

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED THIRD CONGRESS
SECOND SESSION
ON
CONFIRMATIONS OF APPOINTEES TO THE FEDERAL JUDICIARY

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NOMINATIONS OF DIANA G. MOTZ AND ROBERT MANLEY PARKER, TO BE U.S. CIRCUIT JUDGES; RICARDO M. URBINA, RICHARD A. PAEZ, DENISE PAGE HOOD, PAUL L. FRIEDMAN, AND WILLIAM F. DOWNES, TO BE U.S. DISTRICT JUDGES

WEDNESDAY, MAY 25, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:34 p.m., in room 628, Dirksen Senate Office Building, Hon. Dennis DeConcini presiding.

Also present: Senator Simpson.

OPENING STATEMENT OF SENATOR DeCONCINI

Senator DeCONCINI. The Senate Judiciary Committee will come to order.

Ladies and gentlemen, we have a number of nominees today and we also have a number of colleagues, both from the House and the Senate, to introduce them. Due to scheduling and what have you, I am going to take the Senators who are here and the House Members that are here and have them testify, if they care to make their introductory remarks.

Before doing so, let me say this afternoon the Judiciary Committee is going to conduct hearings on seven nominees, two for the position of circuit court and five for the position of Federal district court. As is customary, the nominees will be introduced, as I indicated, by their Senators and Representatives who are here, and we will proceed with that in just a moment.

There have been some statements of opposition to some of the nominees and the record will remain open. All the nominees have answered the questions that have been presented to them by the Judiciary Committee, and portions of those questionnaires will be printed in the record as part of this hearing.

It is also my understanding that the committee has received written testimony concerning several of the nominees, particularly nominees Paez and Urbina. The record of this hearing will be kept open for a period of time, determined by the chairman, in the event that any other written testimony is offered or other members wish to submit written questions for these particular members.

This afternoon, we will first take up with Senator Sarbanes for the introduction of Diana G. Motz to be U.S. Circuit Judge for the Fourth Circuit. Senator Sarbanes, we are very pleased to have you here, and you may proceed.

**STATEMENT OF HON. PAUL S. SARBANES, A U.S. SENATOR
FROM THE STATE OF MARYLAND**

Senator SARBANES. Mr. Chairman, thank you very much.

I am very pleased to appear before you to introduce to the committee Judge Diana Gribbon Motz, who has been nominated by President Clinton to be the U.S. Circuit Judge for the Fourth Circuit.

Diana Motz has an extraordinarily distinguished record of both professional practice and public service. A native of Washington, DC, she is an honors graduate of Vassar College, an honor graduate of the University of Virginia Law School.

For over 25 years since finishing law school, she has been active in the practice of law in Maryland, in both the public and private sectors. She began her career with our city's largest law firm.

Three years later, in 1972, she joined the Maryland Attorney General's Office, where she served as an assistant attorney general to begin with and then moved on to more responsible positions within the office over a 14-year tenure. During the last 4 years, she was the chief of litigation in the Maryland Attorney General's Office, which involved supervising all trial and appellate civil litigation in an office of more than 200 lawyers.

She then returned to private practice for 5 years as a litigation partner in a large Baltimore law firm, and in 1991 was appointed to her current position as an associate judge on the Court of Special Appeals of Maryland. The court of special appeals is our State's intermediate appellate court. It hears all appeals, civil and criminal, from the trial courts of general jurisdiction, with a few limited exceptions that go directly to the court of appeals.

Diana Motz is an experienced litigator who enjoys an outstanding reputation in our community. She has appeared in State and Federal courts at all levels. She has received many honors and awards for accomplishments as a lawyer, and in 1988 was selected by the Chief Justice of the Supreme Court to be part of a 15-member Federal Courts Study Committee. This important committee, made up of judges, law professors, practicing lawyers, and four members of Congress, including Senators Heflin and Grassley from this committee, made significant recommendations for the improvement of the Federal courts system.

In addition to her very active legal career, she has been active in a number of important community events, has volunteered her time for important public interest legal representation of nonprofit and citizen groups.

Mr. Chairman, let me close with this observation. Over 30 years ago, I clerked for Judge Morris Soper on the Court of Appeals for the Fourth Circuit, so I have a particular personal interest in this very important appellate court. I am proud of the high quality of judges from Maryland who have served on the fourth circuit.

Judge Motz has consistently demonstrated outstanding ability. She has established herself as a highly respected appellate judge

in our State. She has the intelligence, the judicial temperament, the experience, and the character needed to hold this important position. She will be a very considerable asset to the fourth circuit and help this court maintain its high standard.

I congratulate Diana Motz, her husband, Fred, and her two children, and all of her friends and family, and I commend the President for nominating this outstanding person to this important judicial position. I am very pleased to come this afternoon and introduce her to the committee and to urge you to report her to the Senate favorably.

Thank you very much.

Senator DECONCINI. Senator Sarbanes, thank you for your fine testimony and recommendation.

Judge Motz, I am advised that Senator Barbara Mikulski is also going to be here, although because we have other Members of the Senate and the House here, we are going to go ahead and hear from them. We will hear from you shortly, Judge.

At this time, we will take up the introductory remarks for Judge Robert Manley Parker, from Tyler, TX, U.S. Circuit Court. Senator Hutchinson, would you care to lead off, and then we will hear from the chairman of the Judiciary Committee from the House of Representatives, Jack Brooks, who we are honored to have here today. He has a long history and legacy in the judiciary.

Senator Hutchison.

**STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S.
SENATOR FROM THE STATE OF TEXAS**

Senator HUTCHISON. Thank you, Mr. Chairman.

I certainly do appreciate the opportunity to be here on behalf of Judge Robert Parker for the fifth circuit, and I am very pleased to have my distinguished colleague from the House side, the chairman of the Judiciary Committee there. I certainly work with him on these appointments and am pleased to be here with him.

Our distinguished nominee, Judge Parker, graduated from the University of Texas and the University of Texas School of Law, which makes him qualified *per se*.

He spent time on the Hill, Mr. Chairman. Judge Parker served as administrative assistant to Congressman Ray Roberts, who was a wonderful Congressman that I knew when I was an intern here in the summertime and a great leader.

Then he moved to Longview and practiced law and was a self-described country lawyer. You know what happens when you go against a country lawyer in the courtroom. They always beat you, and that is exactly the kind of reputation that Judge Parker had.

He has had a long and distinguished career as a jurist. He was appointed to the U.S. District Court for the Eastern District of Texas by President Carter in May 1979, and he became chief judge of the Eastern District in February 1990.

Judge Parker was a good nomination for President Clinton to make for the fifth circuit. I am very pleased that he has with him today his family, his wife, Frieda, and his daughter. I am pleased to be here on his behalf and I recommend him to the committee for confirmation.

Senator DECONCINI. Thank you very much, Senator Hutchinson.

Chairman Brooks, we will hear from you, and then we will return to Senator Barbara Mikulski for Judge Motz. You may proceed, and thank you for being with us.

STATEMENT OF HON. JACK BROOKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Representative BROOKS. Thank you very much, Senator.

I am especially honored to be here today in company with my attractive junior Senator, to be here with my Senate colleagues to introduce my good friend, Judge Robert Parker, nominee for the fifth circuit of appeals.

I would like to recognize his wife, Frieda. Stand up, Frieda. I want them to know who you are, and his daughter, Jennifer. He has another pretty daughter, also.

I have known Judge Parker for 25 years and have always been impressed by his hard work and dedication to the law and his local community. He served with distinction on the U.S. District Court for the Eastern District of Texas since 1979 and as chief judge since 1990.

I have some statistics on his record which you might be interested in. During his first 10 years on the Federal bench, he closed more cases than any other judge in this United States. In 1 year, he closed off a total of 911 cases. He has certainly earned his reputation as a dedicated judge, competent and efficient.

During my tenure as chairman of the House Judiciary Committee, I valued Judge Parker's straight information and wise counsel on matters related to administration and operation of our Federal courts. His experience as a judge and his insight on the issues facing the Federal judiciary and his outstanding work ethic are all qualities which lead me to give him my fullest, unequivocal support for the fifth circuit court of appeals. I am certain, after meeting Bob Parker, you will agree.

It is a pleasure, as always, to be here today, and I want to thank you for your usual courtesy and consideration of his nomination. Thank you very much.

Senator DECONCINI. Chairman Brooks, thank you very much, and Senator Hutchinson, thank you.

Judge Parker, we will return to you shortly.

Senator Mikulski, do you care to make your statement on behalf of Judge Motz?

STATEMENT OF HON. BARBARA A. MIKULSKI, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MIKULSKI. Thank you very much, Senator.

I apologize to Judge Motz for being late. We are debating malpractice reform in the health insurance reform markup.

Senator DECONCINI. Do you have some questions for the judges on that subject matter? [Laughter.]

Senator MIKULSKI. I would like to take you and her with me right now, so that is why I am just kind of parachuting into this hearing.

I just want to lend my enthusiastic endorsement for the nomination of Judge Diana Motz to be on the U.S. Circuit Court for the Fourth Circuit. I know that my senior colleague, Senator Sarbanes,

has spoken about Ms. Motz' legal competence and her professional experience, her degree at Vassar, and her law degree from the University of Virginia. She is in more "Who's Who" than have been published in the field. Of course, now she is an associate judge on the court of special appeals, with extensive experience both in private practice and in supervising the 200 lawyers as the chief of litigation.

I always like to look at what people do as citizen volunteers, which I think also says something about the kind of person a judge may be.

When one looks at the role of Judge Diana Motz, we can see that she has worked on everything from the Union Memorial Hospital Board to make sure health care was available, with a particular orientation to women's health, to being on the board of the YMCA of the greater Baltimore area, and to now being a hands-on volunteer at the Mount Washington Pediatric Hospital with sick babies and toddlers.

Senator you might say, what has that got to do with being on the court of appeals? I believe it is important to couple community service with legal competence, extensive professional experience, and legal scholarship. I believe we need judges who like to be involved in the real world and to really engage with people in terms of their day-to-day problems and the day-to-day issues that they face.

Judges are prohibited from being community activists, but they are not prohibited from being community volunteers. Judge Motz is a wife, a mother, a judge, who still takes time to go to a pediatric hospital to hold a child who would not be held any other way, to try to bring comfort and solace to handicapped and sick children. I think that is exactly the type of person we need on our Federal court, combined with competence, scholarship, and ability. That is why I am so enthusiastic in my endorsement for her.

Senator DECONCINI. Thank you, Senator Mikulski. We are very pleased to have that recommendation for the committee's consideration, and I am sure that it will weigh heavily in our deliberations.

We will now proceed to the introductions for Judge Denise Page Hood from Detroit, MI. Introducing the judge for remarks will be Senator Levin and also Chairman Conyers is here. Chairman Conyers, would you like to come up? Congresswoman Collins is not here, I understand, at this time.

Judge Hood, welcome. Senator Levin, if you would like to proceed.

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Mr. Chairman, it is a real treat to be here to introduce Judge Hood to the committee. She has an illustrious judicial career already. After graduating from Columbia Law School in 1977, she became an assistant corporation counsel in the city of Detroit and from there was elected, first to the district court, then to the recorder's court, which is our criminal court of jurisdiction, and then to the circuit court. She also is just completing her term as president of the Detroit Bar Association, which indicates what her fellow lawyers think about her.

**TESTIMONY OF DIANA G. MOTZ, BALTIMORE, MD, TO BE U.S.
CIRCUIT JUDGE FOR THE FOURTH CIRCUIT**

Judge MOTZ. I wonder if I could introduce my family, Senator DeConcini.

Senator DECONCINI. Please.

Judge MOTZ. I am here today with my husband, Fred Motz.

Senator DECONCINI. Judge, we are very pleased to have you.

Judge MOTZ. And our daughter, Catherine, our son, Daniel, and my parents, Jane and Daniel Gribbon, who I asked to stand, but apparently they are too shy.

Senator DECONCINI. We thank them for being here. I know it is a very proud moment.

Judge MOTZ. I am also accompanied with veritably a busload of friends from Baltimore. It is not very far, but it is an hour away, and I am most appreciative of their support.

Senator DECONCINI. We thank them.

Judge MOTZ. I am just absolutely delighted and honored to be here, Senator. I have no opening statement.

Senator DECONCINI. Thank you, Judge.

Judge Parker, do you have any opening statement or any introductions?

**TESTIMONY OF ROBERT MANLEY PARKER, TYLER, TX, TO BE
U.S. CIRCUIT JUDGE FOR THE FIFTH CIRCUIT**

Judge PARKER. Mr. Chairman, I have no opening statement.

With some trepidation, I point out to the Chair that there is a typographical error about my middle name. It should be "Manley" instead of "Henry." I only mention it to make sure you consider the right person. [Laughter.]

Senator DECONCINI. I don't know, with Mr. Brooks, maybe he is trying to get two judges on there, I don't know. [Laughter.]

QUESTIONING BY SENATOR DECONCINI

Senator DECONCINI. Thank you very much.

Judge Motz, let me pursue some questions, if I can. One issue that is always of great concern to me is judicial temperament. You have been on the bench and you have demonstrated your acumen and your understanding of judicial temperament, I think, but I can't help but ask the question, and I will probably ask it to every nominee here, what do you do as a judge, particularly now as a Federal judge, if confirmed for a lifetime appointment, to maintain your level of balance so that there is not a feeling, either within yourself or expressed on the bench, that you are above those who appear before you?

Judge MOTZ. Mr. Chairman, I think you are absolutely right. Maybe it is as important as anything else. We talk about learning and we talk about experience, but judicial temperament is perhaps as important as any other quality for a judge.

What I have tried to do and what I hope I have done is to, of course, treat people fairly and courteously, but I think at least an equal dimension of a fair and good demeanor is to be prepared and to be intelligently prepared so that you can ask intelligent questions.

I was for a long time, as perhaps you were, Senator, a trial lawyer and argued a number of cases in the appellate courts of our State. Some of the most difficult appellate arguments were those in which the judges didn't give me any indication of where they were.

So I made a promise to myself when I took the job I have now that when I was on the court, that if I did have a difficulty with an advocate's position, I would ask them a question, not a berating question, but that I would try to let them know what my problem was so that they could make their case.

I think that is a fair part of judicial temperament.

Senator DECONCINI. What do you do now as judge, and I presume you will do the same thing as a circuit judge for the fourth circuit you do now, when you have an attorney who is overzealous or rambunctious or nonjudicial within the court? How do you approach that lawyer in front of his client and in front of the court?

Judge MOTZ. I try to get lawyers to answer my questions, and ask them to do that. I am not a believer in berating people in public, and I don't do it.

The problems with lawyers acting out, if you will, acting inappropriately, I think are much less in the Federal appellate courts and in the State appellate courts. You are much more likely to have a lawyer making a position for his client, I think, in a trial court, because the client is much more likely to be there, so that I haven't really had an occasion where someone has acted improperly in front of me.

Senator DECONCINI. Do you have any opinion, Judge Motz, on a process to monitor Federal judges' conduct and a procedure to be set up to handle complaints from the public or the bar toward Federal judges, such as a judicial tenure court?

Judge MOTZ. This is, of course, why the appointment process is so important, and I don't think I have to emphasize that to you or Senator Simpson. I think that once someone becomes a Federal judge, that this is a trust and it is lifetime tenure, and that is why you want to get the very best people there to begin with. It is difficult for the public to complain.

I would be in favor for making that as open as possible, because—

Senator DECONCINI. Do you think that there should be some process for—

Judge MOTZ. I do. Yes, I do, Mr. Chairman.

Senator DECONCINI. For at least registering complaints, valid or not valid?

Judge MOTZ. Yes, sir.

Senator DECONCINI. Thank you.

Judge Parker, the same to you, judicial temperament. I don't know your background on judicial temperament. I do know, however, your background on expediting and innovative procedures in your court, not only from your record, but also from Judge Bilbey in the Tucson District Court who has attempted to work on some comparable approaches. However, he has not received the nickname "The Rocket Docket," as I understand that you have, and I compliment you for innovative approaches that demonstrate that judges can really be involved in expediting and perfecting the proc-

ess, and not just looking to Congress for more judges and more courtrooms.

But referring to judicial temperament, how do you handle problem lawyers, or how do you handle your own ego, your own self-esteem, once you are on the court and know that almost nothing can extract you from that court? How do you handle that, sir?

Judge PARKER. Mr. Chairman, my definition of judicial temperament includes simple courtesy, preparation, and the ability to listen to lawyers. I have never had a lawyer misbehave in my court in 15 years, so it has not been a problem. I would hope that the atmosphere created has contributed to their demeanor.

Senator DECONCINI. Let me give you a hypothetical. What if one does misbehave? What is the action you would take immediately as a judge?

Judge PARKER. I would hope to reason with the lawyer, and am confident that that would be effective.

Senator DECONCINI. Thank you.

Judge Parker, to get on the record regarding some club memberships that you belong to, I understand you were a member of the Pinecrest Country Club of Longview, TX, from 1984 through 1987, and a nonresident member from 1989 through 1992.

The Judiciary Committee passed a resolution expressing the committee's sense that it is inappropriate for judicial nominees to be members of clubs where business is conducted and those clubs discriminate on the basis of race, sex, or religion in their membership policies.

What is your view of the Judiciary Committee's resolution, and for the record, I understand you do not belong to those clubs now, is that correct?

Judge PARKER. That is correct, Senator.

I completely agree with the resolution. I rejoined Pinecrest in 1984, having been a member some years before. I rejoined after satisfying myself that there was an attitude change at the club. I served 1 year on the board. I initiated a discussion on the board relative to minority membership. I was pleased to see that there was unanimous support for minority members in the event an application was received.

Senator DECONCINI. Did the club change its rules for admission?

Judge PARKER. The rules explicitly were race neutral all along.

Senator DECONCINI. There just were no minorities?

Judge PARKER. That is correct.

Senator DECONCINI. Have they accepted any minorities, to your knowledge?

Judge PARKER. Senator, I don't have up-to-date information. I have observed minorities in the eating facilities, on the golf course, and the few times I have been a guest in recent years, but I am not advised that there are minority members, but I don't know for sure.

Senator DECONCINI. Thank you, Judge Parker. I have no further questions.

Senator Simpson.

QUESTIONING BY SENATOR SIMPSON

Senator SIMPSON. Thank you, Mr. Chairman and judges.

Let me ask, Judge Motz, as a court of appeals judge now, a new role, in a sense, at least you have been, of course, an associate judge on the Maryland Court of Special Appeals, as a court of appeals judge, you would be bound to follow precedent laid down by the Supreme Court and by your own court, and you will, of course, be faced with cases of first impression.

What principles will guide you, or what methods will you employ in deciding cases of first impression?

Judge MOTZ. Senator, I think that cases of first impression are sometimes the most difficult cases to decide, because as judges, what we do is usually look for precedent, and there wouldn't be precedent there.

I would think that I would do what I do now when I face a case of first impression, which is to look for an analogous case that would be in the circuit or in the Supreme Court. For example, if you had a question about what kind of due process was due and what kind of hearing was due and you didn't have the precise fact situation decided in the fourth circuit, I would look to see what had been appropriate in an analogous situation, or I would look at out-of-circuit law, which might have decided a very similar situation in another circuit, for example, the ninth circuit or the tenth circuit.

Senator SIMPSON. And then, of course, draw on your own personal experiences in life and your training?

Judge MOTZ. Absolutely. You look at the library and you see all of these books and you think that every single issue must have been decided somewhere by some court, and, of course, that is not true. There are inevitably cases that have not been decided anywhere by any court. You go to the restatement, the American Law Institute's restatement that they put out. You go to treatises, see what the McCormick or something like that has to say about it. You go to law review articles. But ultimately, it is sort of what your judgment is, what your experience is, having read all of these things, of course.

Senator SIMPSON. We always ask here, regardless of which party is involved in the majority or the minority, these issues of judicial activism are always, I think, there. We try to guard against that from both sides of the aisle, as to placing people on the bench who are "judicial activists," so those questions are often posed.

I have reviewed your decisions in the past. I just had one question about one, and I would ask you, this was the case of *Brown v. Ashton*. You ruled basically that an ordinance imposing a curfew on juveniles infringed the "fundamental rights of those juveniles," because of the difference of adults and juveniles. You ruled that all the defendants were immune.

How would you respond to the thought that that might have been activist on your part, to reach out to decide a question that was ultimately unnecessary in the resolution of the case? That would be the only one I would ask you, because you were speaking of the vulnerability of children and their inability to make critical decisions and the importance of parental role, but curfews are usually imposed because the parental role has totally failed. In fact, it is a very dramatic thing. That ordinance might rather support rather than subvert the parental role and put some teeth in a parent's insistence of curfew.

How do you respond to that, in your own thoughts for me, please?

Judge MOTZ. Senator, I think you have accurately characterized the case. I am very impressed, frankly, with how much of the case you seem to really have mastered. It took me quite a while.

Senator SIMPSON. Don't believe it.

Judge MOTZ. I guess the issue there, I thought, was a difficult one.

Senator SIMPSON. Sure.

Judge MOTZ. The ordinance there, if you will remember, imposed a curfew on all those under the age of 18, so it seemed to me it wasn't just young children, 12-year-olds, it was fairly—and, in fact, the plaintiffs that brought the case were over 16 years of age.

The ordinance had been on the books—this was the city of Frederick up here, about an hour away from us—had been on the books of the city of Frederick for 12 years at the time it was enforced. It had never been enforced before. All of a sudden, when a minority organization got together and had some dances downtown and there were some teenagers around at night, there was a decision to enforce the ordinance.

The ordinance was enforced, as I say, for the first time after not having been enforced for 12 years, and it seemed to me, when you looked at the cases around the country, and as you will remember from that case, I didn't decide it in a vacuum. I tried to canvass the waterfront, and there were cases from all over the country.

Most of those cases said that when you had an ordinance of this sort, because it wasn't very specifically grounded for a specific situation or a very young group of children, you had that kind of ordinance, you were talking about fundamental rights. As you know, Senator, once you start talking about fundamental rights, when you put restrictions on those rights, you have a very difficult burden in justifying them.

I think I made clear in the case, and indeed, used an example of another Maryland case, if you had a different kind of curfew, for example, just a curfew over Labor Day weekend in Ocean City, Memorial Day weekend, a beach weekend where you had made a record that there might indeed be problems and you were not using this as some sort of subterfuge, that the ordinance might be fairly constitutional.

I hope that answers your question. I know it is a long answer.

Senator SIMPSON. No, it helps. No, that helps, indeed, because it gives me the knowledge that you will pursue those things on a case-by-case basis with common sense.

Judge MOTZ. Yes, sir.

Senator SIMPSON. I believe that, from everything I know. I just wanted to ask you about that because I was an old city attorney. I remember those curfew cases.

Judge MOTZ. I thought it was a difficult case, I did. I have to tell you that the court of appeals has been considering it for 2 years, so I am interested in hearing what they will say. We have a certiorari court above me.

Senator SIMPSON. Thank you very much.

Judge MOTZ. Thank you, sir.

Senator SIMPSON. Judge Parker, I was reviewing your materials prior to the hearing, and in your question in response to the committee questionnaire, the eternal question on judicial activism, your response gave me recollection of many Supreme Court nominees' response to questions on such issues as constitutional right to privacy, on matters of reproductive choice, and other issues which might require a nominee to disclose how he or she would decide on a particular issue.

I am pro-choice in my own personal life about the issue of reproductive rights and abortion, which, of course, with the nomination coming before us soon, I notice that groups on both sides apparently are going to exhaust themselves asking questions on that. I hope they do, on both sides, exhaust themselves and fall flat on their faces somewhere along the line so that we don't have to just spend days on that issue, which is such a deeply personal decision.

But nevertheless, I ask you, it seemed to me it was not quite a direct response on the issue of judicial activism. I think it is essential to the rule of law that judges not act politically.

Do we have your commitment that you will be deciding cases based on the law and the facts and not let political considerations influence your judgment?

Judge PARKER. Absolutely.

Senator SIMPSON. Without any qualification?

Judge PARKER. None.

Senator SIMPSON. As I say, that came only because I reviewed your answer about your record, containing opinions I am sure some would consider "activist" and opinions that some would criticize as exercising too much "judicial restraint." You found that in public life, which is what you are involved in, you have been accused of everything by now.

Judge PARKER. My definition of activism, Senator, involves one permitting political or personal agendas to creep into the decision-making process. I think it has no role in the decisionmaking process.

Senator SIMPSON. And personal bias?

Judge PARKER. Absolutely.

Senator SIMPSON. Thank you very much.

I thank you, Mr. Chairman.

Senator DECONCINI. Thank you.

Judge Motz, what do you do when your husband's opinion is on appeal?

Judge MOTZ. My husband is usually right, Senator. [Laughter.] He doesn't get appeal.

Senator DECONCINI. I am not going to ask any more questions after that one. [Laughter.]

Senator DECONCINI. Thank you.

Judge MOTZ. I would, of course, recuse myself.

Senator DECONCINI. That is what I wanted for the record.

Judge MOTZ. I won't be hearing any of his appeals, no sir.

Senator DECONCINI. Well, we know who wears the pants in that house now. [Laughter.]

Thank you very much, judge.

Judge MOTZ. Thank you.

Senator DECONCINI. Thank you, judge.

Judge PARKER. I thank the Chair and Senator Simpson.

Judge MOTZ. I do, too. Thank you both.

Senator DECONCINI. We will now ask for Mr. Downes, Mr. Friedman, Ms. Hood, Judge Paez, and Judge Urbina to all come forward, please. If you would remain standing and raise your right hand.

Do you solemnly swear the testimony you are about to give the committee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. DOWNES. I do.

Mr. FRIEDMAN. I do.

Judge HOOD. I do.

Judge PAEZ. I do.

Judge URBINA. I do.

QUESTIONING BY SENATOR DE CONCINI

Senator DECONCINI. Please be seated.

I will pose questions here to all of you and start with Judge Urbina, but it will be the same question for all of you.

If confirmed to the district court, you very well may be faced with applying a court of appeals or a Supreme Court decision that has already been decided and affirmed, and it may be different than your personal view or perhaps your interpretation of what the law might be interpreted, if you were sitting on the court of appeals or the Supreme Court.

Would you personally have any difficulties, if you would each respond to this, in applying precedent established by circuit courts or the Supreme Court of the United States, even though the case is one with which you might personally disagree?

Judge Urbina.

Judge URBINA. Mr. Chairman, the answer to the question is no, and the reason for the answer is that it has always been my firm belief that the law must maintain continuity, predictability, and stability, and the only way to achieve those goals in the application of the law is to apply precedent.

Senator DECONCINI. Thank you.

Judge Paez.

Judge PAEZ. Senator DeConcini, if I am fortunate enough to be confirmed, I can assure you that I will have no difficulty in following established precedent in my circuit.

Senator DECONCINI. Judge Hood.

Judge HOOD. Mr. Chairman, I would also have no problem following the precedent of my circuit and that of the Supreme Court.

Senator DECONCINI. Mr. Friedman.

Mr. FRIEDMAN. Mr. Chairman, the judge I clerked for, R.B. Robinson, once told me that the district court judge has a lot less power than people think and the main reason is that he is bound by what Congress writes and he is bound by what the circuit has said and what the Supreme Court has said. I will have no problem applying the law.

Senator DECONCINI. Mr. Downes.

Mr. DOWNES. Mr. Chairman, the obligation of every Federal district judge is to follow judicial precedent, and I cannot conceive of a situation in which I would not do that, sir.

Senator DECONCINI. Thank you.

SUBMISSIONS FOR THE RECORD

UNITED STATES SENATE

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (including any former names used.)

Diana Gribbon Motz, nee Diana Jane Gribbon.

2. Address: List current place of residence and office address(es).

626 B Courthouse East
111 N. Calvert Street
Baltimore, Maryland 21202

123 St. Dunstan's Road
Baltimore, Maryland 21212

3. Date and place of birth.

July 15, 1943. Washington, D.C.

- 4.
- Marital Status
- (including maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Spouse: John Frederick Motz
United States District Court Judge
District of Maryland
101 Lombard Street
Baltimore, Maryland 21201

Employer: United States

- 5.
- Education
- : List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Vassar College, 1961-1965; B.A. in 1965.

University of Virginia Law School, 1965-1968; J.D. in 1968.

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

Summer 1965 United States Justice Department,
 Civil Rights Division, intern

Summer 1967 Carter Ledyard & Milburn (law firm), summer
 associate

1968-1971 Piper & Marbury (law firm), associate

1971-1976 YWCA of Greater Baltimore (non-profit), Board
 of Directors

1974-1976 Junior League of Baltimore (non-profit), Board
 of Directors

1971-1985 Maryland Attorney General's Office, Assistant
 Attorney General

1975-1991 Union Memorial Hospital (non-profit), Board of
 Directors

1976-1978 Guilford Association (non-profit neighborhood
 association), Board of Directors

1980-1984 Maryland Hospital Laundry, Inc. (non-
 profit adjunct to a number of Maryland
 hospitals), Board of Directors, 1980-84;
 President, 1983-1984.

1986-1991 Frank, Bernstein, Conaway & Goldman, partner

1986 Fraskop Partnership (less than 1% ownership of
 portion of law offices building,
 law firm defunct)

1986 American Bar Foundation (non-profit), Fellow

1986 American Law Institute (non-profit), Fellow

1987-1991 Legal Mutual Society (non-profit), Board of
 Directors

1987-1988 Wranglers Law Club (non-profit), President

1988 Maryland Bar Foundation (non-profit), Board of
 Directors

1991-present State of Maryland, Judiciary, Associate Judge,
 Court of Special Appeals

1993 Young Victorian Theatre, Inc. (non-profit),
 Board of Directors

1993 Johns Hopkins Hospital (non-profit), Board of
 Directors

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

No.

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

Federal Courts Study Committee, 1988-1990

I was appointed by Chief Justice Rehnquist to a 15 member committee created by Congress to make recommendations as to the future and jurisdiction of the federal courts. The Committee was composed of two Senators, two Congressmen, five federal judges, the Chief Justice of the Supreme Court of Washington, a former solicitor general, the Chief of the Criminal Division of the United States Department of Justice, the Chief of a State Public Defender Program, a former president of the American Bar Association, and me. After fifteen months of study, including thirteen public hearings all over the United States - i.e., from Boston to Salt Lake City to Seattle to Atlanta - the Committee issued a 200-page report containing more than 100 recommendations. Some of those recommendations have now been incorporated in proposed federal legislation.

American Law Institute

Fellow, American Bar Foundation

Fellow, Maryland Bar Foundation

Who's Who in American Law

Who's Who of American Women

Graduated from Vassar College, cum laude, and from the University of Virginia Law School with honors

Editorial Board of University of Virginia Law Review, 1967-1968.

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

American Law Institute, 1986 -

- American Bar Foundation, 1986 -
- Maryland Bar Foundation, 1988 -
- American Bar Association, 1969 -
- Maryland Bar Association, 1969 -
 - Chairman, Appellate Practice Committee, 1993 - and 1982-1984
 - Member, Litigation Council, 1986-1991
- Bar Association of Baltimore City, 1969 -
- Women's Bar Association of Maryland, 1990 -
- Member, Maryland Judicial Conference, Executive Committee, 1992 -
- Panelist, State of Maryland Judicial Conference May, 1992 (Moderated and participated in a program on Sanctions under Md. Rule 1-341.)
- Member, Program Committee for Fourth Circuit Judicial Conference, 1985-1991
- Panelist, Judicial Conference of the United States Court of Appeals for the Fourth Circuit, June, 1990 "Federal Courts Study Committee" (Panel discussion of the Committee's recommendations)
- Panelist, Judicial Conference of the United States Court of Appeals for the Fifth Circuit, May, 1990, "Federal Courts Study Committee" (Panel discussion of the Committee's recommendations)
- Panelist, Judicial Conference of the United States Court of Appeals for the Fourth Circuit, June, 1983, "Attorneys fees as an Item of Expense." (My portion dealt with some proposals as to § 1988 fees).

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

The only organizations to which I belong that have ever lobbied are the American Bar Association and the Johns Hopkins Hospital; I have never participated in any lobbying efforts.

- Johns Hopkins Hospital
 - Board of Directors, 1993 -
- Young Victorian Theatre
 - Board of Directors, 1993 -

Task Force on the Feasibility of Future Consolidation of State
Psychiatric Hospitals, 1993 -

Round Table Law Club, 1986 -

Wranglers Law Club, 1982 -
Pooh-Bah (President) 1987

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

The Supreme Court of the United States	-	1980
United States Court of Appeals for the Fourth Circuit	-	1973
United States District Court for the District of Maryland	-	1969
Court of Appeals of Maryland	-	1969

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

I have contributed to various continuing legal education outlines on administrative law, media access to the courts, motions practice, appellate practice, federal, and state injunctive practice. These were not published. A representative list of seminars for which these outlines were prepared is set forth in answer to question 31.

The only article that I have published since law school is: Motz and Baida, "The Due Process Rights of Post Judgment Debtors and Child Support Obligors," 45 Md. Law Rev. 61 (1986), which I co-wrote with Andrew Baida. A copy of that article is attached. I have also attached a short essay I recently wrote at the request of Paul Mark Sandler and Andrew Levy, who are editing a book on appellate practice. My understanding is that the book will be published within the year and that my essay, titled "Appellate Argument" will be included in the book.

Finally, I often give speeches to bar groups, law students, women's groups, etc. but inevitably those speeches are designed to educate (discussion of appellate practice, statutory construction, motion's practice, administrative procedure act, etc.) or entertain (anecdotes) or to encourage public service. I generally speak extemporaneously or from notes, which I do not retain. These speeches do not involve constitutional law or "legal policy" in the sense that it is used here. To my knowledge, there has never been any press report of any of my speeches.

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

Excellent. December, 1993.

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

I presently serve as an Associate Judge, Court of Special Appeals of Maryland; it is the only judicial office I have ever held. I was appointed by the Governor in May, 1991, after being recommended by a Judicial Nominating Commission; I was "retained" by the voters in the 1992 General Election. The Court of Special Appeals is the state's intermediate appellate court. We hear all appeals - civil and criminal - from the trial courts of general jurisdiction, except cases in which the death penalty has been imposed, certain election law cases, and certain appeals from orders of a court in a savings and loan conservatorship. We also can, but need not, hear *i.e.*, exercise a kind of certiorari jurisdiction over, cases originating in the Maryland District Courts (trial courts of limited jurisdiction), which already have been appealed to a circuit court (trial court of general jurisdiction). Approximately 2,000 appeals are filed with us each year. Some appeals are dismissed, some are consolidated, and some are settled, so that each of the thirteen judges writes approximately 120 opinions a year.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings

on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

a. Citations for the ten most significant opinions that I have written are as follows:

1. O'Hara v. Kovens, 92 Md. 9, 606 A.2d 286, cert. denied, 328 Md. 93 (1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1282 (1993).
2. Brown v. Ashton, 93 Md. App. 25, 611 A.2d 599, cert. granted, 328 Md. 462 (1992).
3. Board of School Commissioners v. James, 96 Md. App. 401, 625 A.2d 361, cert. denied, 332 Md. 381 (1993).
4. Keene Corp. v. Hall, 96 Md. App. 644, 626 A.2d 997 (1993).
5. Stevenson v. State, 94 Md. App. 715, 619 A.2d 155 (1993).
6. Mattingly v. Mattingly, 92 Md. App. 248, 607 A.2d 575 (1992).
7. Parker v. Columbia Bank, 91 Md. App. 346, 604 A.2d 521, cert. denied, 327 Md. 524 (1992).
8. Allen v. State, 89 Md. App. 25, 597 A.2d 489 (1991), cert. denied, 325 Md. 396 (1992).
9. Fowler v. Printers II, Inc., 89 Md. App. 448, 598 A.2d 794 (1991), cert. denied, 325 Md. 619 (1992).
10. Esslinger v. Baltimore City, 95 Md. App. 607, 622 A.2d 774, cert. denied, 331 Md. 479 (1993).

b. I am not aware of any case in which I have been affirmed in which my substantive or procedural rulings were criticized. Those cases in which my opinions have been reversed or vacated are as follows:

1. Coe v. Hayes, 328 Md. 350, 614 A.2d 576 (1992), vacating Hayes v. Coe, 88 Md. App. 491, 595 A.2d 484 (1991). The case raised the question of whether equitable conversion could be applied to proceeds from the sale of real estate, which a decedent contracted to sell before his death, but which was not sold until after his death. The trial court held the doctrine of equitable conversion was not applicable. Our court, in my opinion, held it was and reversed. The Court of Appeals agreed that the doctrine was applicable, but

concluded it was unclear, on this record, whether the doctrine should be applied because it was unclear whether the decedent had entered into a specifically enforceable contract to sell the property before his death. Accordingly, the Court of Appeals vacated our judgment and remanded to the circuit court for further findings.

2. Nolt v. USF&G, 329 Md. 51, 617 A.2d 578 (1993), reversing, USF&G v. United States Fire Co., 90 Md. App. 327, 600 A.2d 1178 (1992). Two insurance companies battled to determine which was responsible for coverage for damages arising from an accident caused by a truck driver, who regularly drove for an interstate carrier, insured by one company, but, who, on the day of the accident, was driving for an interstate carrier, insured by the other company. The trial court concluded both insurers were equally liable. Our court reversed. In my opinion, I reasoned that it was undisputed that at the time of the accident the driver was operating under the bill of lading for Shirk, hauling cargo for Shirk, pursuant to Shirk's instruction, and that there was simply no evidence that the driver was in any way acting on behalf of the other carrier, Summers. I followed federal precedent and concluded that in such circumstances, the insurer of the carrier whose ICC authority was implicated, i.e., Shirk's insurer, was the primary insurer. The Court of Appeals did not disagree with my conclusions as to the facts, or my reading of federal precedent, but decided that it would not follow the federal precedent because it led to an "uncertain" result. Rather, it held that since both insurers provided primary coverage to their respective insureds, they must equally share liability.

3. Harris v. State, 331 Md. 137, 626 A.2d (1993), reversing, Rich v. State, 93 Md. App. 142 (1992), vacating and remanding, Jones v. State (unreported) (copy attached). In Harris, the Court of Appeals rejected most federal precedent to hold that "use" in a State statute making it a crime for a person to use a firearm during, and in relation to, a drug trafficking crime means more than possession of a firearm. In Rich, written by another judge on my Court, we had held, relying on the federal precedent, to the contrary. In an unreported opinion, Jones v. State, I authored, we relied on Rich; Jones was vacated and remanded for reconsideration in light of Harris.

4. Medical Mutual Liability Ins. Society of Maryland v. B. Dixon Evander & Associates, 331 Md. 301, 628 A.2d 170 (1993), dismissing appeal in 92 Md. App. 551, 609 A.2d 353, cert. denied, 328 Md. 447, 614 (1992). This was an appeal from a jury verdict finding that Medical Mutual had tortiously interfered with Evander's business relationships and awarding Evander \$1.725 million in compensatory damages and \$7 million in punitive damages. The jury failed to reach a verdict on the defamation count and a mistrial was declared as to it. The trial court then, at the request of all parties, certified the judgment as final. On appeal, we affirmed in all respects, except that we remanded for the trial court to make some factual findings as to the punitive damages. 92 Md. App. 551, 609 A.2d 353. Medical Mutual petitioned for certiorari, which was denied. 328 Md. 447. After findings were made on remand, Medical Mutual again petitioned for certiorari, which was then granted. The Court of Appeals concluded that the case had been improperly certified by the trial court and the judgment was not final, and so, dismissed the appeal.

5. State v. Sanders, 331 Md. 378, 628 A.2d 209 (1993) reversing an unreported opinion, Sanders v. State (copy attached). A trial court agreed to a plea agreement and then refused to honor it and also refused to permit the defendant to withdraw his guilty plea. We concluded that this result was wrong. The record was unclear but it seemed to our court, in an opinion I authored, that a fair reading of the record was that the trial judge had originally stated he would honor the agreement if the defendant truthfully disclosed prior criminal offenses and the defendant believed he had done this, but was confused because he only served one prison term for two offenses. Accordingly, we remanded so that the defendant could be sentenced pursuant to the plea agreement. The Court of Appeals agreed that the result reached by the trial court was wrong; it held, however, that the trial court could reject the plea agreement but then had to permit the defendant to withdraw his guilty plea.

6. Epps v. State, 333 Md. 121, 634 A.2d 20 (1993) reversing an unreported opinion, Epps v. State (copy attached). When a prisoner was convicted of common law battery for throwing an unknown liquid on a prison guard, the trial court sentenced him to twenty years imprisonment. This sentence followed a sentence of ten years imprisonment imposed only two months earlier for another battery on a prison guard, an attack with a sharp piece of coat hanger. The prisoner challenged the sentence as cruel and unusual punishment violative of the Eighth Amendment. Our court, in an opinion written by me, found this was not the sort of rare case in which the

Supreme Court has indicated that a sentence can be inferred to be grossly disproportionate. The Court of Appeals reversed, with two judges dissenting.

7. Brantley v. Fallston General Hospital, Inc., ___ Md. ___, ___ A.2d ___ (1994) (copy attached) reversing an unreported opinion, Brantley v. Fallston General Hospital, Inc. (copy attached). This case involved an appeal from a dismissal of an action for lack of prosecution on the ground, *inter alia*, that contrary to the Maryland rules no hearing was held prior to the dismissal. We affirmed in an opinion authored by me. As to this issue, we rejected the appellees' sole argument that failure to hold the hearing was harmless error but concluded that there was no error in not holding a hearing because no party, only plaintiff's attorney, requested one. This was so because the plaintiff had died fifteen months before the case was dismissed and no heir or successor in interest was substituted for him until after the case was appealed. The Court of Appeals vacated on the basis of "a new question" raised by the appellees "based on part of the rationale" of our decision, *i.e.*, there could be no appeal at all without a live party pursuing the case. The effect of this decision is the same as ours - to leave intact the trial court's dismissal of the action.

8. Holmes v. State, ___ Md. ___, ___ A.2d ___ (1994) (copy attached) reversing an unreported opinion, Holmes v. State (copy attached). A criminal defendant, representing himself, stated at trial that although he did not want to testify he did want to say "a few things in [his] behalf." He was permitted to do this, after the trial court had found him guilty of certain of the offenses. On appeal, the defendant claimed he had been denied an opportunity for closing argument. Our court, in an opinion authored by me, concluded that because the defendant's remarks were more in the nature of allocution than closing argument, and because he never protested any denial of closing argument to the trial court, the record did not "clearly disclose" either his waiver or denial of closing argument. In such circumstances, the Court of Appeals had previously held the proper course is to affirm the judgment and "leave open" a defendant's right to seek post conviction relief, and so that is what we did. The Court of Appeals reversed, holding that the defendant had tried to give a closing argument and been denied that right, and so ordered reversal of the convictions.

c. Citations of significant opinions of mine on federal or state constitutional issues and citations of later appellate rulings on these cases are as follows:

1. Baltimore Sun v. Thanos, 92 Md. App. 227, 607 A.2d 565 (1992).
2. Brown v. Ashton, 93 Md. App. 25, 611 A.2d 599, cert. granted, 328 Md. 462 (1992).
3. Keene Corp. Inc. v. Abate, 92 Md. App. 362 (1992).
4. Market Tavern v. Bowen, 92 Md. App. 622, 610 A.2d 295, cert. denied, 328 Md. 238 (1992).
5. O'Hara v. Kovens, 92 Md. App. 9, 606 A.2d 286, cert. denied, 328 Md. 93 (1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1282 (1993).
6. Epps v. State, unreported (copy attached in response to question 15b), reversed, 333 Md. 121, 634 A.2d 20 (1993).

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

None.

17. Legal Career:

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

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

I never clerked for a judge or practiced alone; instead, I began work at Piper & Marbury immediately after my graduation from law school in 1968.

1968-1971
Associate, Piper & Marbury
100 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201

1972-1986
Office of the Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

Assistant Attorney General, 1972-1980
Principal Counsel, Appellate Litigation, 1980-1982
Chief of Litigation, 1982-1986

1986-1991
Partner, Frank, Bernstein, Conaway & Goldman
300 East Lombard Street
Baltimore, Maryland 21202

1991-Present
Associate Judge
Court of Special Appeals of Maryland
626 B Courthouse East
111 N. Calvert Street
Baltimore, Maryland 21202

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

Throughout my career, I have appeared in court regularly. A LEXIS search indicates that I have been involved, as an

attorney, in more than seventy cases, with reported opinions, including five in the Supreme Court; about 40% of these cases were in the federal courts and 60% were in the state courts. In all of these cases, I wrote all, or a substantial part, of the memoranda or briefs and in fifty of them, I also tried the case or gave the oral argument. The LEXIS list is, of course, incomplete as LEXIS does not seem to pick up most unreported opinions. A representative list of cases with reported opinions, in which I not only wrote the briefs or memoranda, but also tried and/or gave the oral argument, is attached hereto.

From April, 1986, until my appointment to the Maryland Court of Special Appeals in May, 1991, I worked as a litigation partner in a large Baltimore law firm. Most of my cases were commercial disputes involving claims of substantial money damages, lengthy discovery and complex legal issues, s.g., what determines the validity of a letter of credit, the Federal Reserve Bank's obligations when honoring a draft, who constitutes a consumer for purposes of the Consumer Protection Act or the Magnuson-Moss Act, the disclosure obligations of limited partners to other partners, etc. Typically, my clients were banking institutions, insurance companies, small to medium sized corporations, and individuals.

However, I also handled a substantial amount of public interest litigation. For example, I represented Citizens Against Saturday Night Specials and obtained for them an emergency injunction against certain illegal election practices during a hotly contested referendum campaign. I also represented a citizens' group in Talbot County in litigation challenging the initiative provision in the County Charter. My most interesting public law case was one in which I represented a sheriff in a very complicated § 1983 suit. A sixteen-year-old boy was shot and severely brain damaged when deputies attempted to apprehend a reckless driver. Numerous constitutional claims were made under the Fourth and Fourteenth Amendments. The case involved more than twenty depositions of fact and expert witnesses, and after discovery and very full briefing, we prevailed in the district court, and that decision was affirmed by the Fourth Circuit.

Between 1982 and 1986, I served as Chief of Litigation in the Maryland Attorney General's Office. My practice involved supervising all trial and appellate civil litigation in the Office of 200+ lawyers. I decided what cases should be brought, what defenses made, how cases should be staffed, what cases should be appealed, when certiorari should be sought, whether settlement was appropriate, and reviewed (and sometimes substantially rewrote) every important appellate brief filed by the Office. For the two years prior to that, I served as Principal Counsel for Appellate Litigation in the Attorney General's Office and my practice was similar. My decision-making, however, was confined to appellate matters. In addition, throughout my time in the Attorney General's

Office, I personally represented the State in numerous civil and criminal cases in the State and federal courts.

From 1972 to 1981, I was an Assistant Attorney General. For most of that period, I had small children and worked only three days per week. From 1976 to 1980, I worked in the Civil Division doing general trial litigation and represented the State Election Board in various election contests. From 1972 until 1975, I represented the Department of Human Resources and handled most of its litigation. From 1968 to 1971, I was an associate at Piper & Marbury and there worked largely on tax and estate planning.

2. What percentage of these appearances was in:

(a) federal courts	40%
(b) state courts of record	60%
(c) other courts	0%

3. What percentage of your litigation was:

(a) civil	90%
(b) criminal	10%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

In addition to settling most matters, I have also prevailed on pre-trial motions (often after extensive discovery) in numerous cases and so obtained judgments as to them. However, I have only participated in trials of ten cases that I can remember clearly; in three of these, I was sole counsel; in three, I was chief counsel, usually assisted by a young associate; and in the rest, I was associate counsel. I have also participated in a number of trial-like administrative hearings. In addition, I have been specially assigned as a trial judge for a few weeks in the summer and have presided over a number of jury trials then.

5. What percentage of these trials was:

(a) jury	0%
(b) non-jury	100%

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

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

1. Agnew v. State, 51 Md. App. 614, 446 A.2d 425, cert. denied, 294 Md. 441 (1982). I was co-counsel at trial in this case, representing the State of Maryland. The State claimed that former Vice President Agnew should be required to refund to the State the money he received as bribes while Governor, because, as Governor, he was a trustee for the people of the State and, therefore, held this money in constructive trust for them. In addition to establishing the validity of the constructive trust theory in this context, this case established new Maryland law on numerous difficult evidentiary questions involving declarations against interest, past recollection recorded, admissions and attorney-client privilege. After years of discovery and trial, Judge Williams granted judgment for the State. In addition to my work at trial and pre-trial, I wrote the entire brief for the State and argued the case on appeal; the taxpayers filed a separate brief and argued for a very short period. The Court of Special Appeals affirmed in a lengthy opinion, the Court of Appeals denied certiorari, and Agnew paid the judgment.

a. 1980 - 1982.

b. Judge Bruce Williams
Circuit Court for Anne Arundel County

c. Counsel for taxpayers: Co-counsel:

David L. Scull
8401 Connecticut Avenue
Chevy Chase, Maryland
(301) 951-0100

Michael Millemann
13009 Bottom Road
Hydes, Maryland
(410) 706-8340

Opposing counsel:

T. Rogers Harrison
 Jefferson Building
 Suite 300
 105 W. Chesapeake Avenue
 Towson, Maryland
 (410) 828-1335

2. Anderson v. Morris, 636 F.2d 55 (4th Cir. 1980) and 500 F.Supp. 1095 (D.Md. 1980) vacated and remanded, 658 F.2d 246 (4th Cir. 1981). Both in the trial court and on appeal, I, with co-counsel, represented the State Administrator of Elections, Willard Morris, and various other state officials in this challenge to the constitutionality of a Maryland filing deadline for independent candidates. Congressman John Anderson, after running for seventeen months as a Republican presidential candidate in numerous primary elections, decided to become an independent candidate. The deadline by which candidates must file a certificate of candidacy and necessary petition signatures had passed in six states - including Maryland. It was critical to Mr. Anderson's independent candidacy that he appear as a candidate on the ballots of all fifty states. Accordingly, he brought a § 1983 action in each state with an early filing deadline, asserting that the state statute violated the First and Fourteenth Amendments. Maryland's statute, like that of the other five states, was ultimately declared unconstitutional by a district court. That decision was affirmed by the Fourth Circuit. 636 F.2d 55 (1980).

Mr. Anderson's lawyers then requested \$80,000+ in attorneys' fees, which we vigorously opposed. The district court found only a \$10,000 fee was warranted, 500 F.Supp. 1075 (1980) but the Fourth Circuit reversed, 688 F.2d 246 (1981); the fee dispute was ultimately settled at appreciably less than the amount requested. On the merits, I did approximately half of the work on this case in the trial and appellate courts. On the attorney's fees issue, I did most of the work in both the trial and appellate courts.

- a. Spring, 1980 - Fall, 1981.
- b. Judge Joseph Young
 United States District Court for the District of
 Maryland
- c. Co-counsel:

Robert A. Zarnoch
 Counsel to the General Assembly
 90 State Circle
 Room 104
 Annapolis, Maryland 21401
 (410) 841-3889

Opposing counsel:

Henry R. Lord
 Piper & Marbury
 100 Charles Center South
 36 South Charles Street
 Baltimore, Maryland 21201
 (410) 539-2530

3. **Consumer Protection Division v. Consumer Publishing Co.**, 304 Md. 731, 501 A.2d 48 (1985). The Consumer Protection Division of the Maryland Attorney General's Office found that the advertisements of a diet pill company, Consumer Publishing Co., were false and misleading in violation of Maryland's Consumer Protection Act (similar to FTC Act) and ordered the company to cease such advertisements and pay restitution to injured consumers. The company appealed and the Circuit Court for Baltimore City vacated this order, finding, *inter alia*, the company's constitutional rights under the First and Fourteenth Amendments were violated by the order, the Consumer Protection Division engaged in selective enforcement, the Division improperly tried to adjudicate where it should have issued a regulation, and the Attorney General of Maryland poisoned the administrative proceedings, for his own political gain, by issuing an inflammatory press release. I did not handle any portion of the case prior to issuance of the trial court's opinion and order. At that point, the Attorney General asked me to prepare a petition for certiorari and represent the Consumer Protection Division on appeal, which I did. The Court of Appeals granted certiorari and reversed the trial court in all respects. The case was one of the earliest Consumer Protection Division enforcement cases and virtually established that Division's powers. Moreover, in it we managed to persuade the Court of Appeals to permit the Division to appeal, in spite of a long established state administrative law doctrine that an agency could not appeal from a trial court reversal of its decision; this ultimately led to an amendment of the State's administrative procedure act.

- a. 1984 - 1985.
- b. Judge Thomas Ward
Circuit Court for Baltimore City
- c. Opposing counsel:

Henry R. Lord
 Piper & Marbury
 100 Charles Center South
 36 South Charles Street
 Baltimore, Maryland 21201
 (410) 539-2530

4. In re Legislative Districting, 299 Md. 658, 475 A.2d 428 (1984). I was lead counsel in these ten cases, heading a five person state team, in defending the 1982 legislative districting plan. These cases were consolidated for trial before Judge Albert Menchine, serving as a special master for the Court of Appeals, which, under the Maryland Constitution, had original jurisdiction over such challenges. The plaintiffs challenged the constitutionality of the State's legislative districting plan on numerous grounds, e.g., racial discrimination, failure to give due regard to political subdivisions, unlawful favoring of incumbents and lack of compactness. Judge Menchine upheld the plan except for two districts in Baltimore City. All plaintiffs appealed. The Court of Appeals found the plan constitutional in all respects, even those disapproved by Judge Menchine; it issued a *PER CURIAM* order in 1982, immediately after argument, and a published opinion explaining that order in 1984. I led the effort before the Master, wrote substantial portions of the memoranda before him and the briefs in the appellate court, and presented a substantial amount of the argument in both forums.

a. February, 1982 - June, 1982.

b. Judge Albert Menchine
Retired from Court of Special Appeals (sitting as a
Special Master)

c. Principal co-counsel:

Robert A. Zarnoch
Counsel for the General Assembly
90 State Circle
Room 104
Annapolis, Maryland 21401
(410) 841-3889

d. Principal opposing counsel:

M. Albert Figinski
Weinberg & Green
100 South Charles Street
Baltimore, Maryland 21201
(410) 332-8634

Roger W. Titus
Venable, Baetjer & Howard
Suite 500
1 Church Street
Rockville, Maryland 20850
(301) 217-5600

5. Mercantile-Safe Deposit & Trust v. Baltimore County, 309 Md. 668, 526 A.2d 591 (1987). The trial court held that the bank had wrongfully dishonored a draft, presented pursuant to a letter of credit. Another law firm handled the case at trial; after losing there, the bank, Mercantile Safe-Deposit & Trust Co., asked my firm to represent it on appeal. I prepared the petition for certiorari, which the Court of Appeals granted. I then briefed and argued the case on appeal. The appellate court reversed holding that a beneficiary's demand for payment must comply strictly, rather than substantially, with the terms of the letter of credit. The case was extremely important to the commercial community because it established, for the first time, the strict compliance test in Maryland; the holding has, I understand, been discussed and praised in periodicals in the field.

- a. 1986 - 1987.
- b. Judge Edward A. DeWaters
Circuit Court for Baltimore County
- c. Opposing counsel:

Michael J. McMahon
302 Five Farms Lane
Lutherville, Maryland 21093
(410) 494-4420

6. Ollman v. Toll, 516 F.Supp. 1196 (D.Md. 1981), aff'd, 704 F.2d 139 (4th Cir. 1983). I was co-counsel at trial in this case, representing the President of the University of Maryland, John Toll, and other officers of the University. We tried the case for four weeks, before Chief Judge Harvey, in the United States District Court for the District of Maryland. Ollman, a Marxist, contended that the University of Maryland unlawfully discriminated against him by refusing, because of his political beliefs, to accept a search committee's recommendation that he be appointed Chairman of the Government Department. Ollman brought suit under 42 U.S.C. § 1983 and asked for appointment to the position, back pay, substantial damages, and attorneys fees. The case was important to the State for its precedential and psychological value; it was a cause celebre at the time. Refusal to appoint Prof. Ollman was one of President Toll's first acts on becoming president of the University and he believed that prevailing in the case was crucial to a successful term as president. Judge Harvey, in a lengthy and well reasoned opinion, found that there was no improper motivation in the failure to select Ollman and granted judgment to defendants. 516 F. Supp. 1196. Ollman appealed and the case was affirmed by the Fourth Circuit. 704 F.2d 139. In addition to my work at trial, I wrote the vast bulk of the appellate brief, but did not argue the case on appeal.

- a. 1981 - 1983.
- b. Judge Alexander Harvey, Jr.
United States District Court for the District
of Maryland
- c. Co-counsel for Toll:

Paul F. Strain
Venable, Baetjer & Howard
2 Hopkins Plaza
1800 Mercantile Bank & Trust Building
Baltimore, Maryland 21201
(410) 244-7400

Opposing Counsel:

David Bonderman
Richard Ewing
Arnold & Porter
Thurman Arnold Building
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036-6885
(202) 872-6700

7. Reigh v. Schleigh, 595 F.Supp. 1535 (D.Md. 1984), vacated and remanded, 784 F.2d 1191 (4th Cir.), cert. denied, 479 U.S. 847 (1986). Judgment debtors brought suit challenging the constitutionality of a rule of the Maryland district court (not federal court - put Maryland's equivalent to a small claims court) governing postjudgment attachment. The district court held the rule failed to provide a judgment debtor adequate notice of available claims of exemption and to assure resolution of such claims within a reasonable time. I was not involved in the case until the district court issued its opinion and order. State judges and the State Rules Committee were extremely upset by this result because it meant that complicated procedures would have to be imposed on the "small claims" courts, without any seeming need or benefit. It also meant that a rule adopted by the Court of Appeals, at the recommendation of the Rules Committee, was, only months later, held unconstitutional by a federal court. I briefed and argued the case on appeal, on behalf of Charles Schleigh and other State officials. There was a split in the circuits on the issues raised in the case and a legitimate position on both sides. We prevailed in the Fourth Circuit, however, and the district court's judgment was vacated. I became very interested in the issues raised in the case and co-authored a law review article discussing the problems presented by such rules. See Motz and Baida, "The Due Process Rights of Post Judgment Debtors and Child Support Obligor," 45 Md. L. Rev. 61 (1986) (attached in answer to question 12).

- a. 1985 - 1986.
- b. Judge James R. Miller
United States District Court
for the District of Maryland

c. Opposing counsel:

Elizabeth Renuart
714 E. Pratt Street
Baltimore, Maryland 21202
(410) 539-5350

8. Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). In this case a trial court upheld the constitutionality of a Maryland statute imposing a percentage limitation on the amount a charity could pay for fundraising expenses; the intermediate appellate court affirmed. Maryland's highest court, however, reversed and held the statute violated the First Amendment. I did not personally handle the case in any of the State court proceedings. Some alleged charities were spending as much as 90% on fundraising expenses and the Secretary of the State believed the statute was extremely important to effective regulation of charities and so I was asked to try to obtain review in the Supreme Court and represent the Secretary of State there. I prepared the petition for certiorari; the Court granted certiorari. Then I wrote, in substantial part, the Supreme Court briefs and argued the case in that Court in October, 1983. Eight months later the Court issued its opinion, affirming the Court of Appeals and finding the statute unconstitutional by a five to four vote.

- a. 1983 - 1984.
- b. Judge Eugene Lerner
Circuit Court for Anne Arundel County
- c. Counsel for the State below:

James G. Klair
Administrative Law Judge
10753 Falls Road
Lutherville, Maryland
(410) 321-3993

Opposing Counsel:

Yale L. Goldberg
Suite 900 N
4550 Montgomery Avenue
Bethesda, Maryland 20814
(301) 718-8860

9. State of Maryland, ex. rel. Attorney General v. Burning Tree Club, Inc., 301 Md. 9, 481 A.2d 785 (1984). On behalf of the State and the Attorney General, with co-counsel, I filed a petition for declaratory judgment in the circuit court challenging the constitutionality of a Maryland statute that conferred preferential property tax treatment on country clubs. The statute granted a country club a lower tax assessment if it agreed to preserve open space and to refrain from engaging in discrimination in its guest and membership policies, except that with regard to the latter, it permitted a club to "serve or benefit members of a single sex." On behalf of the State and Attorney General, we asserted that the provision violated the Maryland Equal Rights Amendment and equal protection guarantees in the Maryland Constitution. The country club maintained that the State and Attorney General had no right to challenge the constitutionality of a State statute. The trial court agreed and the Court of Appeals affirmed. We lost this battle, but ultimately won the war when several citizens, who we assisted, later persuaded the court that the statute was unconstitutional. Burning Tree Club, Inc. v. Rainum, 305 Md. 53, 507 A.2d 817 (1985). I did approximately half of the work on this case at trial and on appeal.

- a. 1984 - 1985.
- b. Judge Calvin R. Sanders
Circuit Court for Montgomery County
- c. Co-counsel:

Robert A. Zarnoch
Counsel to the General Assembly
90 State Circle
Room 104
Annapolis, Maryland 21401
(410) 841-3889

Opposing counsel:

Benjamin R. Civiletti
Venable, Baetjer & Howard
2 Hopkins Plaza
1800 Mercantile Bank & Trust Building
Baltimore, Maryland 21201
(410) 244-7400

10. Stone v. University of Maryland Medical System Corp., 855 F.2d 167 and 855 F.2d 178 (4th Cir. 1988), on certification, The Baltimore Sun Co. v. University of Maryland Medical System, 321 Md. 659, 584 A.2d 683 (1991). I represented the University of Maryland Medical System Corp.

(the hospital), a private corporation, and certain of its officers who, with the University of Maryland Medical School and some of its officers, represented by the Attorney General's Office, were sued by Dr. Harlan Stone. In 1986, several highly publicized malpractice actions were filed against the hospital, other doctors, and Stone, who, at that time, was Chief of the Division of General Surgery at the hospital and a Professor of Surgery at the medical school. After an internal and external peer review, Stone, without a lawyer, met with the individual defendants, some of whom were in-house counsel, and then signed short letters resigning his positions at the hospital and medical school. Five months later, he brought this § 1983 action, asserting that defendants had forced him to resign in violation of his due process rights. We engaged in arduous discovery and eventually obtained summary judgment in the district court; the Fourth Circuit affirmed in a scholarly opinion. 855 F.2d 167.

During the litigation, the parties had jointly requested that the entire record be sealed; the district court granted that request, but without giving notice or making any findings. The Fourth Circuit remanded with instructions that the trial court give the required notice and opportunity for a hearing prior to issuing any seal order and make the required findings justifying the order. 855 F.2d 178. On remand, the defendants agreed that most portions of the file should be public but requested that certain exhibits be kept confidential. The district court, after giving notice, etc., did precisely as the defendants requested. The Baltimore Sun then appealed. After hearing argument, the Fourth Circuit certified the question of whether a Maryland statute relied on by the district court "bars press access to the records at issue in this case." The Court of Appeals held it did not, 321 Md. 659, but three members of the seven member court specially concurred stating that the statute did express a compelling governmental interest in keeping medical records confidential. The Fourth Circuit ultimately held, apparently in an unreported opinion, that the records could not be sealed.

Both aspects of the case are of some significance. On the merits, the case provided the Fourth Circuit with the opportunity to clarify the law with regard to substantive and procedural due process rights in employment situations. The principles established in the Court of Appeals' decision in regard to the interests in protecting confidentiality of medical records were important and have, I believe, been followed as a guide in forming legislation in other states. I did approximately half of the work on the case on the merits and most of the work on the seal order issue.

- a. 1987 - 1991.
- b. Judge John Hargrove
United States District Court for
the District of Maryland

c. Co-counsel:

Ralph S. Tyler
Deputy Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6342

Opposing counsel on the merits
(i.e., Dr. Stone's counsel):

N. Roy Grutman
Grutman, Greene & Humphrey
505 Park Avenue
New York, New York 10022-1155
(212) 888-1900

Opposing counsel on the seal order
(i.e., Counsel for the Sunpapers):

Mary Craig
Doyle & Craig, P.A.
Suite 1910
25 South Charles Street
Baltimore, Maryland 21201
(410) 332-6520

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

My most significant non-litigation related experience as a practicing lawyer was the opportunity to work on the Congressionally created fifteen member Federal Courts Study Committee. Work with Committee members, who included Senators Heflin and Grassley and Congressmen Kastenmeir and Morehead,

as well as some very distinguished judges, professors, and practicing lawyers, and travelling around the country to obtain the views of the 200+ persons who testified at hearings before us was an incredible education for me. I not only learned a great deal about the problems, workings, and talents of the federal courts, but I also learned much about the diversity of our country and the challenges that diversity creates for the federal courts.

My years as an appellate judge have been probably my single most significant legal activity. Service as an appellate judge is something I have aspired to ever since I gave my first appellate argument, more than twenty years ago. Being an appellate judge has been one of those rare life experiences in which reality exceeds expectations. I have worked harder than ever before in my life, but with a real sense that I am contributing to the public good, that the clearer, more intelligent, more intellectually honest I can be in my opinions, the better the law will ultimately be.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I received all deferred income, etc. from my former law firm two years ago. That firm, which I left in 1991 to become a judge, has since been dissolved. It had a pension plan; my assets in the plan are valued at approximately \$60,000.

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

I do not anticipate any conflicts of interest, except, of course, I would not sit on any cases in which husband had been involved. I will continue to look for guidance and follow the Code of Judicial Conduct in determining if a case presents any conflicts of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

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

Attached please find a copy of the financial disclosure report required by the Ethics in Government Act of 1978.

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

Attached please find a copy of my financial net worth statement.

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

I was Vice Chairman of the Committee to re-elect the Sitting Judges of the Circuit Court for Baltimore City. The circuit court judges (trial judges) are appointed by the Governor and then must run in an election against anyone who wishes to file and run against them. I worked on the Committee to Re-elect Judges Ellen Heller, Roger Brown, and John Prevas - I believe it was the 1986 election. I helped to brainstorm ideas; ultimately, the judges ran unopposed.

III. GENERAL (PUBLIC)

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

Over the years, I have worked for and served as a volunteer in a number of community boards. These include the YWCA of Greater Baltimore, the Junior League of Baltimore, and the Union Memorial Hospital. At present, I serve on the Board of Directors of the Johns Hopkins Hospital and a task force requested by the Maryland legislature to examine the feasibility of closing or consolidating the State's mental institutions. In addition, I try to spend a few hours each week as a "hands on" volunteer at the Mt. Washington Pediatric Hospital, playing with and cuddling very sick or abused babies and toddlers.

While in private practice, from 1986 to 1991, I spent at least 25% of my time on pro-bono activities. I represented a number of persons unable to pay for representation. The most significant of these matters are detailed in response to an answer in Part I, question 17 b.1. I have also provided free advice: (1) to countless persons who have sought help in understanding Maryland's arcane election laws and (2) to various non-profit institutions on miscellaneous legal questions, e.g., how a school can obtain a new kind of certification from the state, how to obtain tax free status from the Internal Revenue Service, etc.

When I worked in the Attorney General's Office, there was an office policy prohibiting pro bono representation (then thought to be a conflict with representation of State) but teaching, lecturing, etc. pro bono was permitted. Accordingly, I made it a rule, which I still follow, to try to make myself available to lecture, instruct, moot court, etc. pro bono, any group that asked me. Thus, I have served as a moot court judge on several occasions, e.g., last year at the University of Notre Dame School of Law and the University of Maryland School of Law and in 1986 for the National Association of Attorneys General in preparation for the Supreme Court argument of the Attorney General of North Carolina and I have participated in hundreds of formal and informal talks, panel discussions, conferences, etc. Among these are the following:

Keynote Address, Mandatory Seminar on Professionalism
for Attorneys Seeking Admission to the Maryland Bar,
December 3, 1993

- Moderator, "Nuts and Bolts of Appellate Practice," Program for Baltimore County Bar Association, October, 1993
- Instructor, Judicial Institute, "First Amendment Access to Courts," September 9, 1993
- Panelist, "New Administrative Procedure Act and How It Affects OAH Practice," June, 1993
- Panelist, "Nuts and Bolts of Appellate Practice," Program for Frederick County Bar Association, Spring 1992
- Panelist, Maryland Bar Association, Annual Meeting 1992, Appellate Moot Court; "Sanctions" (two different programs.)
- Panelist, Maryland Bar Association, Annual Meeting, 1990, "Appellate Practice" (appellate practice "pointers" - my portion of the program dealt with brief writing)
- Panelist, Maryland Bar Association, January, 1990 Mid-Winter Meeting, "Recent Decisions of the Court of Appeals" (comment on significant recent decisions - my part of the program involved constitutional cases)
- Instructor, University of Virginia Trial Advocacy Institute, 1990, 1988 (seven day session each time) (teaching trial practice - I taught closing argument and direct and cross examination)
- Lecturer, Maryland Institute for Continuing Professional Education of Lawyers, "Effective Appellate Practice," May 24, 1988 (appellate practice "pointers" - my portion dealt with brief writing, appellate argument, and cert. petitions)
- Lecturer, Maryland Institute for Continuing Professional Education of Lawyers, "Practice Tactics of Successful Motion Practice," 1987 (my portion dealt with summary judgment motions)
- Instructor, Baltimore City Bar Association, "Federal Civil Rights Claims," 1986
- Panelist, Maryland Bar Association, Annual Meeting - 1985, Section on Delivery of Legal Services, "Use of Constitutional Claims for Attorneys' Fees in State Court"
- Instructor, Judicial Institute of Maryland, "Civil Rights Litigation," April 19, 1985 (bringing \$ 1983 claims in State court)

Panelist, Maryland Bar Association, Annual Meeting -
1984, Section of State and Local Government,
"Distinctions Between State and Federal
Constitutional Law"

Lecturer, Maryland Institute for Continuing
Professional Education of Lawyers, "Injunctive,
Emergency and Expedited Practice - Federal and
State Court Injunctive Practice," December 9, 1983
and December 16, 1983. (my portion dealt with
injunctions).

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

I do not belong and never have belonged to any discriminatory organization.

3. If there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no selection commission in my jurisdiction to recommend candidates for appointment to the Fourth Circuit. I know very little about the judicial selection process. I did not know I was under serious consideration for nomination to the Fourth Circuit until I received a telephone call from Mr. Bernard Nussbaum informing me that I was and that I would shortly be sent some forms that should be answered accurately and fully - and as soon as possible. I completed my written answers and returned them to the White House Counsel's Office. Subsequently, I was interviewed by representatives of that office, and members of the FBI and American Bar Association. The FBI and ABA conducted investigations of me; after several weeks, those investigations were completed. On January 27, 1994, Mr. Nussbaum telephoned me to tell me that President Clinton had sent my name to the Senate to nominate me for appointment to the Fourth Circuit.

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

No.

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

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

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

I am not generally a believer in "judicial activism." It is not the job of the courts to formulate new law. The legislature is to legislate; the judiciary is, when asked, to interpret the legislation and, very importantly, to determine if it is constitutional. Both roles are important but they are hardly identical. This is, of course, a principle that provides the bedrock of our democracy. It has generally worked well for 200 years; it should be followed.

Moreover, a case presents an opportunity to resolve legal questions within a finite factual situation; a judge should try to resolve those questions, fully, fairly and with the greatest intellectual honesty. That often becomes impossible

if one uses the case to pronounce general principles, i.e., the issues in the case get lost in the mighty rhetoric and do not receive the attention they need and deserve. Conversely, in my experience, the loose dicta that passes for enunciation of general principles does not really help litigants in future cases. In our system of precedent, only holdings are binding. A party can, of course, use a similar case to argue by analogy, but that is possible without any enunciation of general all-encompassing principles. Moreover, often dicta simply confuses litigants and less sophisticated lawyers into following a course, that, ultimately, when given the opportunity, a court may well find ill conceived.

In summary, being a judge presents enormous challenges without adding that of administering a school, prison, etc. or enunciating general policy, which is almost inevitably based on little empirical research or knowledge. "Getting it right," clearly, simply, and intelligently in the individual case is hard enough; accordingly, this task should be what the judge concentrates on, not making "new law" or taking over governmental institutions.