

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

Katherine Polk Failla (née Katherine Mary Polk)

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

United States District Judge for the Southern District of New York

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.

United States Attorney's Office for the Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

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

1969; Edison, New Jersey

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.

1990 – 1993, Harvard Law School; J.D. (*cum laude*), 1993

1987 – 1990, College of William & Mary; B.A. (*summa cum laude*), 1990

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.

2000 – Present

United States Attorney's Office for the Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Chief, Criminal Appeals Unit (2008 – present)

Deputy Chief, Criminal Appeals Unit (2004 – 2008)
Assistant United States Attorney (2000 – present)

1994 – 2000
Morgan Lewis & Bockius LLP
101 Park Avenue
New York, New York 10178
Associate

1993 – 1994
United States District Court for the District of New Jersey
Mitchell H. Cohen Building and U.S. Courthouse
Fourth and Cooper Streets
Camden, New Jersey 08101
Law Clerk to the Honorable Joseph E. Irenas

Summer 1992
Morgan Lewis & Bockius LLP
101 Park Avenue
New York, New York 10178
Summer Associate

Summer 1991
Beattie Padovano LLC
50 Chestnut Ridge Road
Montvale, New Jersey 07645
Summer Associate

Summer 1990
Toys 'R' Us Corporate Headquarters (now located in Wayne, New Jersey)
461 From Road
Paramus, New Jersey 07652
Legal Assistant

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. I was 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.

Commendations in recognition of outstanding performance, dedicated service, and/or successful prosecutions from the following law enforcement agencies:

Federal Bureau of Investigation (2004)

New York Drug Enforcement Task Force (2003)

United States Customs Service (2002)

Co-Editor-in-Chief, *Harvard Journal of Law & Public Policy* (1993)

Managing Editor, *Harvard Journal of Law & Public Policy* (1992)

Articles Editor, *Harvard Journal of Law & Public Policy* (1991 – 1992)

College of William & Mary Dean's List (every semester)

Phi Beta Kappa, College of William & Mary (1989 – 1990)

High Honors for Senior Thesis (1990)

Richard Lee Morton Award for Outstanding History Graduate (1990)

Elsa Monk Krattiger Award for Outstanding Thesis in Early American History (1990)

Phi Alpha Theta History Honor Society, Vice President (1989 – 1990)

Phi Eta Sigma Freshman Honor Society (1987)

Alpha Lambda Delta Freshman Honor Society (1987)

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

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.

New York, 1994

New Jersey, 1994

My New Jersey bar membership has been inactive since 2000. Otherwise, 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.

United States Court of Appeals for the Second Circuit, 2002

United States District Court for the Southern District of New York, 1995

United States District Court for the Eastern District of New York, 1995

There have been no lapses in membership.

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 Club of New York City (1993 – 1998)

William & Mary Alumni Association (1990 – Present)

- b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. 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.

To the best of my knowledge, none of the organizations listed in response to Question 11a currently discriminates 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.

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.

Anne C. Flannery & Katherine M. Polk, *Recent Decisions on the Attorney-Client Privilege and Their Impact on Internal Corporate Investigations*, Metropolitan Corporate Counsel, November 1996. Copy supplied.

Anne C. Flannery & Katherine M. Polk, *Between a Rock and a Hard Place: Internal Corporate Investigations and the Attorney-Client Privilege*, Practising Law Institute, October/November 1996. Copy supplied.

Note, *Inferring Actual Malice from Altered Quotations*, Masson v. New Yorker Magazine, Inc., 15 Harv. J.L. & Pub. Pol'y 255 (1992). Copy supplied.

- 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.

In my capacity as Chief of Criminal Appeals, I have participated in the creation of reports, memoranda, and policy statements for and on behalf of the United States Attorney's Office for the Southern District of New York, but these materials are privileged.

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

I have not given any such testimony, official statement, or other communication.

- 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.

October 3, 2011: White Collar Crime 2011: Prosecutors and Regulators Speak, Practising Law Institute. I was part of a panel titled "Sentencing in White Collar Cases," and spoke on issues relating to guilty pleas and sentencings in white collar cases, including variations among pleas and plea agreements, the application of the United States Sentencing Guidelines in white collar cases, and sentencing trends in white collar cases among judges in the Southern District of New York. Video supplied.

March 23, 2011: I spoke to students in Columbia Law School's Second Circuit Externship Program concerning appellate advocacy before the Second Circuit and, more specifically, the United States Attorney's Office as an appellate litigant. I have no notes, transcript, or recording. Columbia Law School is located at 435 West 116th Street, New York, New York 10027.

October 20, 2010: I spoke to students in Columbia Law School's Second Circuit Externship Program concerning appellate advocacy before the Second Circuit. I have no notes, transcript, or recording. Columbia Law School is located at 435 West 116th Street, New York, New York 10027.

September 16, 2010: Federal Sentencing Update 2010, Association of the Bar for the City of New York (ABCNY), Committee on Criminal Law. I spoke on post-Booker sentencing trends in criminal cases among judges in the Southern District of New York. Video supplied.

January 27, 2010: I spoke to students taking the Legal Process Workshop II class at Columbia Law School concerning appellate advocacy before the Second Circuit. I have no notes, transcript, or recording. Columbia Law School is located at 435 West 116th Street, New York, New York 10027.

November 4, 2009: I spoke to students in Columbia Law School's Second Circuit Externship Program concerning appellate advocacy before the Second Circuit and, more specifically, the United States Attorney's Office as an appellate litigant. I have no notes, transcript, or recording. Columbia Law School is located at 435 West 116th Street, New York, New York 10027.

September 23, 2009: Fourth, Fifth, and Sixth Amendment Issues: New York City Department of Investigation (DOI) Continuing Legal Education Program. I lectured DOI investigators concerning Fourth, Fifth, and Sixth Amendment issues that frequently arise in the context of DOI investigations. Outlines supplied.

August 8, 2008: A Review of the Recent Supreme Court Term: American Bar Association (ABA) Criminal Justice Section. I participated on a panel discussing various criminal law decisions issued by the Supreme Court of the United States during the October 2007 Term. Among other areas, I focused on several decisions concerning money laundering. I have no notes, transcript, or recording, but a brief summary by the panel moderator is supplied. The Criminal Justice Section of the ABA is located at 740 15th Street, NW, Washington, DC 20005.

February 26, 2008: Ethics for the Litigator, New York County Lawyers' Association (NYCLA), CLE Institute. I participated on a panel that discussed various ethical issues that can arise when attorneys engage in aggressive litigation tactics at the pleading, discovery, trial, and/or settlement stages of a matter. Video supplied.

January 23, 2007: Ethical Bounds of Aggressive Litigation: 2007 Update, New York County Lawyers' Association, CLE Institute. I participated on a panel that discussed ethical issues that frequently arise for new or recently admitted attorneys, particularly those who engage in aggressive litigation tactics without considering the ramifications under the New York Lawyer's Code of Professional Responsibility. Video supplied.

December 21, 2005: Ethics in Context: Winter 2005, Practising Law Institute. I participated on a panel that discussed then-new and modified rules of professional responsibility in the context of issues such as zealous advocacy, the "crime-fraud exception" to the attorney-client privilege, the duty of candor to the court, and

conflicts of interest. I have no notes, transcript, or recording. The Practising Law Institute is located at 810 Seventh Avenue, New York, New York 10019.

September 14, 2005: Emerging Issues in Litigation Ethics, New York County Lawyers' Association, CLE Institute. I participated on a panel that discussed ethical issues that can arise for criminal defense attorneys during the course of representing their clients. I have no notes, transcript, or recording. The NYCLA is located at 14 Vesey Street, New York, New York 10007.

May 5, 2005: Emerging Ethical Issues for the Corporate Lawyer, New York County Lawyers' Association, CLE Institute. I participated on a panel that discussed ethical issues that might arise for in-house corporate counsel when their corporations are subject to litigation and/or criminal or agency investigation. Video supplied.

January 12, 2005: Ethics for the Litigator, New York County Lawyers' Association, CLE Institute. I participated on a panel that discussed the governing rules of professional responsibility and their "real-life" application in the litigation setting. I have no notes, transcript, or recording. The NYCLA is located at 14 Vesey Street, New York, New York 10007.

February 2, 2001: I spoke at Career Day at my high school alma mater concerning my career as a lawyer practicing in both the public and private sectors. I have no notes, transcript, or recording. The Academy of the Holy Angels is located at 315 Hillside Avenue, Demarest, New Jersey 07627.

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

I have not given any such interviews.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____
 - i. Of these, approximately what percent were:

jury trials:	_____ %
bench trials:	_____ %

civil proceedings: _____ %
criminal proceedings: _____ %

- b. Provide citations for all opinions you have written, including concurrences and dissents.
 - c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).
 - d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.
 - e. Provide a list of all cases in which certiorari was requested or granted.
 - f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.
 - g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.
 - h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.
 - i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.
14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not served as a judge.

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

15. Public Office, Political Activities and Affiliations:

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

I have not held any public office, either elected or appointed, nor have I ever been an unsuccessful candidate or nominee.

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

I have never held membership or office in any political party or election committee, nor have I held a position or played a role in a political campaign.

16. 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;

The Honorable Joseph E. Irenas
 United States District Judge for the District of New Jersey
 1993 – 1994

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

I have never practiced alone.

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

1994 – 2000
Morgan Lewis & Bockius LLP
101 Park Avenue
New York, New York 10178
Associate

2000 – Present
United States Attorney's Office for the Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
Chief, Criminal Appeals Unit (2008 – Present)
Deputy Chief, Criminal Appeals Unit (2004 – 2008)
Assistant United States Attorney (2000 – present)

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

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

b. Describe:

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

After joining Morgan Lewis, I litigated numerous commercial matters in state and federal courts, as well as several regulatory matters before the United States Securities and Exchange Commission (SEC) and what was then known as the National Association of Securities Dealers (NASD, now FINRA). These cases implicated a wide range of legal issues, including federal and state securities laws, contract law, insurance and reinsurance law, and salvor-in-possession law.

From 1995 through 1999, I defended Merrill Lynch and several of its related entities in a series of civil litigations and regulatory proceedings stemming from the filing of bankruptcy by Orange County, California, in December of 1994. My work on the Orange County matters focused on issues of federal and state securities law, bankruptcy law, and the attorney-client privilege and work product doctrine. During that time period, I also represented several clients in securities regulatory matters before the

NASD and the SEC, and was associate counsel in the bench trial of a civil RICO action involving issues of reinsurance law.

In my last two years at Morgan Lewis, I worked on a number of commercial litigations (including a temporary restraining order) involving contract law and intellectual property issues. In addition, I conducted an internal investigation of a multi-national company in response to claims of accounting fraud, insider trading, and market manipulation. I then represented that company in civil shareholder class action lawsuits, regulatory proceedings before the SEC, and a criminal investigation.

While at Morgan Lewis, I counseled firm clients on risk management, compliance, and litigation issues. Among other things, I directed special supervision projects to identify and address compliance issues at several broker-dealers; I conducted internal investigations; and I advised clients on emerging legal issues and litigation exposure.

As a member of the United States Attorney's Office's General Crimes Unit in 2000 and 2001, I prosecuted a variety of offenses, including firearms trafficking, art fraud, child pornography, immigration offenses, and narcotics offenses. From 2001 to 2002, as a member of the Office's Narcotics Unit, I prosecuted narcotics trafficking and money laundering cases. From 2002 to 2004, I served as a member of the Securities and Commodities Fraud Task Force, where I prosecuted a range of securities frauds, including private placement fraud, foreign exchange fraud, and market manipulation cases. Even after my promotion to Deputy Chief of Criminal Appeals in 2004, I retained a slate of securities fraud cases that I continued to prosecute.

In the Criminal Appeals Unit, my work implicates the spectrum of criminal cases prosecuted by the Office. While in the Unit, I have edited the Government's briefs on appeal in approximately 380 cases. I have also developed expertise in cases involving terrorism offenses, securities fraud, fraud in the marketing and promotion of tax shelters, and the Sixth Amendment.

As Chief of the Criminal Appeals Unit, I also serve as counselor to the Office. In that capacity, I am consulted daily by other prosecutors so that we may identify, and resolve, appellate issues long before any appeal. Issues on which I am consulted often include the appropriate manner of conducting investigations; the decision to bring criminal charges; the Government's response to substantive defense motions; and legal and evidentiary issues that may arise during the course of a prosecution. In addition, I develop, and assist in developing, Office policy on issues of federal criminal law and procedure.

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

At Morgan Lewis, I typically represented large multi-national corporations, financial services entities, and broker-dealers. After a few years at the firm, I joined the Securities Practice Group, which focused on administrative and regulatory proceedings instituted by the SEC or various self-regulatory organizations (including the New York Stock Exchange and the NASD), as well as shareholder class action lawsuits. I focused on issues implicating the federal securities laws. Also during this time, I specialized in attorney-client privilege and work product issues, as well as the conduct of internal investigations.

As an Assistant United States Attorney, I have represented the United States in criminal prosecutions (both trials and appeals) and in post-conviction litigation.

- 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.

The majority of my practice has involved litigation, although I have also counseled clients and other lawyers. While an associate at Morgan Lewis, I appeared in federal court on a number of litigation matters. In 1996 and 1997, as part of a *pro bono* case in which I was involved, I also appeared in Bronx County Family Court.

At the United States Attorney's Office, from 2000 until 2005, I appeared almost daily before various judges in the Southern District of New York. As a member of the Criminal Appeals Unit, I continue to appear in the District Court, and I appear weekly (on average) in the United States Court of Appeals for the Second Circuit.

- i. Indicate the percentage of your practice in:

1. federal courts:	85%
2. state courts of record:	2%
3. other courts:	0%
4. administrative agencies:	13%

- ii. Indicate the percentage of your practice in:

1. civil proceedings:	30%
2. criminal proceedings:	70%

- 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 had ten trials that proceeded to verdict. I was chief counsel for five trials, co-counsel for three, and served in a supervisory capacity on two.

- i. What percentage of these trials were:
 - 1. jury: 90%
 - 2. non-jury: 10%

- 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 practiced before the Supreme Court of the United States.

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

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. County of Orange v. Merrill Lynch & Co., No. SA CV-95-0037 (GLT) (C.D. Cal.); Irvine Ranch Water District v. Merrill Lynch & Co., No. SA CV-97-254 (GLT) (C.D. Cal.); Schools Excess Liability Fund v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Case No. SA CV 95-23 GLT (C.D. Cal.) (cases assigned to Taylor, D.J.)

Shortly after Orange County, California, filed for bankruptcy in December 1994, the County, as well as several municipal participants in its investment pool, filed civil lawsuits against Merrill Lynch and certain of its officers and employees. The lawsuits alleged contract and securities law claims arising from Merrill Lynch's sale of derivative securities to the then-County Treasurer for inclusion in the investment pool, as well as the firm's use of reverse repurchase transactions with the County. The cases involved a number of securities and bankruptcy law issues of first impression, as well as complicated factual issues arising from the nature of the derivative transactions at issue.

I defended Merrill Lynch and its employees in these lawsuits and in related regulatory matters. My work included drafting briefs on substantive securities law and discovery issues; preparing and defending senior Merrill Lynch executives at depositions in civil and regulatory proceedings; taking depositions of Orange County investment pool participants; and working with expert witnesses. In 1998, Merrill Lynch settled with Orange County and the majority of pool participants before trial. In 1999, it settled with the remainder of the pool participants, again before trial.

Co-Counsel

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2. Banca Cremi, S.A. v. Alex. Brown & Sons, Inc., 132 F.3d 1017 (4th Cir. 1997)
(Magill, Luttig, Williams, C.JJ.)

Banca Cremi was a large Mexican bank and an institutional customer of the broker-dealer Alex. Brown & Sons. Over a period of more than two years, Banca Cremi purchased approximately \$140 million in collateralized mortgage obligation (CMO) derivatives. After initially earning profits in excess of \$2 million, Banca Cremi lost \$21 million after a drop in the liquidity of the CMO market in April 1994. Thereafter, Banca Cremi sued Alex. Brown in the United States District Court for the District of Maryland on various fraud claims, arguing that Alex. Brown had failed to disclose the risks adequately to the bank and that it had charged excessive markups. The District Court granted summary judgment, finding that Banca Cremi was a sophisticated institutional investor that could not establish “justifiable reliance” on the representations of Alex. Brown; that Alex. Brown lacked the requisite scienter; and that the markups were not excessive.

Banca Cremi appealed to the United States Court of Appeals for the Fourth Circuit. It was the principal drafter of an amicus brief filed by the PSA/Bond Market Association in support of Alex. Brown, which argued that: (i) it was inappropriate to extend the “suitability” doctrine to a principal-to-principal relationship between institutional investors and securities dealers in the fixed income market; (ii) Banca Cremi’s losses had been caused by market forces, rather than any misconduct on the part of Alex. Brown; and (iii) no fraud claim could lie in the markups charged by Alex. Brown. The Fourth Circuit upheld the grant of summary judgment, finding, among other things, that (i) Banca Cremi had failed to show justifiable reliance on

Alex. Brown's representations; (ii) Alex. Brown had no fiduciary obligations to Banca Cremi, but rather interacted at arm's length in principal-to-principal dealings; and (iii) Banca Cremi had failed to state a cause of action based on purportedly excessive markups.

Co-Counsel

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Counsel for Alex. Brown

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PNC Financial Services Group
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(412) 762-2000

3. United States v. Castellanos, 355 F.3d 56 (2d Cir. 2003) (Oakes, Newman, Pooler, C.JJ.)

On September 6, 2001, defendant Vasquez-Piedrahita was arrested at Miami International Airport while in possession of approximately 900 grams of heroin that had been hidden in his sneakers. He agreed to cooperate with the United States Customs Service and, to that end, participated in a controlled delivery of the heroin that led to the arrests of the Castellanoses, a married couple. Four days after the arrests, on September 11, 2001, all of the physical evidence in the case, which had been stored at the Customs Service's offices at the World Trade Center, was destroyed as a result of the terrorist attacks.

All three defendants were charged with participating in a heroin conspiracy. Vasquez-Piedrahita and Mr. Castellanos each pleaded guilty prior to trial. However, in light of the destruction of the evidence (including the video and audio tapes of the controlled delivery), Ms. Castellanos elected to proceed to trial (Mukasey, D.J.), where she was convicted and sentenced to 78 months' imprisonment. Her conviction and sentence were upheld by the Second Circuit in a reported decision.

I was assigned the case on September 7, 2001, and was lead counsel at trial. I later drafted the Government's brief on appeal and argued the matter before the Second Circuit. In 2002, I received a commendation from the United States Customs Service for my work on this case.

Co-Counsel

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(counsel for Ms. Castellanos)

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4. United States v. Garcia, 413 F.3d 201 (2d Cir. 2005) (Calabresi, Parker, Raggi, C.JJ.); United States v. Valentin, 239 Fed. Appx. 674 (2d Cir. 2007) (Jacobs, Katzmann, Hall, C.JJ.)

The New York Drug Enforcement Task Force (DETF) investigated a wide-ranging cocaine and heroin trafficking organization that operated in Mexico, Baltimore, and New York City. At the conclusion of the investigation, the Government arrested seven individuals in New York and approximately the same number in Baltimore. Six of the individuals arrested in New York pleaded guilty prior to trial, and one was convicted after a jury trial. Of the individuals who pleaded guilty, one pleaded pursuant to a cooperation agreement with the Government, and provided substantial assistance in the investigation and prosecution of approximately 10 other defendants, including three defendants who were apprehended with 797 kilograms of cocaine.

My involvement in the case began with the drafting of a wiretap application to intercept communications occurring over one of the defendants' cellular telephones; I would later draft six additional wiretap applications. After the defendants were arrested, I oversaw the New York case, handling court appearances, pretrial motion responses, and guilty plea negotiations.

I served as lead counsel for the trial, after which the defendant was convicted on all counts. I also prepared the briefs for and successfully argued two appeals before the Second Circuit, the first of which followed the sentencing of the trial defendant and one of the pleading defendants, and the second of which followed the resentencings of these two defendants in light of United States v. Booker, 543 U.S. 220 (2005). I also handled post-conviction litigation in this case. In 2003, I received a DETF commendation for my work on the case.

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5. United States v. Schlisser, 2004 WL 736900 (S.D.N.Y. Apr. 6, 2004) (Berman, D.J.), aff'd, 168 Fed. Appx. 483 (2d Cir. 2007) (Jacobs, Ch.J., Raggi, C.J.)

Defendant Schlisser was a failed businessman who defrauded investors of millions of dollars in a complicated private placement fraud. In broad summary, the defendant touted “d-merc.com” – a non-existent subsidiary of the defendant’s failed company – as a promising internet start-up venture. In so doing, he duped a sophisticated stock promoter, a prominent New York City law firm, and numerous individual and corporate investors.

I worked with a securities fraud squad at the Federal Bureau of Investigation to investigate the case. I also prepared and successfully argued the Government’s pretrial motion for the disclosure of information pursuant to the crime-fraud exception to the attorney-client privilege. I then served as lead counsel at trial and obtained the defendant’s conviction on all charges. I prepared the Government’s brief on appeal and argued the matter in the Second Circuit, which affirmed the defendant’s conviction and sentence by summary order. In 2004, I received a commendation from the FBI for my work on the case.

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6. United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (“Stein I”) (Kaplan, D.J.); United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) (“Stein II”) (Kaplan, D.J.); United States v. Stein, 452 F. Supp. 2d 230 (S.D.N.Y. 2006) (“Stein III”) (Kaplan, D.J.); United States v. Stein, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) (“Stein IV”) (Kaplan, D.J.); United States v. Stein, 541 F.3d 130 (2d Cir. 2008) (Jacobs, Ch.J., Feinberg, Hall, C.JJ.); United States v. Pfaff, 619 F.3d 172 (2d Cir. 2010) (Jacobs, Ch. J., Winter, McLaughlin, C.JJ.), cert. denied, 131 S. Ct. 3059 (2011) (as to defendant Larson), 131 S. Ct. 3060 (2011) (as to defendant Ruble)

These cases stemmed from the Government’s investigation into fraudulent tax shelters that were marketed by the accounting firm KPMG LLP beginning in or about 1996. At the conclusion of the investigation, 19 KPMG officers, directors, and affiliates were arrested on charges of conspiracy to defraud the United States, tax evasion, and obstruction of the Internal Revenue Service. The defendants filed numerous pretrial motions, resulting in extensive briefing, hearings, and argument before the District Court. Ultimately, the District Court denied most of the defendants’ pretrial motions, but found that the Government had violated the Fifth and Sixth Amendment rights of 13 of the defendants; as a result, it suppressed certain evidence as to three defendants, and subsequently dismissed the indictment as to all 13 defendants. The Government appealed from the suppression and dismissal decisions to the Second Circuit; the Court affirmed the dismissal of the indictment, rendering the suppression issue moot.

The Government proceeded to a jury trial against four of the defendants; the remaining two defendants pleaded guilty. The jury convicted three of the trial defendants of tax evasion and acquitted the remaining defendant of all charges. The three defendants appealed from their convictions, and the Second Circuit affirmed the convictions and vacated the fine imposed on one of the defendants. Two of the defendants then petitioned to the Supreme Court of the United States for a writ of certiorari, but their petitions were denied.

I was not involved in the criminal investigation of the tax shelters but, due to the importance of the case, I was asked to assist the trial team in early 2006, several months after the indictment was returned but before any appeals had been filed. Initially, my role was somewhat limited. However, after the District Court questioned the constitutionality of the Government's conduct during the investigation and held an evidentiary hearing on that topic, I was assigned a more active role. Among other things, I drafted the Government's post-hearing submissions in response to the District Court's request for additional briefing on a number of Fifth and Sixth Amendment issues. I also led the appellate team that handled the Government's affirmative appeals from the District Court's suppression and dismissal decisions. During trial, I assisted the trial team in responding to numerous mid-trial defense motions and District Court requests. After the convictions of three of the defendants, I headed up the appellate team for the defensive appeal, which resulted in the affirmance of the convictions.

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7. United States v. Josephberg, 418 F. Supp. 2d 297 (S.D.N.Y. 2005) (Bricant, D.J.), rev'd, 459 F.3d 350 (2d Cir. 2006) (Kearse, Calabresi, Pooler, C.JJ.); United States v. Josephberg, 562 F.3d 478 (2d Cir. 2009) (Kearse, Sack, Katzmman, C.JJ.)

Defendant Josephberg was an investment banker who enlisted various clients to participate in fraudulent tax shelter transactions between 1977 and 1985. He was charged with multiple counts of tax evasion, the filing of false tax returns, failing to pay taxes, and endeavoring to obstruct and impede the due administration of the Internal Revenue Laws. Before trial, the District Court dismissed the IRS obstruction count on multiplicity grounds and the Government appealed. In a written opinion, the Second Circuit agreed with the Government that the obstruction count was legally distinct from the other counts in the indictment, and therefore did not implicate double jeopardy concerns.

The Government proceeded to trial against Josephberg, and the jury convicted him of all counts. The District Court sentenced Josephberg to a term of 50 months' imprisonment and Josephberg appealed, raising, among other things, challenges to the sufficiency of the evidence, the jury instructions, and the Government's conduct at trial. The Second Circuit rejected Josephberg's arguments and affirmed his conviction in a published decision.

After the District Court dismissed the obstruction count, I assisted the trial team in handling the Government's affirmative appeal. When Josephberg himself later appealed from his conviction and sentence, I assisted in the preparation of the Government's brief on appeal.

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8. In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93 (2d Cir. 2008); In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157 (2d Cir. 2008) (Fourth Amendment Challenges); In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 177 (2d Cir. 2008) (Fifth Amendment Challenges); In re Terrorist Bombings of U.S. Embassies in East Africa, 553 F.3d 150 (2d Cir. 2008) (opinion denying rehearing petition); In re Terrorist Bombings of U.S. Embassies in East Africa, 407 Fed. Appx. 548 (2d Cir. 2011) (affirming, after remand, district court decision denying motion to reopen) (all cases heard by Feinberg, Newman, Cabranes, C.JJ.)

The 308-count indictment in this case, United States v. Bin Laden, S7 98 Cr. 1023 (LBS), charged Usama Bin Laden and members and associates of the al Qaeda terrorist group with conspiring to kill American citizens worldwide. The objects of the conspiracy included the bombings of the United States embassies in Nairobi,

Kenya, and Dar es Salaam, Tanzania, on August 7, 1998, during which 224 people, including 12 Americans, were killed. In 2001, four of the defendants were tried and found guilty of all counts. Thereafter, the Hon. Leonard B. Sand sentenced each of the defendants to life imprisonment.

Defendants Odeh, al-'Owhali, and el Hage appealed from their convictions and sentences, raising a host of challenges, many of which involved Fourth and Fifth Amendment issues of first impression. Among other things, the defendants challenged (i) the District Court's denial of a motion to suppress materials gathered in Kenya as part of a foreign intelligence collection operation; (ii) the admissibility of statements made by al-'Owhali and Odeh while in Kenya; (iii) the constitutionality of the Classified Information Procedures Act (CIPA); and (iv) the operation of the Foreign Intelligence Surveillance Act (FISA). In a series of published opinions, the Second Circuit rejected all of the defendants' challenges, and vacated el Hage's sentence so that the District Court could resentence him in light of the intervening Supreme Court decision in United States v. Booker, 543 U.S. 220 (2007). Relatedly, the Court affirmed the District Court's denial of al-'Owhali's motion to reopen his prior motion to suppress, on voluntariness grounds, statements made to law enforcement agents in Kenya.

I had substantial involvement in drafting and editing the Government's brief on appeal. During the pendency of the appeal, the Second Circuit issued a limited remand of al-'Owhali's case to the District Court so that the defendant could move to reopen a prior suppression hearing based on information that had been recently disclosed by the Government. During the remand proceedings before the Hon. Kevin Thomas Duffy, I had substantial involvement in drafting and editing the Government's briefing to the District Court and, after the defendant's motion was denied, its briefing to the Second Circuit.

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9. United States v. Stewart, 590 F.3d 93 (2d Cir. 2009) (Walker, Calabresi, Sack, C.JJ.), petition for reh'g denied, 597 F.3d 514 (2d Cir. 2010); United States v. Stewart, No. 10-3185 (2d Cir.) (Walker, Calabresi, Sack, C.JJ.)

This case involved the prosecution of three individuals for various terrorism offenses, arising from their maintenance of a communications network through which Sheikh Omar Abdel Rahman could maintain his position as the spiritual leader of a noted terrorist organization, the Islamic Group, despite his conviction and sentence of life imprisonment. Specifically, the three trial defendants and others received messages from Islamic Group leaders around the world, smuggled those messages to Abdel Rahman in prison, procured and disseminated Abdel Rahman's responses to those messages, and broadcast those responses.

All three defendants were convicted after trial. The District Court (Koeltl, D.J.) sentenced defendant Sattar to 288 months' imprisonment, defendant Stewart to 28 months' imprisonment, and defendant Yousry to 20 months' imprisonment. All three defendants appealed from their convictions, and the Government cross-appealed from all three sentences. On appeal, the defendants raised novel challenges to the use of Special Administrative Measures, the operation of the material support statute, 18 U.S.C. § 2339A, and, as to Stewart, the interplay between the crimes of conviction and the attorney-client relationship. In a published decision, the Second Circuit affirmed all three convictions and the sentences of Sattar and Yousry, but agreed with the Government that the sentence imposed on Stewart was procedurally, if not substantively, unreasonable.

On remand, the District Court resentenced Stewart principally to a term of 120 months' imprisonment, which itself was considerably below the 360-month range to which she was potentially exposed under the United States Sentencing Guidelines. Stewart appealed from her sentence, claiming, among other things, that her pre- and post-sentencing public statements were protected by the First Amendment and could not be considered by the District Court at her resentencing. The Second Circuit affirmed her sentence.

During the pretrial, trial, and sentencing phases of the matter, I provided guidance to the trial team on numerous legal issues. In the first appeal, I drafted and edited substantial portions of the Government's opening brief on appeal, as well as its reply brief in the cross-appeal. I then assisted the trial team during Stewart's resentencing proceedings. In the second appeal, I drafted portions of the Government's brief on appeal, and edited that brief in its entirety.

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10. United States v. Gupta, 650 F.3d 863 (2d Cir. 2011) (reported decision) (Walker, Parker, Hall, C.JJ.), petition for reh'g granted Sept. 15, 2011; United States v. Gupta, 426 Fed. Appx. 12 (2d Cir. 2011) (summary order) (Walker, Parker, Hall, C.JJ.)

Defendant Gupta was convicted of immigration fraud after a two-week jury trial. The District Court (Batts, D.J.) sentenced him to 51 months' imprisonment. While Gupta's case was on appeal, the Supreme Court decided Presley v. Georgia, 130 S. Ct. 721 (2010) (per curiam), in which it found that a courtroom closure during voir dire violated the defendant's Sixth Amendment right to a public trial. Gupta then obtained a remand to the District Court to develop the record concerning the exclusion of two spectators (his brother and girlfriend) from voir dire, and argued on appeal that his Sixth Amendment right had been violated.

A panel of the Second Circuit affirmed Gupta's conviction, concluding that any violation was subsumed by the "triviality exception" established by long-standing Second Circuit precedent. Gupta petitioned for panel rehearing and rehearing en banc, arguing that the exception did not survive Presley. The Court granted the petition, ordered rehearing en banc, and obtained supplemental briefing from the parties on issues including the right to a public trial under the Sixth Amendment, the triviality exception, and the effect of any waiver or forfeiture by Gupta of his Sixth Amendment claim. Oral argument before the en banc Court was held on December 14, 2011, and the matter remains under advisement.

I provided advice to the trial team throughout the trial and in connection with the sentencing in this case. When the rehearing petition was granted, I assisted in preparing and editing the Government's brief to the en banc Court. I then argued the matter on behalf of the Government before the en banc Court. Following the argument, I assisted in drafting supplemental submissions to the Court concerning the record on appeal and plain-error review.

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18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. 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.)

At Morgan Lewis, I represented a number of corporate and individual clients in investigations brought by the SEC, the NASD, and other self-regulatory organizations

concerning possible violations of the securities laws. In several cases, I drafted submissions and/or participated in presentations to the respective agency that led the agency to decline to bring formal proceedings against the client.

In addition, as noted, I counseled other lawyers at Morgan Lewis, as well as a number of the firm's clients, on compliance and litigation issues. These issues included developing compliance protocols for broker-dealers, conducting internal investigations, and understanding and preserving the attorney-client privilege and the work product doctrine.

As Chief of Criminal Appeals at the United States Attorney's Office, I have consulted on hundreds of criminal cases in this Office, not all of which have proceeded to trial and, indeed, not all of which have resulted in the filing of criminal charges. In addition, I have drafted and assisted in drafting significant memoranda, briefs, and other pleadings for cases that are being handled by other Assistant United States Attorneys. Last year, for example, I drafted the Government's brief in opposition to a motion to dismiss, and argued the motion on behalf of the Government, in United States v. Daugerdas, a tax shelter prosecution involving former employees of BDO Seidman, Jenkens & Gilchrist, and Deutsche Bank. In addition, in just the past two years, I have provided advice and assistance (i) to the trial teams in Daugerdas, United States v. Rajaratnam (an insider trading case involving the Galleon Group hedge fund), United States v. Gansman (an insider trading case involving an attorney at Ernst & Young), United States v. Cuti (an accounting fraud case involving the former President and the former Chief Financial Officer of Duane Reade), United States v. Siddiqui (a terrorism case involving the attempted murder of American military personnel in Afghanistan), United States v. Cromitie (a terrorism case involving a plot to bomb a synagogue in Riverdale, New York), United States v. Bout (a terrorism prosecution of a noted arms dealer); and (ii) to the AUSAs prosecuting United States v. Sharef (a Foreign Corrupt Practices Act case involving former officers and agents of Siemens AG), United States v. Scheinberg (an Internet poker prosecution), United States v. Pettway (a kidnapping prosecution involving the 1987 theft of a baby from Harlem Hospital), United States v. Corrozzo (an organized crime prosecution of members of the Gambino Family), United States v. Kruger (a public corruption case involving, among others, a former New York State Senator), United States v. Coke (a RICO prosecution of a Jamaican drug lord), and United States v. Ahmed (a terrorist prosecution involving a conspiracy to support the al Shabaab foreign terrorist organization), among others.

In November 2009, I was assigned to the team of Assistant United States Attorneys prosecuting Khalid Sheikh Mohammed and four other detainees at the Guantanamo Bay Naval Station who were allegedly involved in the terrorist attacks of September 11, 2001. My focus was on identifying and resolving legal issues that might arise before and during the trial. In that regard, I participated in meetings to discuss, and engaged in analyses of, legal issues implicated by the 80-page indictment returned by a grand jury in the Southern District of New York in December 2009. After the decision was made to change the forum for the prosecution of the case, I was involved in the process that resulted in the dismissal of the indictment in April 2011.

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

I have not taught any classes.

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

Upon retirement, I will receive payments from the Federal Employees Retirement System. I do not anticipate any other deferred income or benefits.

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

I do not have any such plans, commitments, or agreements.

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

See attached Financial Disclosure Report.

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

See attached Net Worth Statement.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements 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.

Generally speaking, I would handle any matters involving actual or potential conflicts of interest in conformity with the Code of Conduct for United States Judges and any other relevant statutes, ethical canons, and rules. More

specifically, I would recuse myself from any case that I worked on, supervised, or on which I was consulted as an Assistant United States Attorney.

My husband is a partner at the law firm of Proskauer Rose LLP. I would recuse myself from any cases in which Proskauer Rose is a party or is representing a party. In addition, I would recuse myself from any matter involving a member of my immediate family, including my siblings.

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

If confirmed, I would handle any matters involving actual or potential conflicts of interest in conformity with the Code of Conduct for United States Judges and any other relevant statutes, ethical canons, and rules. Further, upon learning of any situation that a party or observer might perceive or identify as an actual or potential conflict of interest, I would alert the parties to the situation in question, and solicit their views. I would also consult with my judicial colleagues on these issues.

25. **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.

While working at Morgan Lewis, I represented an Albanian man who sought asylum in the United States as a result of abuses he had suffered as a student in Kosovo. The representation was facilitated by the Lawyers Committee for Human Rights (now known as Human Rights First). Over a period of almost five years, from 1994 until 1999, I assisted my client in obtaining asylum, employment authorization documents, and, ultimately, lawful permanent resident status.

Also while at Morgan Lewis, I represented a woman who had sought legal assistance through the Battered Women's Legal Services Project. Over a period of approximately two years, in 1996 and 1997, I assisted my client in obtaining child support from, and in working out a mutually acceptable custody schedule with, the father of her child.

26. **Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department

regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I submitted a Confidential Questionnaire to the Chairman of the Judicial Screening Panel for Senator Charles E. Schumer on March 27, 2012. On April 10, 2012, I was interviewed by members of the Judicial Screening Panel. On April 22, 2012, I met with Senator Schumer. After that meeting, I was informed that Senator Schumer would recommend my name to President Obama. Since April 25, 2012, I have been in contact with officials from the Office of Legal Policy at the United States Department of Justice. On May 30, 2012, I met with officials from the White House Counsel's Office and the Department of Justice in Washington, D.C. On June 25, 2012, the President submitted my nomination to the Senate.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

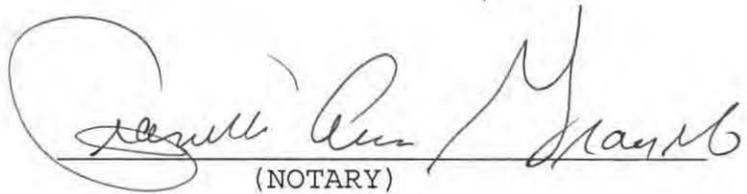
No.

AFFIDAVIT

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

6/21/2012
(DATE)

Katherine Polk Failla
(NAME)


(NOTARY)

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 01GR4995793
Qualified in Kings County
Commission Expires Nov 30, 2013