UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

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

Maurice Miller Baker

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

Judge, United States Court of International Trade

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.

Office: McDermott Will & Emery LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001

Residence: Clifton, Virginia


1962; Houma, Louisiana

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.

1987, U.S. Naval War College; no degree


1980 – 1981, Louisiana State University; no degree (accepted into law school with equivalent of three undergraduate years of work as part of an accelerated program)

1979 – 1980, Nicholls State University; no degree (attended part-time during high school)

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
McDermott Will & Emery LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
Partner

1993 – 2000
Carr Goodson Warner, P.C.
[now Carr Maloney, P.C.]
1301 K Street, N.W., Suite 400 East Tower
Washington, D.C. 20005
Associate (1993 – 1995)

1991 – 1993
U.S. Senate Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C. 20510
Counsel to Senator Orrin Hatch, Ranking Member (Full Committee, 1993; Subcommittee on Patents, Copyrights and Trademarks, 1991 – 1992)

1991
Carr Goodson & Lee, P.C.
[now Carr Maloney, P.C.]
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Associate

1989 – 1991
Dilworth, Paxson, Kalish & Kauffman
[this branch office no longer exists]
1001 Pennsylvania Avenue, N.W.
Suite 275 North
Washington, D.C. 20004
Associate

1989
Myerson & Kuhn
[this firm closed on October 31, 1989]
1001 Pennsylvania Avenue, N.W.
Suite 275 North
Washington, D.C. 20004
Associate
1986 – 1989
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Special Assistant to the Assistant Attorney General, Civil Rights (1988 – 1989)

1985 – 1986
Hon. Thomas G. Gee
United States Court of Appeals for the Fifth Circuit
515 Rusk Street
Houston, Texas 77002
Law Clerk

1984 – 1985
Hon. John M. Duhé, Jr.
United States District Court for the Western District of Louisiana
800 Lafayette Street
Lafayette, Louisiana 70501
Law Clerk

Summer 1983
Wilkinson & Carmody
[now Wilkinson, Carmody & Gilliam]
400 Travis Street
Shreveport, Louisiana 71101
Summer Associate

Summer 1983
Broadhurst, Brook, Mangham, Hardy & Reed
[This firm no longer exists]
Lafayette, Louisiana 70501
Summer Associate

1982 – 1983
Shushan, Meyer, Jackson, McPherson & Herzog
[This firm no longer exists]
New Orleans, Louisiana 70112
Law Clerk

Summer 1982
Legislative Bureau
Louisiana State Senate
Baton Rouge, Louisiana 70804
Intern
Summer 1981  
Senator Russell B. Long  
United States Senate  
Washington, D.C. 20510  
Intern

Other Affiliations (uncompensated):

2005 – present  
Clifton Hunt III Homeowners’ Association  
Clifton, Virginia  
President (2013 – present)  
Vice-President (2005 – 2012)

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.

1986 – 1995 (Honorable Discharge)  
United States Naval Reserve  
Lieutenant (junior grade), Selected Reserve (1988 – 1990)  
Ensign, Selected Reserve (1986 – 1988)

I registered for the selective service when I was 18.

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.

Litigator of the Week, *AmLaw Litigation Daily* (May 7, 2009)
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.

   Federalist Society (1985 – present)


   United States Court of Federal Claims Bar Association (2017 – present)

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, 1993

       District of Columbia, 1995

    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, 1994
       United States Court of Appeals for the First Circuit, 2003
       United States Court of Appeals for the Second Circuit, 2002
       United States Court of Appeals for the Third Circuit, 1997
       United States Court of Appeals for the Fourth Circuit, 1993
       United States Court of Appeals for the Fifth Circuit, 1986
       United States Court of Appeals for the Sixth Circuit, 1999
       United States Court of Appeals for the Seventh Circuit, 2003
       United States Court of Appeals for the Eighth Circuit, 2002
       United States Court of Appeals for the Ninth Circuit, 1998
       United States Court of Appeals for the Tenth Circuit, 2001
       United States Court of Appeals for the Eleventh Circuit, 2003
       United States Court of Appeals for the District of Columbia Circuit, 1999
       United States Court of Appeals for the Federal Circuit, 2000
       United States District Court for the District of Columbia, 1998
       United States District Court for the Eastern District of Virginia, 1994
       United States District Court for the Western District of Virginia, 1995
       United States District Court for the Middle District of Louisiana, 1995
United States District Court for the Western District of Louisiana, 1996
United States Court of Federal Claims, 1990
United States Court of International Trade, 2018

My membership in the bar of the United States Court of Appeals for the Second Circuit inadvertently lapsed at some point before 2012 when I did not renew it (I do not recall receiving notification of the renewal requirement). When the lapse was brought to my attention in 2012, I renewed my membership.

My membership in the bar of the United States District Court for the Middle District of Louisiana lapsed in 2009 because I did not renew it. I renewed my membership in 2018.

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.

To the best of my recollection:

Boy Scouts of America, National Capital Area Council, Bull Run District, Troop 554
   Committee Chair (2003 – 2011)
   Eagle Award Coordinator (2013 – 2017)

Catholics for Dole-Kemp (1996)

Clifton Hunt III Homeowners’ Association, Clifton, Virginia (2003 – present)
   President (2013 – present)
   Vice-President (2005 – 2012)


Fairfax Station Swim and Tennis Club (2003 – present)


Lawyers for Bush-Quayle (1992)

National Rifle Association (2010 – 2013)
Northern Virginia Republican Business Forum (2014 – present)
Reserve Officers Association (1986 – 1995)

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 above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin, with the exception of the Knights of Columbus, which is open to male Catholics.

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.

ERISA Broadly Preempts State Regulation of PBM-Pharmacy and PBM-Plan Agreements, McDermott on the Subject, July 26, 2018. Copy supplied.


Supreme Court Grants Certiorari in Case Involving Auer Deference, McDermott on the Subject, November 1, 2016. Copy supplied.


Non-Direct Competitors May Sue Under the Lanham Act, Doctrine of Prudential Standing Eliminated, McDermott on the Subject, April 2, 2014. Copy supplied.


Supreme Court Clarifies “Principal Place of Business” Test for Diversity Jurisdiction, McDermott on the Subject, February 26, 2010. Copy supplied.


I recall writing an op-ed or letter to the editor that the Daily Reveille (my college newspaper) published in the summer or fall of 1980 regarding inflation and monetary policy. I do not have a copy of this and have been unable to locate it.

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.

During my tenure at the Justice Department’s Office of Legal Policy, the office released several “Report[s] to the Attorney General,” including the following that
I recall contributing to:


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.

*Re: Confirmation of Senator Jeff Sessions for Attorney General of the United States*, Letter from former staff members of the United States Senate Committee on the Judiciary to Chairman Charles E. Grassley and Ranking Member Dianne Feinstein, January 6, 2017. Copy supplied.


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.

To the best of my recollection and according to my records and the records of
McDermott Will & Emery:

April 17, 2018: Panelist, South Dakota v. Wayfair, Inc. Oral Argument
Roundtable, McDermott State and Local Tax, BNA Tax, and the Council on State
Taxation. Transcript and press reports supplied.

May 21, 2015: Panelist, When Should Non-Profits Have to Disclose Their
Donors?, Thomas Jefferson Institute for Public Policy Debate. Video recording
available at
https://www.youtube.com/watch?v=41EIuufqkJM.

March 28, 2013: Panelist, Patent Settlements in the Pharmaceutical Industry:
Reading the Tea Leaves of the Supreme Court Argument, McDermott Webcast.
Slides supplied.

November 14, 2012: Panelist, Patent Settlements in the Pharmaceutical Industry:

June 29, 2012: Panelist, Health Care in the High Court: The Supreme Court
Decision, McDermott Webcast. Slides supplied.

May 31, 2012: Panelist, Health Care in the High Court: Preview of the Supreme
Court Decision, McDermott Webcast. Transcript and press report supplied.

May 19, 2012: Speaker, Candidate for Republican National Convention Delegate,
10th Congressional District Republican Convention, Leesburg, Virginia. I have
no notes, transcript, or recording. The address of the 10th Congressional District
Republican Committee is Post Office Box 650552, Potomac Falls, Virginia
20165.

March 29, 2012: Panelist, Health Care in the High Court: Reading the Tea
Leaves of the Supreme Court Arguments, McDermott Webcast. Agenda supplied.

November 1, 2011: Speaker, Candidate Forum, South County Secondary School,

October 19, 2011: Speaker, Candidate Forum, Robinson High School, Fairfax,
Virginia. Video recording supplied.


October 4, 2011: Speaker, *Candidate Debate*, Greenspring Retirement Community, Springfield, Virginia. Video recordings supplied (the main recording omits my closing statement; the second recording is an excerpt that includes a portion of my closing statement).


June 2, 2011: I gave brief remarks regarding my candidacy for state office at the Alexandria City Republican Committee, Alexandria, Virginia. I have no notes, transcript, or recording. The address of the Alexandria City Republican Committee is Post Office Box 245, Alexandria, Virginia 22313.

April 18, 2011: Speaker, *Primary Candidate Debate*, Republican Women of Clifton, Clifton, Virginia. I have no notes, transcript, or recording. The address of the Republican Women of Clifton is 12644 Chapel Road, Clifton, Virginia 20124.

March 15, 2011: I gave brief remarks regarding my candidacy for state office at the Lee District Republican Committee, Alexandria, Virginia, 2011. I have no notes, transcript, or recording. The address of the Lee District Republican Committee is 4246 Chain Bridge Road, Fairfax, Virginia 22030.
Northern Virginia Tea Party is Post Office Box 223472, Chantilly, Virginia 20153.

February 28, 2011: I gave brief remarks regarding my candidacy for state office at the Prince William County Republican Committee, Manassas, Virginia. I have no notes, transcript, or recording. The address of the Prince William County Republican Committee is 4431 Prince William Parkway, Woodbridge, Virginia 22192.

February 27, 2011: Speaker, Campaign Kickoff, Clifton, Virginia. Video recording supplied.

February 2, 2011: Speaker, Primary Candidate Forum, Fairfax County Republican Committee, Falls Church, Virginia. I have no notes, transcript, or recording. The address of the Fairfax County Republican Committee is 4246 Chain Bridge Road, Fairfax, Virginia 22030.

February 1, 2011: I gave brief remarks regarding my candidacy for state office at the Greenspring Retirement Community Republican Club, Springfield, Virginia. I have no notes, transcript, or recording. The address of the Greenspring Retirement Community Republican Club is 7410 Spring Village Drive, Springfield, Virginia 22150.

September 17, 2009: Panelist, Developments in Federal Arbitration Practice, McDermott Webcast. Written materials supplied.


November 30, 2001: I spoke on election law reform to the New Orleans chapter of the Federalist Society. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006.

April 1, 2000 (approximate): I spoke at a conference on election policy sponsored
by the Voting Integrity Project in Washington, D.C. I have no notes, transcript, or recording. Press report supplied. The address of the Voting Integrity Project (a non-profit group that is no longer operational) was Post Office Box 6470, Arlington, Virginia 22206.

January 22, 1997: I spoke at the Racquet Club of Philadelphia at an event sponsored by the Federalist Society. The topic was civil rights law. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006.

Fall 1994 (approximate): I recall speaking at a meeting of my homeowners’ association in Springfield, Virginia, as a surrogate for congressional candidate Kyle McSlarrow. I have no notes, transcript, or recording.

Fall 1992 (approximate): I recall speaking at the Georgetown University Law School as a surrogate for the Bush-Quayle campaign. I have no notes, transcript, or recording. The address of Georgetown University Law School is 600 New Jersey Avenue, N.W., Washington, D.C. 20001.

Fall 1980 (approximate): In college, I participated in a number of debates or talks on campus in connection with the 1980 presidential campaign. I have no notes, transcript, or recording. Undated press report supplied. The address of Louisiana State University is 1146 Pleasant Hall, Baton Rouge, Louisiana 70803.

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.

Since I returned to private practice from the Senate Judiciary Committee staff in 1993, I have given numerous print, broadcast, and internet media interviews in connection with my own cases, as a commentator on legal issues, and in connection with my own campaign for elective office in 2011. I have searched Lexis-Nexis, Westlaw, Google, McDermott’s records, and my own records for press reports of those interviews, and the results of those searches are as follows:

* Obama’s Supreme Court Pick Is Highly Regarded Antitrust Scholar*, Deal, March 17, 2016. Copy supplied.


* Supreme Court Pick to Face Long Odds*, Associated Press Online, February 24,
2016. Copy supplied.


*Aereo’s Future in Doubt After Supreme Court Sides with Broadcasters*, Bloomberg Television, June 25, 2014. I have no recording or transcript. I have supplied a contemporaneous summary prepared by McDermott’s media department.

*How Did Aereo Fare in Front of the Supreme Court?*, Bloomberg Television,
contemporaneous summary prepared by McDermott’s media department.

_Court Opens Lanham Claims to Non-Direct Competitors_, McDermott on the Subject, March 25, 2014. Copy supplied.


_Supreme Court Denies Edmond Soldier’s Petition_, Edmond Sun (Oklahoma), June 3, 2013. Copy supplied.


_President’s ‘Designated Survivor’ Remembers Being on Call_, Intelligencer, February 14, 2013. Copy supplied.


_Supreme Court Upholds Health Care Mandate_, CNBC-TV, June 28, 2012. I have
no recording or transcript. I have supplied a contemporaneous summary prepared by McDermott’s media department.


Obama Warns Supreme Court on Health-Care Law; U.S. President Says He’s Confident Law Will Be Upheld, MarketWatch, April 2, 2012. Copy supplied.


Battle for the 39th; Two Republicans Vying to Take on Incumbent Sen. George Barker, Springfield Connection (Virginia), August 18, 2011. Copy supplied.

GOP Primary Challengers Fight over Senate Seats, Wash. Post, August 18, 2011. Copy supplied.


Redistricting Alters Candidates' Battleground; Precincts Switch from Lee to Mount Vernon, Fairfax Connection (Virginia), June 8, 2011. Copy supplied.


Fox News, August 20, 2001. According to McDermott's media records, I was interviewed about Oregon’s vote-by-mail system on this date. I have no notes, transcript, or recording.


Gore's Hopes Rest with Florida Court: Democrat Pledge that New Challenge


Who Do You Think Is Going to Decide This Election?, CNN Talkback Live, November 30, 2000. Copy supplied.


Palm Beach Story: Angry Voters, Contested Ballot; Disputes About Design Are Infrequent; Few Precedents for This Kind of Case, Wash. Post, November 11, 2000. Copy supplied.


Inequality Seen in Voting Via the Internet; Minorities Have Less Access, Group Says, Richmond Times-Dispatch, April 2, 2000. Copy supplied.


Anyone Can Run in N.H. All It Takes Is $1,000, Even if There’s a Boot on Your Head, Post-Standard (Syracuse, New York), February 1, 2000. Copy supplied.


Widow Seeks In-Law’s Share of State Award; Brother Got $10,000, Owes Finn $13,000, Richmond Times-Dispatch, July 25, 1999. Copy supplied.

Finn Wants Share of In-Law’s Award; Widow Asks to Garnish State Payment, Wash. Post, July 24, 1999. Copy supplied.

I recall being interviewed on the Diane Rehm Show in 1999 or 2000 to comment on a lawsuit challenging the lack of voting representation in Congress for citizens of the District of Columbia. I have no notes, transcript, or recording.


Judge's Louisiana Ruling May Give Boost to Plan for Preserving October Primary Date, Roll Call, May 14, 1998. Copy supplied.


Louisiana Suit Challenges State’s Open Primary Law, Roll Call, August 10, 1995. Copy supplied.


Election to End Quade/Baker Rivalry, Daily Reveille, November 4, 1980.

Reagan Proves Victorious in Low Turnout Mock Vote, Daily Reveille, undated (presumably October 1980).

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 never held judicial office.

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:

   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.

I have never held judicial office.

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 never held elective or appointive office. In 2011, I was a candidate for the Virginia Senate in the 39th District. I won the Republican nomination in a
contested primary with 73% of the vote, and lost the general election with 47% of the vote.

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.

As an attorney, I have provided legal services to the following candidates and election committees:

Cuccinelli for Governor (2013 – 2015)
Obenshain for Attorney General (2013)
Republican Party of Virginia (2013)
Vitter for Senate (2010)
Fimian for Congress (2010)
Republican National Committee (2004 – 2010)
Ashcroft for Senate (2000)
Keyes for President (2000)
National Republican Congressional Committee (1999 – 2000)
Ensign for Senate (1998)
Gilmore for Governor (1997)
Jenkins for Senate (1996)
Republican Party of Louisiana (1995)
Bush-Quayle Reelection Campaign (1992)

I have provided non-legal services to the following campaigns and election committees:

Northern Virginia Republican Business Forum PAC (hosted fundraiser) (2014)
Obenshain for Attorney General (hosted fundraiser) (2013)
Marshall for Delegate (canvassing) (2013)
Allen for Senate (hosted fundraiser) (2012)
Fimian for Congress (canvassing and hosted fundraiser) (2010)
Cuccinelli for Attorney General (hosted fundraiser) (2009)
Cuccinelli for State Senate (recount volunteer) (2007)
Hatch for President (hosted fundraiser) (2000)
Vitter for Congress (raised money) (1999)
Braunlich for School Board (hosted fundraiser) (1995)
Hatch for Senate (hosted fundraiser) (1994)
McS larrow for Congress (poll watching and canvassing; hosted meet and greet; surrogate speaker) (1994)
Allen for Governor (poll watching and canvassing) (1993)
Bush-Quayle Reelection Campaign (surrogate speaker) (1992)
McSlarrow for Congress (poll watching and canvassing) (1992)
Carter-Mondale Reelection Campaign (college student group chair) (1980)
Taulin for Congress (research) (1980)
Treen for Governor (phone banking) (1979)
Huckaby for Congress (canvassing and sign placement) (1976)
Hughes for Louisiana Supreme Court (envelope stuffing) (1975)

I have held the following party and election committee offices and memberships:

Republican Party of Virginia, Congressional District Convention Delegate (CD8, 1996; CD11, 2008; CD10, 2012, 2016)
Young Democrats of Louisiana, Member (1979 – 1980)

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;

After graduating from law school in May 1984, I began a clerkship the following July with Judge John M. Duhé, Jr., of the U.S. District Court for the Western District of Louisiana. That clerkship ended in the summer of 1985. I then began a clerkship with Judge Thomas G. Gee of the U.S. Court of Appeals for the Fifth Circuit, which ended in the summer of 1986.

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.

1986 – 1989
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Special Assistant to the Assistant Attorney General, Civil Rights (1988 – 1989)

1989
Myerson & Kuhn
[this firm closed on October 31, 1989]
1001 Pennsylvania Avenue, N.W.
Suite 275 North
Washington, D.C. 20004
Associate

1989 – 1991
Dilworth, Paxson, Kalish & Kauffman
[this branch office no longer exists]
1001 Pennsylvania Avenue, N.W.
Suite 275 North
Washington, D.C. 20004
Associate

1991
Carr Goodson & Lee, P.C.
[now Carr Maloney, P.C.]
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Associate

1991 – 1993
U.S. Senate Committee on the Judiciary
Dirksen Senate Office Building
Washington, D.C. 20510
Counsel to Senator Orrin Hatch

1993 – 2000
Carr Goodson Warner, P.C.
[now Carr Maloney, P.C.]
1301 K Street, N.W., Suite 400 East Tower
Washington, D.C. 20005
Associate (1993 – 1995)

2000 – present
McDermott Will & Emery LLP
500 North Capitol Street, N.W.
Washington, D.C. 20001
Partner
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.

b. Describe:

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

After my judicial clerkships, I served in the Justice Department from July 1986 until January 1989, where I provided legal and policy advice to senior Justice Department officials. From 1989 to 1991, as a junior associate in private practice, my practice focused primarily on securities litigation, with a brief introduction to insurance coverage in 1991. From 1991 to 1993, I took a sabbatical from private practice to serve as counsel to the Senate Judiciary Committee, where I provided legal and policy advice to Senator Orrin Hatch on issues before the committee. In 1993, I returned to private practice, and my focus over the following seven years was primarily insurance coverage and election-related litigation in state and federal courts across the country. Beginning in 2000 with my move to McDermott Will & Emery, my practice evolved over time into an “issues and appeals” practice encompassing a wide range of civil (and occasionally white-collar criminal) matters reflecting McDermott’s very broad practice. In 2006, I was appointed co-chair of McDermott’s appellate practice group, and I have continued in that role until the present.

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

From 1989 to 1991, I principally represented publicly-traded corporations and individuals in securities litigation. From 1993 until the 2000s, I represented major insurance companies in coverage litigation in a national practice. During the same time period, I represented national campaign committees, political candidates, state political parties, non-profit entities, and individuals in a national election-law practice. Beginning in 2000 with my move to McDermott Will & Emery, my practice gradually evolved into an “issues and appeals” litigation practice representing major publicly-traded corporations, privately-held businesses, nonprofit entities, agricultural cooperatives, and national trade associations in myriad subject matters reflecting McDermott’s very broad practice footprint, including health care, patents and intellectual property, energy, environmental law, securities and white collar defense, food and beverage, administrative law, antitrust, employee benefits, agro-business, insurance, international trade,
federal tax, and state and local tax.

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.

Virtually 100% of my practice has involved actual or anticipated litigation. I have appeared in federal and state trial courts in 17 states and the District of Columbia to argue injunctions, dispositive motions, and other motions. I have argued 19 appeals in federal and state appellate courts, including appeals in nine of the 13 federal courts of appeals. In addition to appearing in trial and appellate courts, I have drafted and/or edited hundreds of trial and appellate court briefs, including in cases in which I neither appeared in court nor appeared on the papers. I have also mooted dozens of trial and appellate arguments for colleagues and co-counsel.

i. Indicate the percentage of your practice in:
   1. federal courts: 88%
   2. state courts of record: 10%
   3. other courts: 0%
   4. administrative agencies: 2%

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 98%
   2. criminal proceedings: 2%

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

My practice has always focused on complex civil litigation, which is infrequently resolved at the trial court level in trials. With one exception (a case resolved through a bench trial), all of the matters that I have litigated in trial courts were resolved at that level either by settlement—in one major case, on the eve of trial—or by dispositive motion. As sole counsel, chief counsel, and associate counsel, I have litigated numerous cases to a final decision at the trial court stage by way of dispositive motion or post-judgment motion.

Since 2006, as co-chair of McDermott’s appellate practice, my practice has involved “issues and appeals.” In the context of trial court proceedings, that means serving as lead counsel in cases involving purely legal issues. In trial court cases involving or potentially involving evidentiary hearings with jury or bench trials, that means serving as lead counsel with regard to dispositive, pre-trial, and post-trial motions turning on legal questions.
i. What percentage of these trials were:
   1. jury: 0%
   2. 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.

   (1) I have argued three cases in the Supreme Court as counsel of record:


   Transcripts and briefs supplied.

   (2) I have been co-counsel at the merits stage for parties in seven Supreme Court cases:

   *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013)
   *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005)

   (3) I have been counsel of record or co-counsel at the merits stage for amici curiae in ten Supreme Court cases:

   *Frank v. Gaos*, No. 17-961
   *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015)
   *Horne v. Dep't of Agric.*, 569 U.S. 513 (2013)
   *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)

   (4) I have been co-counsel for a party in one case in which the opposing party sought emergency relief from the Supreme Court:

(5) I have been counsel of record or co-counsel at the certiorari and jurisdictional (i.e., direct appeals from three-judge district court panels) stages for parties in 31 cases in the Supreme Court. (An asterisk indicates that the Supreme Court granted certiorari or noted probable jurisdiction; in three cases in which I was counsel of record for the petitioners or petitioners, the Court granted the petition for a writ of certiorari.)

Pfeil v. State St. Bank & Tr. Co., No. 15-1199
*Universal Health Servs., Inc. v. United States ex rel. Escobar, No. 15-7
*Lexmark Int'l, Inc. v. Static Control Components, Inc., No. 12-873
State St. Bank & Tr. Co. v. Pfeil, No. 12-256
Extreme Networks, Inc. v. Enterasys Networks, Inc., No. 10-1199
Borden v. Sch. Dist. of E. Brunswick, No. 08-482
Aristocrat Techs. Austl. Pty Ltd. v. Int'l Game Tech., No. 08-446
*Arthur Andersen LLP v. Carlisle, No. 08-146
Cemco Inv'r s, LLC v. United States, No. 07-1526
Convolve, Inc. v. Seagate Tech., LLC, No. 07-656
*FEC v. Wis. Right to Life, Inc., No. 06-969
Blackwater Sec. Consulting, LLC v. Nordan, No. 06-857
City of Gettysburg v. United States, No. 06-235
*Beck v. PACE Int'l Union, No. 05-1448
Christian Civic League of Me., Inc. v. FEC, No. 05-1447
Renesas Tech. Am., Inc. v. United States, No. 05-986
*Wis. Right to Life, Inc. v. FEC, No. 04-1581
McEnroe v. Ramirez, No. 03-871
Boca Investerings P'ship v. United States, No. 02-1859
Continental Ins. Co. v. Allianz Ins. Co., No. 02-1275
Carson Harbor Vill., Ltd. v. Braley, No. 01-1091
Decker v. Bradbury, No. 01-732
Logitech, Inc. v. Gart, No. 01-710
Voting Integrity Project, Inc. v. Bomer, No. 99-1685
Jordahl v. Democratic Party of Va., No. 97-859
*Foster v. Love, No. 96-670

(6) I have been counsel of record or co-counsel at the certiorari stage for amici curiae in six Supreme Court cases:

Xue v. Sessions, No. 16-1274
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) Maynard v. CGI Techs. & Sols. Inc., 227 F. Supp. 3d 773 (E.D. Ky. 2017);

In this litigation, I represented CGI Technologies and Solutions Inc. (“CGI”) as lead appellate counsel. The case involved important questions regarding the scope of “reverse preemption” under the McCarran-Ferguson Act.

In 2016, the liquidator of an insolvent Kentucky health insurer sued CGI in Kentucky state court for contract and tort claims arising out of CGI’s provision of administrative services to the insolvent insurer. CGI removed the action to the U.S. District Court for the Eastern District of Kentucky on the basis of diversity jurisdiction, and brought a separate federal court action under the Federal Arbitration Act (“FAA”) to compel arbitration of the liquidator’s claims. The district court (Van Tatenhove, J.) denied the motion to compel arbitration without prejudice.

CGI took an interlocutory appeal to the Sixth Circuit, and I argued that appeal before a panel comprising Judges Keith, McKeague, and Stranch. The issues presented on appeal included whether state law “reverse preempts” the federal diversity jurisdiction statute and the FAA by operation of the McCarran-Ferguson Act, and whether the text of the FAA forecloses application of the Burford and Colorado River abstention doctrines as a matter of law when arbitration is sought. On February 9, 2018, in an unpublished opinion, the panel vacated the district court’s order denying
arbitration. The panel held that Kentucky law did not “reverse preempt” the FAA by operation of the McCarran-Ferguson Act, declined to abstain on the basis of the Burford and Colorado River abstention doctrines, and remanded for further proceedings in the district court.

On remand, the district granted CGI’s motion to compel arbitration, and stayed proceedings pending arbitration.

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Brigham and Women’s Hospital (“Brigham”) brought this patent infringement case against Perrigo Company (“Perrigo”) in the U.S. District Court for the District of Massachusetts. After the jury found Perrigo liable for patent infringement and awarded $10.2 million in damages, the clerk of the district court purported to enter “judgment” against Perrigo. The clerk’s “judgment,” however, did not dispose of the plaintiff’s claim for enhanced damages. Perrigo filed post-judgment motions and appealed to the Federal Circuit. The district court then ruled that Perrigo’s post-judgment motions and appeal were untimely. In the same order, the district court also denied Brigham’s claim for enhanced damages, thus resolving the last open merits issue in the case.

Although I was not involved in the trial or post-judgment motion practice in the district court, I became involved in the litigation as lead appellate counsel for Perrigo
after the district court ruled that Perrigo’s post-judgment motions were untimely. Perrigo appealed to the Federal Circuit from the district court’s order denying its post-judgment motions and refiled those motions on the theory that the district court’s ruling on enhanced damages created a “final decision” for purposes of the Federal Circuit’s appellate jurisdiction under 28 U.S.C. § 1295(a)(1).

In the Federal Circuit, Brigham moved to dismiss Perrigo’s original appeal and to limit the issues in Perrigo’s second appeal to the district court’s final order. Judge Wallach, sitting as a single circuit judge under Federal Rule of Appellate Procedure 27, denied the motion to dismiss Perrigo’s original appeal and to limit the issues in Perrigo’s second appeal, reasoning that although the district court’s original “judgment” may have been “final except for an accounting” for purposes of the Federal Circuit’s interlocutory appellate jurisdiction under 28 U.S.C. § 1292(c), it was not a “final decision” for purposes of the Federal Circuit’s appellate jurisdiction under 28 U.S.C. § 1295(a)(1) because it did not dispose of Brigham’s claim for enhanced damages. Judge Wallach further noted that interlocutory appeals from § 1292(c) judgments are permissive, not mandatory, and that Perrigo was free to wait to appeal all issues upon the entry of a “final decision” for purposes of § 1295(a)(1). Judge Wallach then deactivated the appeals pending the district court’s resolution of Perrigo’s refiled post-judgment motions, which were necessarily timely under Judge Wallach’s reasoning.

Brigham moved for reconsideration, contending, inter alia, that Judge Wallach’s order was procedurally improper. The full motions panel, in an opinion written by Judge Wallach and joined by Judges Newman and Stoll, denied Brigham’s motion for reconsideration and reaffirmed (at greater length) the reasoning of Judge Wallach’s original order.

When the district court subsequently considered Perrigo’s refiled post-judgment motions on the merits, it granted Perrigo’s motion for judgment as a matter of law on non-infringement, which had the effect of vacating the judgment against Perrigo. The district court thereafter entered an amended final judgment in favor of Perrigo. At the time I submitted this questionnaire response, appeals were pending from the amended final judgment.

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(3) Pharm. Care Mgmt. Ass’n v. Gerhart, No. 4:14-cv-00345 (S.D. Iowa); 852 F.3d 722 (8th Cir. 2017)
In this litigation, I represented the Pharmaceutical Care Management Association ("PCMA"), the national trade association for pharmacy benefit managers ("PBMs"), in an important case regarding the scope of express preemption under the Employee Retirement Income Security Act of 1974 ("ERISA"). PBMs administer the prescription drug benefit for health plans, including health plans governed by ERISA.

In 2013, the Iowa Legislature enacted a statute regulating prices set in contracts between PBMs and retail pharmacies and requiring PBMs to report pricing information to the state. PCMA challenged the law in district court on various grounds, including that ERISA expressly preempted the Iowa law insofar as it regulated PBMs serving as third-party-administrators for ERISA plans. I assumed the role of lead counsel for PCMA after the complaint was filed.

Iowa moved to dismiss PCMA’s complaint for failure to state a claim. After a motions hearing where I argued for PCMA, the district court (Jarvey, J.) granted Iowa’s motion to dismiss for failure to state a claim. PCMA then appealed to the Eighth Circuit, where I argued the appeal. The court of appeals, in an opinion by Judge Perry (of the U.S. District Court for the Eastern District of Missouri, sitting by designation) and joined by Judges Murphy and Shepherd, reversed the district court. The court reasoned that the challenged Iowa statute had both a prohibited “reference to” and “connection with” ERISA plans for purposes of ERISA express preemption. As to the former ground, the Iowa statute contained impermissible explicit and implicit references to ERISA plans. As to the latter ground, the Iowa statute impermissibly dictated ERISA plan choices and interfered with uniformity in ERISA plan administration. The court of appeals also accepted PCMA’s request to enter judgment in favor of PCMA on the purely legal question of ERISA preemption, rather than remand for further proceedings, even though the case was on appeal from the district court’s grant of a Federal Rule of Civil Procedure 12(b)(6) motion.

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These related cases involved fundamental issues of Article III standing, the separation of powers under Article II, and the structural Constitution.

The patent marking statute, 35 U.S.C. § 292, imposes liability for civil penalties on any person who marks any unpatented article with the word “patent” or a number indicating that the product is protected by a patent. Until 2011, § 292 also contained a *qui tam* provision allowing a relator to sue to recover the penalty, which if awarded was divided equally between the government and the relator. Approximately ten years ago, creative plaintiff lawyers began to use § 292’s *qui tam* provision to harass companies that were selling products with expired patent numbers, even though the relators bringing the action suffered no actual harm themselves from the expired patent numbers. Over one thousand such suits were filed across the country, mainly for the purpose of extracting settlements. One of those harassed companies was my client Ciba Vision, which was sued in the U.S. District Court for the Western District of North Carolina because one of its products was marked with an expired patent number.

I appeared in that suit in 2009 for the purpose of asserting two distinct constitutional challenges to the *qui tam* provision of § 292, and the United States intervened for the purpose of defending the statute. First, I contended that the relator lacked constitutional standing under Article III because the relator lacked any personal injury-in-fact. The injury to the government’s *sovereign* interest in compliance with its laws—in contrast to the government’s proprietary interest in recovering damages—is not assignable and thus could not confer Article III standing on the relator. Second, I contended that the *qui tam* provision of § 292 violated the separation of powers, and specifically the Take Care Clause and Appointments Clause of Article II of the Constitution, by delegating to the relator the Executive Branch’s exclusive law enforcement authority.

After two motions hearings at which I argued for Ciba Vision, the district court (Whitney, J.) rejected those arguments and declined our request to certify those issues to the U.S. Court of Appeals for the Federal Circuit for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). One of my colleagues then proceeded to try the merits of the case and won. The relator declined to appeal.

In the meantime, Brooks Brothers was one of the hundreds of other companies sued for false patent marking (in its case because a bow tie contained an expired patent number), and the district court in that case dismissed the relator’s case for lack of Article III standing. The relator appealed to the Federal Circuit, where I filed an *amicus curiae* brief on behalf of Ciba Vision in support of Brooks Brothers. My brief asserted both Article III standing and Article II separation of powers challenges to the
qui tam provision of § 292. In an opinion written by Judge Lourie, joined by Chief Judge Rader and Judge Moore, the court of appeals held that the reasoning of the Supreme Court’s decision in Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000)—which upheld the Article III standing of qui tam relators in the False Claims Act context on the basis that the assignment of the government’s damages claim supplied the relator’s standing—applied in this context, even in the absence of proprietary injury to the United States. The panel expressly declined to consider my Article II separation of powers argument, as Brooks Brothers failed to raise that argument either below or on appeal. Brooks Brothers then declined to seek certiorari in the Supreme Court on the Article III standing issue.

The next false marking case to make its way to the Federal Circuit involved Wham-O, the Frisbee manufacturer. Unlike Brooks Brothers, Wham-O challenged the constitutionality of the qui tam provision of § 292 on Article II separation of powers grounds, and I filed an amicus curiae brief in support of Wham-O on behalf of the U.S. Chamber of Commerce. The Federal Circuit granted leave for me to argue on behalf of the Chamber, which I did on July 11, 2011. Several weeks after argument, Congress repealed the qui tam provision in § 292. The Federal Circuit then dismissed the appeal as moot.

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(5) *Xilinx, Inc. v. Comm'r of Internal Revenue*, 598 F.3d 1191 (9th Cir. 2010).

This case involved a critical issue of “transfer pricing” tax law governing intercompany transactions under § 482 of the Internal Revenue Code and its associated regulations. Those regulations govern how a company’s true taxable income is determined in connection with controlled transactions, that is between the taxpayer and a related or affiliated entity. I represented Cisco Systems as *amicus curiae* in support of a successful petition for panel rehearing in the Ninth Circuit.
Xilinx, a major U.S. technology company, entered into a cost-sharing arrangement with its Irish subsidiary to develop certain technology. The agreement required the parties to share associated costs and provided that the parties would jointly own the technology.

In the tax years in question, Xilinx fully deducted expenses associated with stock options exercised by employees involved in the joint venture with the subsidiary. The Internal Revenue Service partly disallowed those deductions on the basis that those costs should have been shared with the Irish subsidiary. Xilinx then sued in the U.S. Tax Court, which found that two non-related entities dealing with each other at arm’s length would not share costs of employee stock options, and held that the IRS’s disallowance of Xilinx’s deductions was arbitrary and capricious under § 482 regulations.

A divided Ninth Circuit panel comprising Judges Reinhardt, Noonan, and Fisher reversed the Tax Court. 567 F.3d 482 (9th Cir. 2009). Writing for the majority, Judge Fisher recognized that one § 482 regulation supported the taxpayer—it required that the “arms-length” standard be applied “in every case.” Under that standard, Xilinx’s deductions were fully permissible because a similarly-situated company dealing at arm’s length with a non-related entity in a comparable transaction would not have shared employee stock option costs. On the other hand, another regulation required that “all costs” related to transactions—such as the one at issue—be shared. Applying the canon of construction that the more specific controls over the more general, Judge Fisher’s majority opinion held that the latter regulation controlled over the former regulation. Judge Noonan dissented, contending, among other things, that the canon of construction applied by the majority defeated the purpose of § 482—which was to place intercompany transactions on the same footing as arm’s-length transactions between unrelated entities—and thus should be disregarded.

Xilinx petitioned for panel rehearing or rehearing en banc. In support of that petition, my McDermott colleagues and I filed an amici curiae brief on behalf of Cisco Systems, which was exposed to at least $720 million in additional tax liabilities if the panel decision remained intact. Thirty-two other major U.S. corporations—representing over two trillion dollars in market capitalization and a broad cross-spectrum of industries significant to the U.S. economy—joined our brief as amici. Our brief argued that the panel decision upset settled business expectations, imposed potentially billions of dollars of unforeseen costs on amici, and created staggering financial uncertainties.

The panel withdrew its prior decision, granted rehearing without argument, and issued a new (divided) decision, this time written by Judge Noonan and joined by Judge Fisher. 598 F.3d 1191. Judge Noonan’s opinion reasoned that the purpose of § 482 resolved the conflict between the two regulations, and that Treasury’s interpretation of a tax treaty between the U.S. and Ireland further confirmed this conclusion. Judge Fisher, in a concurring opinion, explained that in light of the ambiguity created by the conflicting regulations, he was persuaded to change his view.
in part by “what appears to have been the understanding of corporate taxpayers in similar circumstances and others.” 598 F.3d at 1198 n.2 (citing, inter alia, Cisco’s amici brief). Judge Reinhardt dissented.

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This case involved important questions concerning appellate jurisdiction under the Federal Arbitration Act ("FAA") and the rights of non-signatories to arbitration agreements to enforce such agreements. I represented Arthur Andersen as counsel of record in the Supreme Court at both the certiorari and merits stages. I was not involved in the proceedings below.

After being sued in the U.S. District Court for the Eastern District of Kentucky on tort claims arising out of the provision of professional services, Andersen moved to arbitrate pursuant to an arbitration clause in a contract between the plaintiffs and a third party involved in the same transaction. The district court denied arbitration, which Andersen immediately appealed to the Sixth Circuit under the FAA’s interlocutory appeal provision. The Sixth Circuit held that because Andersen had not signed the contract containing the relevant arbitration clause, Andersen had neither any right of interlocutory appeal nor any cognizable arbitration rights. In so holding, the Sixth Circuit relied upon the reasoning of a then-recent D.C. Circuit decision written by then-Judge John G. Roberts.

Andersen petitioned for certiorari, which the Supreme Court granted. After merits briefing, I argued for Andersen. In an opinion by Justice Scalia, joined by Justices Kennedy, Thomas, Ginsburg, Breyer, and Alito, the Supreme Court reversed the Sixth Circuit, disapproved of the reasoning of the D.C. Circuit decision that the Sixth Circuit had followed, and adopted both of our arguments: (1) the denial of a motion to stay pending arbitration is immediately appealable under the FAA, regardless of whether the party moving to stay is a signatory to the arbitration agreement; and (2) whether a non-signatory can enforce an arbitration agreement is a question of state, not federal, law. (No court of appeals that had previously addressed these questions had articulated the second proposition that we persuaded the Supreme Court to adopt.) The Court then remanded the case to the Sixth Circuit to determine whether Andersen’s claim to enforce the arbitration agreement was cognizable under state law. Justice Souter, joined by Chief Justice Roberts and Justice Stevens, filed a dissent.

Since this case was decided by the Supreme Court in 2009, it has been cited over 500 times by lower courts.

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This case involved an important issue under the Employee Retirement Income Security Act of 1974 ("ERISA"). I represented Jeffrey Beck, a bankruptcy trustee, as counsel of record in the Supreme Court at both the certiorari and merits stages. I was not involved in the proceedings below.

Mr. Beck was trustee of an insolvent company that was sued under ERISA for breach of fiduciary duty because the company, upon filing for bankruptcy and terminating its pension plan through the purchase of individual annuities, rejected a union’s proposal to merge the plan into the union’s pension plan. The bankruptcy court, the California district court, and the Ninth Circuit all held that the company breached its fiduciary duty in failing to give full consideration to the union’s proposal. The Ninth Circuit denied rehearing en banc.

The Supreme Court granted Mr. Beck’s petition for certiorari. After merits briefing, I argued for Mr. Beck. The Court reversed the Ninth Circuit in a unanimous opinion written by Justice Scalia. The Court reasoned that the company did not breach any fiduciary duty in failing to consider the union’s proposal because merger is not a permissible method of terminating a single-employer pension plan under ERISA.

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These related cases involved a “forum battle” to determine where the merits of an insurance coverage dispute would be litigated, as well as important questions of bankruptcy law and federal jurisdiction.

For almost a decade, I represented the CNA Insurance Companies in litigation and extended mediations in connection with the insurance coverage of asbestos liabilities stemming from asbestos products manufactured by Pittsburgh Corning Corporation, which filed for bankruptcy in the Western District of Pennsylvania in 2000. Corning Inc.—a 50% owner of Pittsburgh Corning— was sued in connection with those liabilities and in turn sought insurance coverage from its insurers.

One of those insurers, Mt. McKinley Insurance Company, brought a comprehensive declaratory judgment action in New York state court against Corning and its other insurers seeking a declaration of the rights and obligations of the parties with respect to Corning’s liabilities stemming from Pittsburgh Corning’s asbestos products. Corning removed the suit to the U.S. District Court for the Southern District of New York, and sought to have the litigation transferred to the Western District of
Pennsylvania, where the Pittsburgh Corning bankruptcy was pending and where Corning filed a competing adversary proceeding against its insurers. The insurers in turn moved to remand the litigation to New York state court for lack of subject matter jurisdiction and on the basis of mandatory abstention under the bankruptcy code.

After a motions hearing where I argued for CNA, Judge Cote of the Southern District of New York granted the motion to remand as to most of Corning’s insurers, but denied the motion as to certain “affiliate” policies issued by certain insurers under which Pittsburgh Corning also claimed coverage. Judge Cote reasoned that Corning’s claims on the “affiliate” policies implicated core bankruptcy jurisdiction and thus did not satisfy the requirements for mandatory abstention. Judge Cote then stayed the case. The state court in turn stayed those claims that had been remanded.

As lead appellate counsel for the “affiliate” insurer group, I argued appeals from both the federal district court’s order denying remand and the state court’s stay order.

In the insurers’ appeal from the federal district court’s order denying remand as to the “affiliate” policy claims, the Second Circuit, in an opinion by Judge Pooler, and joined by Judges Wesley and Cardamone, adopted our arguments and reversed the district court, holding: (1) the court of appeals had appellate jurisdiction over the insurers’ appeal under the collateral order doctrine; (2) the bankruptcy code’s mandatory abstention provision applies to removed actions (and overruling a long line of contrary decisions in the Southern District of New York in so holding); and (3) Corning’s claims on the relevant insurance policies did not implicate “core” bankruptcy jurisdiction, and therefore mandatory abstention (requiring remand to state court) was appropriate if the claims could be timely adjudicated in state court. The Second Circuit remanded the case to the district court, which in due course remanded the “affiliate” policy claims to state court.

In the appeal of the state court’s stay order, the First Department of the Appellate Division of the Supreme Court of New York reversed the state trial court’s stay of proceedings. In a 3-2 decision written by Justice Sullivan, and joined by Justices Buckley and Malone, the First Department reasoned that the insurance coverage dispute was justiciable, and that the pendency of the bankruptcy proceeding and related adversary proceeding in the Western District of Pennsylvania provided no basis upon which to stay the state court proceeding. As a result, the coverage dispute was litigated in New York state court rather than the bankruptcy court of the Western District of Pennsylvania. Justice Andrias, joined by Justice Tom, dissented.

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This case involved important questions of preemption, commercial speech protected by the First Amendment, and the “dormant” Commerce Clause.

In 2001, I filed suit against Colorado challenging a state law that prohibited insect repellent manufacturers from making the claim of “safe for kids” on product labels. My client, Biorganic Safety Brands, alleged that the Federal Insecticide, Fungicide, and Rodenticide Act preempted the Colorado law, and that the Colorado law also violated the First Amendment and Dormant Commerce Clause of the U.S. Constitution. I served as lead counsel for Biorganic. The district court (Babcock, J.) consolidated Biorganic’s preliminary injunction request with a trial on the merits. After a one-day bench trial where I argued the legal issues and my co-counsel
handled the evidentiary issues, the district court entered judgment in favor of Bioganic on all three claims and enjoined enforcement of the Colorado statute. Colorado did not appeal.

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This litigation involved an important question regarding the timing of elections for members of Congress in my home state of Louisiana.

In 1995, I filed suit for a group of voters that challenged Louisiana’s “open primary” system allowing for potentially conclusive congressional elections in October of federal election years, notwithstanding federal statutes that require such elections to be held on the Tuesday following the first Monday in November. Our complaint alleged that federal law preempted Louisiana’s election scheme, insofar as it allowed for conclusive congressional elections prior to the day designated by federal law for congressional elections. I served as lead counsel.

The U.S. District Court for the Middle District of Louisiana (Polozola, J.) entered summary judgment in favor of the state after a motions hearing. My clients took an appeal to the Fifth Circuit, where I argued for the voters. The Fifth Circuit reversed in a 2-1 decision written by Judge Davis and joined by Judge Fallon (of the Eastern District of Louisiana, sitting by designation), reasoning that federal statutes setting a uniform national day for federal elections preempted Louisiana law as a matter of conflict preemption. Love v. Foster, 90 F.3d 1026 (5th Cir. 1996). Judge Dennis
dissented, and dissented again from the Fifth Circuit’s denial of rehearing en banc. 100 F.3d 413 (5th Cir. 1996).

Louisiana then successfully petitioned for certiorari. After merits briefing, I argued for the Louisiana voters. The Court affirmed the Fifth Circuit in a unanimous opinion written by Justice Souter. The Court reasoned that the Fifth Circuit’s conflict preemption analysis was “exactly right”: Federal law set a uniform day for federal elections in November of election years, and Louisiana’s election thwarted that scheme by providing for potentially conclusive congressional elections in October.

After the Supreme Court’s decision, the Louisiana Legislature deadlocked and did not enact any corrective amendment to the Louisiana election code. As a result, the parties litigated what equitable remedy was appropriate in light of Louisiana severability principles. In 1998, the district court ordered that the “open primary” be moved forward to the November election date, with any necessary runoff election conducted in December. My clients, the Louisiana voters, contended that under Louisiana severability principles, Louisiana law would default to the preceding version of Louisiana law, which established a party primary system. On appeal, a panel of the Fifth Circuit comprised of Judges Wisdom, Politz, and Jones upheld the district court’s remedial order, pending further word from the Louisiana Legislature. Love v. Foster, 147 F.3d 383 (5th Cir. 1998). My co-counsel, Daniel Balhoff, argued this appeal, although I was substantially involved in the briefing.

Louisiana conducted congressional elections under the district court’s injunction in 1998, 2000, and 2004. In 2005, the Louisiana Legislature enacted a new law providing that the open primary election would be held in October, but that any outright winner would not be officially declared elected until federal election day. In January 2006, Judge Polozola enjoined enforcement of the new law—characterizing it as merely an attempt to circumvent Foster v. Love—and again required the state to hold the open primary on federal election day in November. I was substantially involved in the briefing for this renewed litigation, but argument at the motions hearing was handled by my co-counsel, Daniel Balhoff.

Thereafter, in 2007, the Louisiana legislature enacted a party-primary system that culminated in a conclusive election on federal election day in November, bringing state law into conformity with federal law. (After the 2010 election cycle, the Louisiana Legislature changed the system again, this time by effectively codifying the remedy created by the district court’s injunction in 1998.)

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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 organization(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In 2001, in the wake of the September 11 terrorist attacks, I wrote an article for the Federalist Society examining the deficiencies in the legal framework governing presidential succession. Thereafter, this Committee, the House Judiciary Committee (twice), and the Continuity in Government Commission—a joint undertaking of the Brookings Institution and the American Enterprise Institute—invited me to testify on this subject. To my knowledge, I was the first scholarly commentator to observe that in an extreme situation, the Presidential Succession Act of 1947 allows for a handful of surviving members of the House of Representatives to seize the Presidency from a cabinet officer serving as Acting President.

Beginning in 1999 and continuing for several years into the following decade, I represented CNA Insurance Companies in litigation in the U.S. District and Bankruptcy Courts for the Western District of Pennsylvania involving claims by PPG Industries, Inc., for insurance coverage of mass tort liabilities stemming from asbestos products produced by Pittsburgh Corning Corporation, an entity 50% owned by PPG. CNA provided tens of millions of dollars in primary and excess insurance coverage to PPG. These claims were ultimately resolved, after two extended mediations, by settlement in connection with the plan of reorganization filed in the Pittsburgh Corning bankruptcy in the Western District of Pennsylvania. I was CNA’s sole counsel in the first mediation, which involved PPG and its primary carriers and was mediated by Harvard Law Professor Robert Mnookin. In the second mediation, which involved PPG and its excess carriers and was mediated by David Geronemus of JAMS, I was co-counsel with Rodney Eshelman.
From 1996 to 1997, I was lead pretrial counsel for CNA Insurance Companies in an insurance coverage suit brought by Bristol-Myers Squibb against CNA and several other insurers in state court in Jefferson County (Beaumont), Texas. Bristol-Myers sought a defense and indemnity from its liability insurers in connection with hundreds of millions of dollars in liability for its production and sale of defective breast implants. CNA provided tens of millions of dollars in excess insurance coverage to Bristol-Myers. After extensive discovery, motion practice, and the selection of a jury, the case settled on the eve of trial. I took and defended depositions, argued numerous procedural and dispositive motions, and was involved in jury selection. Had the case proceeded to trial, I would have second-chaired CNA’s defense.

In 2018, I sent two letters to California Governor Jerry Brown in connection with pending legislation. I sent these letters on behalf of my trade association client, the Pharmaceutical Care Management Association.

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 a course.

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.

In the two calendar years following the year of my resignation from McDermott Will & Emery, the firm will return my paid-in capital contributions. At the time of my nomination, those contributions totaled $108,420.

Under the terms of McDermott’s partnership agreement, I am eligible to receive certain post-partnership payments beginning at age 60. As of January 1, 2019, the value of those payments will be $362,950 paid out over 72 months, followed by monthly payments of $500 for life.

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.

No, but I would consider the possibility of part-time teaching as an adjunct professor at a law school.
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).


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.

   If confirmed, I will recuse myself in any litigation where I have ever played a role. In addition, I will permanently recuse myself in all cases involving my current firm, McDermott Will & Emery. I will evaluate any other real or potential conflict, or relationship that could give rise to appearance of conflict, on a case-by-case basis and determine appropriate action with the advice of parties and their counsel, including recusal where necessary.

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

   I will follow the terms of the applicable federal statute, 28 U.S.C. § 455. I will do so automatically, without the necessity of a party moving to invoke the statute. If there is any doubt in my mind over the proper course, I will err on the side of recusal.

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.

According to my firm’s records, in my 18 years at McDermott Will & Emery, I have billed an average of 70 hours per year to the firm’s pro bono clients in a wide variety of matters.

One of the most significant pro bono matters that I have had in 25 years of private
practice was the privilege of representing 37 retired flag and general officers who filed an *amicus curiae* brief in support of a petition for certiorari filed in the U.S. Supreme Court in the case of Behenna v. United States, No. 12-802. The petitioner, Michael Behenna, was a young Army First Lieutenant who was court-martialed and convicted of murder for killing a detainee on the battlefield during the Iraq War. At his court martial, Lieutenant Behenna contended that he killed the detainee in self-defense. In a sharply divided (3-2) decision, the Court of Appeals for the Armed Forces held that because Lieutenant Behenna acted outside the scope of his orders at the time of the incident, he categorically forfeited the right of self-defense when the detainee attempted to kill him.

My *amicus* brief took no position on the truth of Lieutenant Behenna’s claim that he acted in self-defense. Instead, it argued that the decision of the court of appeals—which assumed the truthfulness of Lieutenant Behenna’s testimony—set a dangerous legal precedent for servicemembers that the Supreme Court should review and reverse. The *amicus* brief argued that although Lieutenant Behenna should be subject to appropriate discipline for his unauthorized conduct, no servicemember in a combat zone should categorically forfeit the right to self-defense because his or her conduct was unauthorized. The Supreme Court denied Lieutenant Behenna’s petition for certiorari, and the troubling decision of the Court of Appeals for the Armed Forces still stands as controlling precedent in military court-martial cases arising out of combat zones.

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.

In April 2017, an official from the White House Counsel’s office contacted me regarding a potential judicial nomination, and since then, I have been in periodic telephonic contact with officials from that office. On June 5, 2017, I interviewed with several attorneys from that office and from the Office of Legal Policy at the Department of Justice in Washington, D.C. On August 9, 2017, I met with an official in the Office of the U.S. Trade Representative.

Since September 18, 2017, I have been in contact with officials from the Office of Legal Policy. On June 18, 2018, 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.