Barbara Perry in her article in this issue (see page 302) fleshes out the policy impact of the Roberts and Alito appointments.

Furthermore, in simple quantitative terms, the proportion of votes supporting civil liberties claims in non-unanimously decided decisions from 2005-2008 was 17 percent for Justice Alito (only Justice Thomas had a lower support level, 10 percent) and 23 percent for Chief Justice Roberts (virtually the same as Justice Scalia's support level). In contrast, Justice Kennedy's civil liberties support level was 40 percent, and the four more liberal justices' support levels ranged from Justice Breyer's 74 percent to Justice Ginsburg's 81 percent.²⁰

Thus, George W. Bush's legacy includes the appointment of like-minded

Supreme Court justices and lower court judges selected by a process structured to achieve that result.

Over the past two decades, the judicial confirmation process has become heavily politicized with active lobbying of senators by conservative and liberal groups. Senators have placed holds on nominations, conducted filibusters, and employed various delaying tactics. This has most notably been the case with appeals court nominees, but district court nominees were also affected. The Democrats were furious with

Bush's judicial legacy is also that of a highly professionally qualified diverse judiciary.

Republican obstruction and delay of Clinton judicial nominees. Particularly during Clinton's second term, dozens of judicial nominations were delayed or killed. Democrats exacted payback during W. Bush's presidency, especially when the nominees were seen as excessively ideological and/or partisan. Rather than lower the partisan temperature, the President raised it. The article by Binder and Maltzman in this issue (see page 320) provides systematic analyses of confirmation battles and what variables are associated with greater or lesser contentiousness.

The level of distrust between Senate Democrats and the Bush White House escalated to the point that during the 110th Congress, the Senate refused to recess lest the President make recess appointments. Thus the Senate was in continuous pro forma session over the major holidays and the customary August recess.

W. Bush's judicial legacy then must be seen as including a highly politicized and confrontational selection and confirmation process.

In terms of the demographics and characteristics of those placed on the bench by George W. Bush, as dis-

cussed earlier in this article, the record is one of highly professionally qualified appointees and the most diverse cohort (race, ethnicity, gender) of any Republican president and of every Democratic president with the exception of Clinton and rivaling Carter. Indeed, Bush's proportion of Hispanics to the federal district courts was a historic record. A full discussion of diversity is found in the article in this issue by Jennifer Segal Diasero and Rorie Spill Solberg (see page 289).

While Democrat Barack Obama

can be expected to set new historic records for diversity, George W. Bush set the benchmark for Republican presidents and it is unlikely that any future Republican president would fail to take account of his performance in this regard.

W. Bush's judicial legacy, then, is also that of a highly professionally qualified diverse judiciary.

In sum, George W. Bush and his administration set out with a vision for the judiciary and firm ideas of what the President wanted his judicial legacy to be. In that respect, unlike the ill-fated war in Iraq that was once touted as "mission accomplished," his successful placing on the bench two Supreme Court justices, 59 appeals courts judges, and 261 district court judges, all lifetime appointees to courts of general jurisdiction, truly constituted "mission accomplished."

18. Interview with Jennifer Brosnahan on December 6, 2006.

19. Charlie Savage, *Appeals Courts Pushed to Right By Bush Chances*, New York Times, October 29, 2008, at A-1, A-14.

20. See Table 2 in Sheldon Goldman, *Obama and the Federal Judiciary: Great Expectations Not Will Be Have a Diskery of a Time Living up to Them?*, 7 THE FORUM, Issue 1, Article 9, p. 8. Online journal at www.bepress.com/forum/vol7/iss1/art9

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Terror-probe rules to change

By Lara Jakes Jordan
The Associated Press

Posted: 09/24/2008 12:30 00 AM MDT

WASHINGTON — The Justice Department, in a nod to concerns that Americans could be investigated in terrorism cases without evidence of wrongdoing, said Tuesday that it will tweak still-tentative rules governing FBI national security cases before they are issued.

The changes represent a small but first victory for skeptical lawmakers and civil liberties groups that want the department to delay the rules until a new president is elected.

Not all of the planned changes were outlined during a Senate Intelligence Committee hearing, but Assistant Attorney General Elisebeth Cook said they would include limits on the length and kinds of investigative activities used in monitoring demonstrations and civil disorders.

"We do anticipate making changes in response to the comments we have received," Cook said. Justice Department and FBI lawyers have been briefing lawmakers and interest groups on the rules for the past six weeks.

The short hearing came as three Democrats on the Senate Judiciary Committee demanded "bare-minimum" civil rights protections for U.S. citizens and residents as the FBI expands its power to seek out potential terrorists.

"The Justice Department's actions over the last eight years have alienated many Americans, especially Arab- and Muslim-Americans," Democratic Sens. Dick Durbin, Russ Feingold and Edward Kennedy wrote Tuesday to Attorney General Michael Mukasey.

The rules, known as attorney general guidelines, will update how agents conduct interviews as the FBI shifts from a traditional crime-fighting agency to one whose top priority is protecting the United States from terrorist attacks.

The Justice Department says the guidelines will merely streamline existing authorities used in criminal and national security investigations. But critics call them a broad expansion of FBI powers that could result in racial, ethnic or religious profiling without any evidence of a crime.

The government initially wanted to issue the guidelines by Oct. 1, but Cook indicated Tuesday that was unlikely. She said, however, that the Justice Department expected to finalize the new rules in the near future.

A growing group of House and Senate lawmakers — both Democratic and Republican — has urged Mukasey to release the policy to the public before it takes effect, allowing scrutiny and easing concerns about rule-making done in

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Senate Intelligence Committee chairman Jay Rockefeller, D-W.Va., said after the hearing that he remains "skeptical" about how well the guidelines will work, but maintained they "could represent an improvement" over current policy.

The panel's top Republican, Sen. Christopher Bond of Missouri, called the guidelines "a remarkable improvement" and said they should be issued immediately.

If Mukasey finalizes the guidelines in the waning days of the Bush administration, Durbin, Feingold and Kennedy demanded that they at least include what they called "bare minimum" safeguards.

Those protections include:

- Explicitly banning surveillance or other investigative activity based on a suspect's race, ethnicity, national origin or religion.
- Requiring some factual proof, allegations or other grounds for opening inquiries that fall short of an investigation.
- Requiring specific plans to protect information that the FBI collects about U.S. citizens and residents, particularly in gathering foreign intelligence data.

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Feds Plan to Take DNA Samples of Anyone Arrested for Immigration Violations

Thursday, January 15, 2009

By Lindsay Stewart

FOX NEWS

LOS ANGELES —

A Mexican national arraigned last month in San Diego on 11 charges in a rape case is now a poster boy for a new Department of Justice policy requiring federal officials to take DNA samples from those arrested on immigration violations.

Before being charged with rape, suspect Carlos Ceron Salazar was deported nine times from the United States. Had the new DOJ policy been in place, federal officials say many victims could have been spared.

"In the past, we have had a limited authority to take DNA samples," said Elisebeth Cook, an attorney in the Office of Legal Policy at the Justice Department. "It's critical while we have the opportunity to take the sample."

But civil libertarians are concerned about the policy, pointing to backlog of DNA samples already existing in criminal laboratories across the country. Samples will be taken from those who are merely detained, they say, not just from those who arrested or charged with any crime.

"We're now treating people who have yet to be taken to court of law, proven to have violated either the civil or criminal law and engaging in probably the most invasive kind of information gathering we have," said Larry Frankel, an attorney for the American Civil Liberties Union.

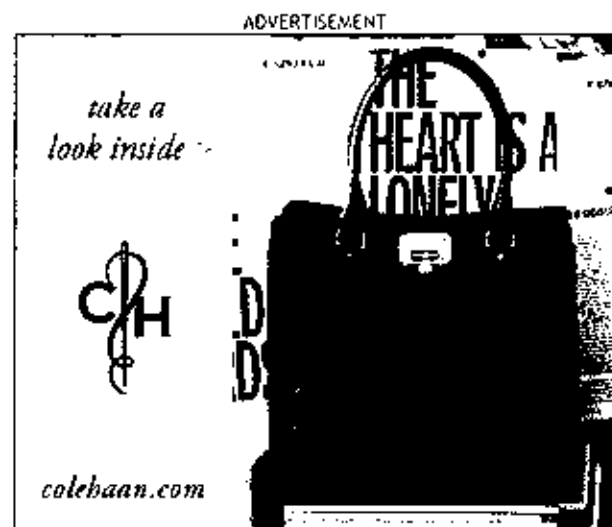
Frankel says the new policy will likely lead to increased racial profiling from law enforcement.

"We're going to find people who someone suspects they're not citizens because of their skin color or their accent, when in fact they are naturalized citizens," he told FOX News.

Yet federal officials insist that cheek swab data taken from those detained — whether it be for coming into the country illegally or overstaying a visa — will be a valuable crime-fighting tool. The DOJ says nearly 60,000 cases have been solved using DNA evidence, either aiding in the conviction or the exoneration of suspects.

In cases where a person is wrongly detained, that individual will have a right to petition the Federal Bureau of Investigations to have their DNA sample removed from their databases, a remedy which the ACLU argues is too arduous for a person who never committed a crime in the first place.

The ACLU is looking for ways to fight the policy. While the organization has not filed any legal action, they will not rule out a future lawsuit.



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INTERNATIONAL **Herald Tribune**

FBI given new rules for investigations

The Associated Press

Saturday, October 4, 2008

WASHINGTON:

The Bush administration issued new rules Friday designed to allow the FBI to pursue potential national security threats with the same vigor and techniques used against common criminals. Civil libertarians said the guidelines will come at a cost to constitutional protections.

The rules, to take effect Dec. 1, are a road map to the FBI's transformation. The Federal Bureau of Investigation made its reputation many decades ago by successfully pursuing bank robbers. The Justice Department says it wants to ensure that the FBI can now meet the biggest threats of the 21st century: national security and terrorism.

The road map consolidates once-separate rules for assessing threats and investigating traditional crimes and terror. They tell FBI agents what they can and cannot do, including when to conduct surveillance, use informants and consider race or ethnicity in determining whether someone is a suspect.

While some changes were made from preliminary rules shown to lawmakers, public interest organizations and reporters, the alterations were not enough to silence critics who say the FBI will be able to begin investigating people with no indication they have committed a crime.

Anticipating the criticism, Attorney General Michael Mukasey and FBI Director Robert Mueller issued a joint statement saying: "We are confident these guidelines will assist the FBI in carrying out its critical national security and foreign intelligence missions while also protecting privacy and civil liberties."

Democratic Sen. Patrick Leahy, chairman of the Senate Judiciary Committee, was not reassured.

"I am concerned that the guidelines continue the pattern of this administration of expanding authority to gather and use Americans' private information without protections for privacy or checks to prevent abuse and misuse," Leahy said.

Three Democrats on the House Judiciary Committee asked the department to postpone the effective date until a new president takes office in January and has an opportunity to review the procedures.

"Questions still remain about why there seems to be a rush to change these procedures in the last days of this administration," Reps. John Conyers, Robert "Bobby" Scott and Jerrold Nadler said in a joint statement.

The three said it was unclear whether the guidelines will result in FBI agents "monitoring the religious and political activities of innocent people."

Michael German, policy counsel for the American Civil Liberties Union, said the Justice Department recently revised the rules to make it appear that limits have been imposed on what techniques the FBI can use to investigate demonstrations and civil disorders. He cited language elsewhere in the guidelines that appear to contradict the restrictions, saying there are no limits on the FBI's authority to investigate federal crimes or threats to national security during civil disorders or demonstrations.

Elisebeth Cook, chief of the Justice Department's Office of Legal Policy, said in an interview that several changes were made to accommodate critics' worries and protect civil rights and liberties.

"To say we're in a brave new world, and the FBI has new ability to investigate without evidence of wrongdoing is misunderstood," she said.

Dealing with concerns about racial profiling, Cook said race is used only as one factor in an investigation when it is relevant, such as describing a suspect. The guidelines cannot undercut any

constitutional protections, state laws, executive orders or federal policies, Cook said.

Among the changes between a preliminary draft and the final rules:

_Investigations related to civil disorders now have a time limit of 30 days. The investigations are to determine only whether the president needs to use the military.

_The guidelines "cut way back," Cook said, in the types of information that can be collected in cases of civil disorders. Only four techniques will be allowed: checking public records, FBI records, other government records and online sources.

Any other methods would have to be approved by the attorney general or one of several top deputies confirmed by the U.S. Senate.

_Language was added to say the FBI "shall" protect speech and practice of religion rights, instead of "should."

Correction:

Notes: