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Sotomayor Miscellaneous [1]

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Sonia Sotomayor to Amy Jimenez; re: Rush Limbaugh Tape, 9/30/97 (1 page)	10/21/1997	P2
002. lists	re: Judicial Selection Meeting (6 pages)	07/09/1998	P2, P5
003. memo	Charles Ruff et al to POTUS; re: Court of Federal Claims Decision Memorandum (4 pages)	n.d.	P2, P5
004. note	Paul Morris & Eldie Acheson to Mark Childress & Sarah Wilson; re: Judges (1 page)	06/04/1998	P2, P5
005. agenda	re: Possible Judicial Nominations and So Forth (1 page)	07/09/1998	P2, P5
006. form	re: Part of Personal Data Questionnaire - Charles Gibbons (1 page)	n.d.	P6/b(6)
007. fax	Helaine Grennfeld to Sarah Wilson; re; Sonia Sotomayor (5 pages)	06/08/1998	P2, P5

COLLECTION:

Clinton Presidential Records
 Counsel's Office
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FOLDER TITLE:

Sotomayor - Miscellaneous [1]

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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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Clinton Library Transfer Form

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Description of Item(s)	Two audiocassettes of the Rush Limbaugh Talk Show from September 30, 1997 12:00 - 2:00 p.m. - Title "Talk Show on Pending Judicial Nomination of Sonia Sotomayor"				

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRAGDON *v.* ABBOTT ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 97–156. Argued March 30, 1998—Decided June 25, 1998

Respondent is infected with the human immunodeficiency virus (HIV), but had not manifested its most serious symptoms when the incidents in question occurred. At that time, she went to petitioner's office for a dental examination and disclosed her HIV infection. Petitioner discovered a cavity and informed respondent of his policy against filling cavities of HIV-infected patients in his office. He offered to perform the work at a hospital at no extra charge, though respondent would have to pay for use of the hospital's facilities. She declined and filed suit under, *inter alia*, the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination against any individual "on the basis of disability in the . . . enjoyment of the . . . services . . . of any place of public accommodation by any person who . . . operates [such] a place," 42 U. S. C. §12182(a), but qualifies the prohibition by providing: "Nothing [herein] shall require an entity to permit an individual to participate in or benefit from the . . . accommodations of such entity where such individual poses a direct threat to the health or safety of others," §12182(b)(3). The District Court granted respondent summary judgment. The First Circuit affirmed, agreeing with the lower court that respondent's HIV was a disability under the ADA even though her infection had not yet progressed to the symptomatic stage, and that treating her in petitioner's office would not have posed a direct threat to the health and safety of others. In making the latter ruling, the court relied on the 1993 Dentistry Guidelines of the Centers for Disease Control and Prevention (CDC) and on the 1991 American Dental Association Policy on HIV.

Held:

1. Even though respondent's HIV infection had not progressed to the so-called symptomatic phase, it was a "disability" under

BRAGDON v. ABBOTT

Syllabus

\$12102(2)(A), that is, "a physical ... impairment that substantially limits one or more of [an individual's] major life activities." Pp. 3-21.

(a) The ADA definition is drawn almost verbatim from definitions applicable to §504 of the Rehabilitation Act of 1973 and another federal statute. Because the ADA expressly provides that "nothing [herein] shall be construed to apply a lesser standard than ... under ... the Rehabilitation Act ... or the regulations issued ... pursuant to [it]," §12201(a), this Court must construe the ADA to grant at least as much protection as the regulations implementing the Rehabilitation Act. Pp. 4-5.

(b) From the moment of infection and throughout every stage of the disease, HIV infection satisfies the statutory and regulatory definition of a "physical impairment." Applicable Rehabilitation Act regulations define "physical or mental impairment" to mean "any physiological disorder or condition ... affecting ... the ... body[s] ... hemic and lymphatic [systems]." HIV infection falls well within that definition. The medical literature reveals that the disease follows a predictable and unalterable course from infection to inevitable death. It causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even during the intermediate stage when its attack is concentrated in the lymph nodes. Thus, HIV infection must be regarded as a physiological disorder with an immediate, constant, and detrimental effect on the hemic and lymphatic systems. Pp. 4-10.

(c) The life activity upon which respondent relies, her ability to reproduce and to bear children, constitutes a "major life activity" under the ADA. The plain meaning of the word "major" denotes comparative importance and suggests that the touchstone is an activity's significance. Reproduction and the sexual dynamics surrounding it are central to the life process itself. Petitioner's claim that Congress intended the ADA only to cover those aspects of a person's life that have a public, economic, or daily character founders on the statutory language. Nothing in the definition suggests that activities without such a dimension may somehow be regarded as so unimportant or insignificant as not to be "major." This interpretation is confirmed by the Rehabilitation Act regulations, which provide an illustrative, nonexhaustive list of major life activities. Inclusion on that list of activities such as caring for one's self, performing manual tasks, working, and learning belies the suggestion that a task must have a public or economic character. On the contrary, the regulations support the inclusion of reproduction, which could not be regarded as any less important than working and learning. Pp. 10-12.

(d) Respondent's HIV infection, "substantially limits" her major

life activity within the ADA's meaning. Although the Rehabilitation Act regulations provide little guidance in this regard, the Court's evaluation of the medical evidence demonstrates that an HIV-infected woman's ability to reproduce is substantially limited in two independent ways: If she tries to conceive a child, (1) she imposes on her male partner a statistically significant risk of becoming infected, and (2) she risks infecting her child during gestation and childbirth, i.e., perinatal transmission. Evidence suggesting that antiretroviral therapy can lower the risk of perinatal transmission to about 8%, even if relevant, does not avail petitioner because it cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction. The decision to reproduce carries economic and legal consequences as well. There are added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and treated. Some state laws, moreover, forbid HIV-infected persons from having sex with others, regardless of consent. In the context of reviewing summary judgment, the Court must take as true respondent's unchallenged testimony that her HIV infection controlled her decision not to have a child. Pp. 12-15.

(e) The uniform body of administrative and judicial precedent interpreting similar language in the Rehabilitation Act confirms the Court's holding. Every agency and court to consider the issue under the Rehabilitation Act has found statutory coverage for persons with asymptomatic HIV. The uniformity of that precedent is significant. When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, Congress' intent to incorporate such interpretations, as well. See, e.g., *Lorillard v. Pons*, 434 U. S. 575, 580-581. Pp. 15-19.

(f) The Court's holding is further reinforced by the guidance issued by the Justice Department and other agencies authorized to administer the ADA, which supports the conclusion that persons with asymptomatic HIV fall within the ADA's definition of disability. The views of agencies charged with implementing a statute are entitled to deference. See *Cheuron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844. Pp. 19-21.

2. In affirming the summary judgment, the First Circuit did not cite sufficient material in the record to determine, as a matter of law, that respondent's HIV infection posed no direct threat to the health and safety of others. The ADA's direct threat provision, §12182(b)(3), stems from *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 287, in which this Court reconciled competing interests in prohibiting discrimination and preventing the spread of disease by construing the

Syllabus

Rehabilitation Act not to require the hiring of a person who posed "a significant risk of communicating an infectious disease to others," *id.*, at 287, and n. 16. The existence of a significant risk is determined from the standpoint of the health care professional who refuses treatment or accommodation, and the risk assessment is based on the medical or other objective, scientific evidence available to him and his profession, not simply on his good-faith belief that a significant risk existed. See *id.*, at 288; *id.*, at 288, n. 18, distinguished. For the most part, the First Circuit followed the proper standard and conducted a thorough review of the evidence. However, it might have mistakenly relied on the 1993 CDC Dentistry Guidelines, which recommend certain universal precautions to combat the risk of HIV transmission in the dental environment, but do not actually assess the level of such risk, and on the 1991 American Dental Association Policy on HIV, which is the work of a professional organization, not a public health authority, and which does not reveal the extent to which it was based on the Association's assessment of dentists' ethical and professional duties, rather than scientific assessments. Other evidence in the record might support affirmation of the trial court's ruling, and there are reasons to doubt whether petitioner advanced evidence sufficient to raise a triable issue of fact on the significance of the risk, but this Court's evaluation is constrained by the fact that it has not had briefs and arguments directed to the entire record. A remand will permit a full exploration of the issues through the adversary process. Pp. 21-29.

107 F. 3d 934, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which BREYER, J., joined. GINSBURG, J., filed a concurring opinion. REHNQUIST, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which SCALIA and THOMAS, JJ., joined, and in Part II of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 97-156

RANDON BRAGDON, PETITIONER v. SIDNEY ABBOTT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 25, 1998]

JUSTICE KENNEDY delivered the opinion of the Court.

We address in this case the application of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. §12101 *et seq.*, to persons infected with the human immunodeficiency virus (HIV). We granted certiorari to review, first, whether HIV infection is a disability under the ADA when the infection has not yet progressed to the so-called symptomatic phase; and, second, whether the Court of Appeals, in affirming a grant of summary judgment, cited sufficient material in the record to determine, as a matter of law, that respondent's infection with HIV posed no direct threat to the health and safety of her treating dentist.

I

Respondent Sidney Abbott has been infected with HIV since 1986. When the incidents we recite occurred, her infection had not manifested its most serious symptoms. On September 16, 1994, she went to the office of petitioner Randon Bragdon in Bangor, Maine, for a dental appointment. She disclosed her HIV infection on the patient reg-

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istration form. Petitioner completed a dental examination, discovered a cavity, and informed respondent of his policy against filling cavities of HIV-infected patients. He offered to perform the work at a hospital with no added fee for his services, though respondent would be responsible for the cost of using the hospital's facilities. Respondent declined.

Respondent sued petitioner under state law and §302 of the ADA, 104 Stat. 355, 42 U. S. C. §12182, alleging discrimination on the basis of her disability. The state law claims are not before us. Section 302 of the ADA provides:

"No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation." §12182(a).

The term "public accommodation" is defined to include the "professional office of a health care provider." §12181(7)(F).

A later subsection qualifies the mandate not to discriminate. It provides:

"Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." §12182(b)(3).

The United States and the Maine Human Rights Commission intervened as plaintiffs. After discovery, the parties filed cross-motions for summary judgment. The District Court ruled in favor of the plaintiffs, holding that respondent's HIV infection satisfied the ADA's definition of disability. 912 F. Supp. 580, 585-587 (Me. 1995). The court held further that petitioner raised no genuine issue

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of material fact as to whether respondent's HIV infection would have posed a direct threat to the health or safety of others during the course of a dental treatment. *Id.*, at 587-591. The court relied on affidavits submitted by Dr. Donald Wayne Marianos, Director of the Division of Oral Health of the Centers for Disease Control and Prevention (CDC). The Marianos affidavits asserted it is safe for dentists to treat patients infected with HIV in dental offices if the dentist follows the so-called universal precautions described in the Recommended Infection-Control Practices for Dentistry issued by CDC in 1993 (1993 CDC Dentistry Guidelines). 912 F. Supp., at 589.

The Court of Appeals affirmed. It held respondent's HIV infection was a disability under the ADA, even though her infection had not yet progressed to the symptomatic stage. 107 F. 3d 934, 939-943 (CA1 1997). The Court of Appeals also agreed that treating the respondent in petitioner's office would not have posed a direct threat to the health and safety of others. *Id.*, at 943-948. Unlike the District Court, however, the Court of Appeals declined to rely on the Marianos affidavits. *Id.*, at 946, n. 7. Instead the court relied on the 1993 CDC Dentistry Guidelines, as well as the Policy on AIDS, HIV Infection and the Practice of Dentistry, promulgated by the American Dental Association in 1991 (1991 American Dental Association Policy on HIV). 107 F. 3d, at 945-946.

II

We first review the ruling that respondent's HIV infection constituted a disability under the ADA. The statute defines disability as:

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

"(B) a record of such an impairment; or

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"(C) being regarded as having such impairment."
§12102(2).

We hold respondent's HIV infection was a disability under subsection (A) of the definitional section of the statute. In light of this conclusion, we need not consider the applicability of subsections (B) or (C).

Our consideration of subsection (A) of the definition proceeds in three steps. First, we consider whether respondent's HIV infection was a physical impairment. Second, we identify the life activity upon which respondent relies (reproduction and child bearing) and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity. In construing the statute, we are informed by interpretations of parallel definitions in previous statutes and the views of various administrative agencies which have faced this interpretive question.

A

The ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" included in the Rehabilitation Act of 1973, 29 U. S. C. §706(8)(B) (1988 ed.), and the definition of "handicap" contained in the Fair Housing Amendments Act of 1988, 42 U. S. C. §3602(h)(1) (1988 ed.). Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations. See *FDIC v. Philadelphia Gear Corp.*, 476 U. S. 426, 437-438 (1986); *Commissioner v. Estate of Noel*, 380 U. S. 678, 681-682 (1965); *ICC v. Parker*, 326 U. S. 60, 65 (1945). In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing as follows:

"Except as otherwise provided in this chapter, nothing

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in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U. S. C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U. S. C. §12201(a).

The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.

1

The first step in the inquiry under subsection (A) requires us to determine whether respondent's condition constituted a physical impairment. The Department of Health, Education and Welfare (HEW) issued the first regulations interpreting the Rehabilitation Act in 1977. The regulations are of particular significance because, at the time, HEW was the agency responsible for coordinating the implementation and enforcement of §504. *Consolidated Rail Corporation v. Darrone*, 465 U. S. 624, 634, (1984) (citing Exec. Order No. 11914, 3 CFR 117 (1976-1980 Comp.)). The HEW regulations, which appear without change in the current regulations issued by the Department of Health and Human Services, define "physical or mental impairment" to mean:

"(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

"(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 CFR §84.3(j)(2)(i) (1997).

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In issuing these regulations, HEW decided against including a list of disorders constituting physical or mental impairments, out of concern that any specific enumeration might not be comprehensive. 42 Fed. Reg. 22685 (1977), reprinted in 45 CFR pt. 84, App. A, p. 334 (1997). The commentary accompanying the regulations, however, contains a representative list of disorders and conditions constituting physical impairments, including "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism." *Ibid.*

In 1980, the President transferred responsibility for the implementation and enforcement of §504 to the Attorney General. See, e.g., Exec. Order No. 12250, 3 CFR 298 (1981). The regulations issued by the Justice Department, which remain in force to this day, adopted verbatim the HEW definition of physical impairment quoted above. 28 CFR §41.31(a)(1) (1997). In addition, the representative list of diseases and conditions originally relegated to the commentary accompanying the HEW regulations were incorporated into the text of the regulations. *Ibid.*

HIV infection is not included in the list of specific disorders constituting physical impairments, in part because HIV was not identified as the cause of AIDS until 1983. See Barré-Sinoussi et al., Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS), 220 Science 868 (1983); Gallo et al., Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS, 224 Science 500 (1984); Levy et al., Isolation of Lymphocytopathic Retroviruses from San Francisco Patients with AIDS, 225 Science 840 (1984). HIV infection does fall well within the general definition set forth by the regulations, however.

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The disease follows a predictable and, as of today, an unalterable course. Once a person is infected with HIV, the virus invades different cells in the blood and in body tissues. Certain white blood cells, known as helper T-lymphocytes or CD4+ cells, are particularly vulnerable to HIV. The virus attaches to the CD4 receptor site of the target cell and fuses its membrane to the cell's membrane. HIV is a retrovirus, which means it uses an enzyme to convert its own genetic material into a form indistinguishable from the genetic material of the target cell. The virus' genetic material migrates to the cell's nucleus and becomes integrated with the cell's chromosomes. Once integrated, the virus can use the cell's own genetic machinery to replicate itself. Additional copies of the virus are released into the body and infect other cells in turn. Young, The Replication Cycle of HIV-1, in The AIDS Knowledge Base, pp. 3.1-2 to 3.1-7 (P. Cohen, M. Sande, & P. Volberding eds., 2d ed. 1994) (hereinafter AIDS Knowledge Base); Folks & Hart, The Life Cycle of Human Immunodeficiency Virus Type 1, in AIDS: Etiology, Diagnosis, Treatment and Prevention 29-39 (V. DeVita et al. eds., 4th ed. 1997) (hereinafter AIDS: Etiology); Greene, Molecular Insights into HIV-1 Infection, in The Medical Management of AIDS 18-24 (M. Sande & P. Volberding eds., 5th ed. 1997) (hereinafter Medical Management of AIDS). Although the body does produce antibodies to combat HIV infection, the antibodies are not effective in eliminating the virus. Pantaleo et al., Immunopathogenesis of Human Immunodeficiency Virus Infection, in AIDS: Etiology 79; Garner, HIV Vaccine Development, in AIDS Knowledge Base 3.6-5; Haynes, Immune Responses to Human Immunodeficiency Virus Infection, in AIDS: Etiology 91.

The virus eventually kills the infected host cell. CD4+ cells play a critical role in coordinating the body's immune response system, and the decline in their number causes

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corresponding deterioration of the body's ability to fight infections from many sources. Tracking the infected individual's CD4+ cell count is one of the most accurate measures of the course of the disease. Greene, Medical Management of AIDS 19, 24. Osmond, Classification and Staging of HIV Disease, in AIDS Knowledge Base 1.1-8; Saag, Clinical Spectrum of Human Immunodeficiency Virus Diseases, in AIDS: Etiology 204.

The initial stage of HIV infection is known as acute or primary HIV infection. In a typical case, this stage lasts three months. The virus concentrates in the blood. The assault on the immune system is immediate. The victim suffers from a sudden and serious decline in the number of white blood cells. There is no latency period. Mononucleosis-like symptoms often emerge between six days and six weeks after infection, at times accompanied by fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders. Usually these symptoms abate within 14 to 21 days. HIV antibodies appear in the bloodstream within 3 weeks; circulating HIV can be detected within 10 weeks. Carr & Cooper, Primary HIV Infection, in Medical Management of AIDS 89-91; Cohen & Volberding, Clinical Spectrum of HIV Disease, in AIDS Knowledge Base 4.1-7; Crowe & McGrath, Acute HIV Infection, in AIDS Knowledge Base 4.2-1 to 4.2-4; Saag, AIDS: Etiology 204-205.

After the symptoms associated with the initial stage subside, the disease enters what is referred to sometimes as its asymptomatic phase. The term is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections. Although it varies with each individual, in most instances this stage lasts from 7 to 11 years. The virus now tends to concentrate in the lymph nodes, though low levels of the virus continue to

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appear in the blood. Cohen & Volberding, AIDS Knowledge 4.1-4, 4.1-8; Saag, AIDS: Etiology 205-206; Strapans & Feinberg, Natural History and Immunopathogenesis of HIV-1 Disease, in Medical Management of AIDS 38. It was once thought the virus became inactive during this period, but it is now known that the relative lack of symptoms is attributable to the virus' migration from the circulatory system into the lymph nodes. Cohen & Volberding, AIDS Knowledge Base 4.1-4. The migration reduces the viral presence in other parts of the body, with a corresponding diminution in physical manifestations of the disease. The virus, however, thrives in the lymph nodes, which, as a vital point of the body's immune response system, represents an ideal environment for the infection of other CD4+ cells. Strapans & Feinberg, Medical Management of AIDS 33-34. Studies have shown that viral production continues at a high rate. Cohen & Volberding, AIDS Knowledge Base 4.1-4; Strapans & Feinberg, Medical Management of AIDS 38. CD4+ cells continue to decline an average of 5% to 10% (40 to 80 cells/mm³) per year throughout this phase. Saag, AIDS: Etiology 207.

A person is regarded as having AIDS when his or her CD4+ count drops below 200 cells/mm³ of blood or when CD4+ cells comprise less than 14% of his or her total lymphocytes. U. S. Dept. of Health and Human Services, Public Health Service, CDC, 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, 41 Morbidity & Mortality Weekly Rep., No. RR-17 (Dec. 18, 1992); Osmond, AIDS Knowledge Base 1.1-2; Saag, AIDS: Etiology 207; Ward, Petersen, & Jaffe, Current Trends in the Epidemiology of HIV/AIDS, in Medical Management of AIDS 3. During this stage, the clinical conditions most often associated with HIV, such as *pneumocystis carinii* pneumonia, Kaposi's sarcoma, and non-Hodgkins lym-

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phoma, tend to appear. In addition, the general systemic disorders present during all stages of the disease, such as fever, weight loss, fatigue, lesions, nausea, and diarrhea, tend to worsen. In most cases, once the patient's CD4+ count drops below 10 cells/mm³, death soon follows. Cohen & Volberding, AIDS Knowledge Base 4.1-9; Saag, AIDS: Etiology 207-209.

In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection. As noted earlier, infection with HIV causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even when the attack is concentrated in the lymph nodes. In light of these facts, HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.

2

The statute is not operative, and the definition not satisfied, unless the impairment affects a major life activity. Respondent's claim throughout this case has been that the HIV infection placed a substantial limitation on her ability to reproduce and to bear children. App. 14; 912 F. Supp., at 586; 107 F. 3d, at 939. Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry. Respondent and a number of amici make arguments about HIV's profound impact on almost every phase of the infected person's life. See Brief for Respondent Sidney Abbott 24-27; Brief for American Medical Association as Amicus Curiae 20; Brief for Infectious Diseases Society

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of America et al. as *Amici Curiae* 7-11. In light of these submissions, it may seem legalistic to circumscribe our discussion to the activity of reproduction. We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.

From the outset, however, the case has been treated as one in which reproduction was the major life activity limited by the impairment. It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari. See, e.g., *Blessing v. Freestone*, 520 U. S. 329, 340, n. 3 (1997) (citing this Court's Rule 14.1(a)); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 760 (1995). We ask, then, whether reproduction is a major life activity.

We have little difficulty concluding that it is. As the Court of Appeals held, "[t]he plain meaning of the word 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." 107 F. 3d, at 939, 940. Reproduction falls well within the phrase "major life activity." Reproduction and the sexual dynamics surrounding it are central to the life process itself.

While petitioner concedes the importance of reproduction, he claims that Congress intended the ADA only to cover those aspects of a person's life which have a public, economic, or daily character. Brief for Petitioner 14, 28, 30, 31; see also *id.*, at 36-37 (citing *Krauel v. Iowa Methodist Medical Center*, 95 F. 3d 674, 677 (CA8 1996)). The argument founders on the statutory language. Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word "major." The breadth of the term confounds the attempt to limit its construction in this

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manner.

As we have noted, the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act. See 42 U. S. C. §12201(a). Rather than enunciating a general principle for determining what is and is not a major life activity, the Rehabilitation Act regulations instead provide a representative list, defining term to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 CFR §84.3(j)(2)(ii) (1997); 28 CFR §41.31(b)(2) (1997). As the use of the term "such as" confirms, the list is illustrative, not exhaustive.

These regulations are contrary to petitioner's attempt to limit the meaning of the term "major" to public activities. The inclusion of activities such as caring for one's self and performing manual tasks belies the suggestion that a task must have a public or economic character in order to be a major life activity for purposes of the ADA. On the contrary, the Rehabilitation Act regulations support the inclusion of reproduction as a major life activity, since reproduction could not be regarded as any less important than working and learning. Petitioner advances no credible basis for confining major life activities to those with a public, economic, or daily aspect. In the absence of any reason to reach a contrary conclusion, we agree with the Court of Appeals' determination that reproduction is a major life activity for the purposes of the ADA.

3

The final element of the disability definition in subsection (A) is whether respondent's physical impairment was a substantial limit on the major life activity she asserts. The Rehabilitation Act regulations provide no additional guidance. 45 CFR pt. 84, App. A, p. 334 (1997).

Our evaluation of the medical evidence leads us to con-

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clude that respondent's infection substantially limited her ability to reproduce in two independent ways. First, a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected. The cumulative results of 13 studies collected in a 1994 textbook on AIDS indicates that 20% of male partners of women with HIV became HIV-positive themselves, with a majority of the studies finding a statistically significant risk of infection. Osmond & Padian, Sexual Transmission of HIV, in AIDS Knowledge Base 1.9-8, and tbl. 2; see also Haverkos & Battjes, Female-to-Male Transmission of HIV, 268 JAMA 1855, 1856, tbl. (1992) (cumulative results of 16 studies indicated 25% risk of female-to-male transmission). (Studies report a similar, if not more severe, risk of male-to-female transmission. See, e.g., Osmond & Padian, AIDS Knowledge Base 1.9-3, tbl. 1, 1.9-6 to 1.9-7.)

Second, an infected woman risks infecting her child during gestation and childbirth, i.e., perinatal transmission. Petitioner concedes that women infected with HIV face about a 25% risk of transmitting the virus to their children. 107 F. 3d, at 942; 912 F. Supp., at 387, n. 6. Published reports available in 1994 confirm the accuracy of this statistic. Report of a Consensus Workshop, Maternal Factors Involved in Mother-to-Child Transmission of HIV-1, 5 J. Acquired Immune Deficiency Syndromes 1019, 1020 (1992) (collecting 13 studies placing risk between 14% and 40%, with most studies falling within the 25% to 30% range); Connor et al., Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment, 331 New Eng. J. Med. 1173, 1176 (1994) (placing risk at 25.5%); see also Strapans & Feinberg, Medical Management of AIDS 32 (studies report 13% to 45% risk of infection, with average of approximately 25%).

Petitioner points to evidence in the record suggesting

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that antiretroviral therapy can lower the risk of perinatal transmission to about 8%. App. 53; see also Connor, *supra*, at 1176 (8.3%); Sperling et al., *Maternal Viral Load, Zidovudine Treatment, and the Risk of Transmission of Human Immunodeficiency Virus Type 1 from Mother to Infant*, 335 *New Eng. J. Med.* 1621, 1622 (1996) (7.6%). The Solicitor General questions the relevance of the 8% figure, pointing to regulatory language requiring the substantiality of a limitation to be assessed without regard to available mitigating measures. Brief for United States as *Amicus Curiae* 18, n. 10 (citing 28 CFR pt. 36, App. B, p. 611 (1997); 29 CFR pt. 1630, App., p. 351 (1997)). We need not resolve this dispute in order to decide this case, however. It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction.

The Act addresses substantial limitations on major life activities, not utter inabilities. Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation. The decision to reproduce carries economic and legal consequences as well. There are added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and, tragic to think, treated for the infection. The laws of some States, moreover, forbid persons infected with HIV from having sex with others, regardless of consent. Iowa Code §§139.1, 139.31 (1997); Md. Health Code Ann. §18-601.1(a) (1994); Mont. Code Ann. §§50-18-101, 50-18-112 (1997); Utah Code Ann. §26-6-3.5(3) (Supp. 1997); *id.*, §26-6-5 (1995); Wash. Rev. Code §9A.36.011(1)(b) (Supp. 1998); see also N. D. Cent. Code §12.1-20-17 (1997).

In the end, the disability definition does not turn on personal choice. When significant limitations result from

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the impairment, the definition is met even if the difficulties are not insurmountable. For the statistical and other reasons we have cited, of course, the limitations on reproduction may be insurmountable here. Testimony from the respondent that her HIV infection controlled her decision not to have a child is unchallenged. App. 14; 912 F. Supp., at 587; 107 F. 3d, at 942. In the context of reviewing summary judgment, we must take it to be true. Fed. Rule Civ. Proc. 56(e). We agree with the District Court and the Court of Appeals that no triable issue of fact impedes a ruling on the question of statutory coverage. Respondent's HIV infection is a physical impairment which substantially limits a major life activity, as the ADA defines it. In view of our holding, we need not address the second question presented, *i.e.*, whether HIV infection is a *per se* disability under the ADA.

B

Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA. Every agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV. Responsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under *Cheron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984). It is enough to observe that the well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U. S. 134, 139-140 (1944).

One comprehensive and significant administrative precedent is a 1988 opinion issued by the Office of Legal Counsel of the Department of Justice (OLC) concluding that the

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Rehabilitation Act "protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program." Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264-265 (Sept. 27, 1988) (preliminary print) (footnote omitted). Relying on a letter from Surgeon General C. Everett Koop stating that, "from a purely scientific perspective, persons with HIV are clearly impaired" even during the asymptomatic phase, OLC determined asymptomatic HIV was a physical impairment under the Rehabilitation Act because it constituted a "physiological disorder or condition affecting the hemic and lymphatic systems." *Id.*, at 271 (internal quotation marks omitted). OLC determined further that asymptomatic HIV imposed a substantial limit on the major life activity of reproduction. The Opinion said:

"Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation . . . is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy, HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child." *Id.*, at 273.

In addition, OLC indicated that "[t]he life activity of engaging in sexual-relations is threatened and probably substantially limited by the contagiousness of the virus." *Id.*, at 274. Either consideration was sufficient to render asymptomatic HIV infection a handicap for purposes of the Rehabilitation Act. In the course of its Opinion, OLC considered, and rejected, the contention that the limitation could be discounted as a voluntary response to the infection. The limitation, it reasoned, was the infection's manifest

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physical effect. *Id.*, at 274, and n. 13. Without exception, the other agencies to address the problem before enactment of the ADA reached the same result. Federal Contract Compliance Manual App. 6D, 8 FEP Manual 405:352 (Dec. 23, 1988); *In re David Ritter*, No. 03890089, 1989 WL 609697, *10 (EEOC, Dec. 8, 1989); see also Comptroller General's Task Force on AIDS in the Workplace, Coping with AIDS in the GAO Workplace: Task Force Report 29 (Dec. 1987); Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 113-114, 122-123 (June 1988). Agencies have adhered to this conclusion since the enactment of the ADA as well. See 5 CFR §1636.103 (1997); 7 CFR §15e.103 (1998); 22 CFR §1701.103 (1997); 24 CFR §9.103 (1997); 34 CFR §1200.103 (1997); 45 CFR §§2301.103, 2490.103 (1997); *In re Westchester County Medical Center*, [1991-1994 Transfer Binder] CCH Employment Practices Guide ¶5340, pp. 6110-6112 (Apr. 20, 1992), *aff'd*, *id.*, ¶5362, pp. 6249-6250 (Dept. of Health & Human Servs. Departmental Appeals Bd., Sept. 25, 1992); *In re Rosebud Sioux Tribe*, No. 93-504-1, 1994 WL 603015 (Dept. of Health & Human Servs. Departmental Appeals Bd., July 14, 1994); *In re David T. Martin*, No. 01954089, 1997 WL 151524, *4 (EEOC, Mar. 27, 1997).

Every court which addressed the issue before the ADA was enacted in July 1990, moreover, concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap. See *Doe v. Garrett*, 903 F.2d 1455, 1457 (CA11 1990), cert. denied, 499 U.S. 904 (1991); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524, 1536 (MD Fla. 1987); *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 381 (CD Cal. 1987); *District 27 Community School Bd. v. Board of Ed. of New York*, 130 Misc.2d 398, 413-415, 502 N.Y.S.2d 325, 335-337 (Sup. Ct., Queens Cty. 1986); cf. *Baxter v. Belleville*, 720 F. Supp. 720, 729 (SD Ill. 1989) (Fair Housing Amendments

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Act); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (ED Pa. 1990) (Pennsylvania Human Relations Act). (For cases finding infection with HIV to be a handicap without distinguishing between symptomatic and asymptomatic HIV, see *Martinez ex rel. Martinez v. School Bd. of Hillsborough Cty.*, 861 F.2d 1502, 1506 (CA11 1988); *Chalk v. United States Dist. Ct.*, 840 F.2d 701, 706 (CA9 1988); *Doe v. Dolton Elementary School Dist. No. 148*, 694 F.Supp. 440, 444-445 (ND Ill. 1988); *Robertson v. Granite City Community Unit School Dist. No. 9*, 684 F. Supp. 1002, 1006-1007 (SD Ill. 1988); *Local 1812, AFGE v. United States Dept. of State*, 662 F. Supp. 50, 54 (DC 1987); cf. *Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Admin.*, 740 F. Supp. 95, 103 (PR 1990) (Fair Housing Amendments Act). We are aware of no instance prior to the enactment of the ADA in which a court or agency ruled that HIV infection was not a handicap under the Rehabilitation Act.

Had Congress done nothing more than copy the Rehabilitation Act definition into the ADA, its action would indicate the new statute should be construed in light of this unwavering line of administrative and judicial interpretation. All indications are that Congress was well aware of the position taken by OLC when enacting the ADA and intended to give that position its active endorsement. H. R. Rep. No. 101-485, pt. 2, p. 52 (1990) (endorsing the analysis and conclusion of the OLC Opinion); *id.*, pt. 3, at 28, n. 18 (same); S. Rep. No. 101-116, pp. 21, 22 (1989) (same). As noted earlier, Congress also incorporated the same definition into the Fair Housing Amendments Act of 1988. See 42 U. S. C. §3602(h)(1). We find it significant that the implementing regulations issued by the Department of Housing and Urban Development (HUD) construed the definition to include infection with HIV. 54 Fed. Reg. 3232, 3245 (1989) (codified at 24 CFR §100.201 (1997)); see also *In re Willie L. Williams*, 2A

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P-H Fair Housing-Fair Lending ¶25,007, pp. 25,111-25,113 (HUD Off. Admin. Law Judges, Mar. 22, 1991) (adhering to this interpretation); *In re Elroy R. and Dorothy Burns Trust*, 2A P-H Fair Housing-Fair Lending ¶25,073, p. 25,678 (HUD Off. Admin. Law Judges, June 17, 1994) (same). Again the legislative record indicates that Congress intended to ratify HUD's interpretation when it reiterated the same definition in the ADA. H. R. Rep. No. 101-485, pt. 2, at 50; *id.*, pt. 3, at 27; *id.*, pt. 4, at 36; S. Rep. No. 101-116, at 21.

We find the uniformity of the administrative and judicial precedent construing the definition significant. When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well. See, e.g., *Lorillard v. Pons*, 434 U. S. 575, 580-581 (1978). The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.

C

Our conclusion is further reinforced by the administrative guidance issued by the Justice Department to implement the public accommodation provisions of Title III of the ADA. As the agency directed by Congress to issue implementing regulations, see 42 U. S. C. §12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, §12206(c), and to enforce Title III in court, §12188(b), the Department's views are entitled to deference. See *Chevron*, 467 U. S., at 844.

The Justice Department's interpretation of the definition of disability is consistent with our analysis. The regulations acknowledge that Congress intended the

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ADA's definition of disability to be given the same construction as the definition of handicap in the Rehabilitation Act. 28 CFR §36.103(a) (1997); *id.*, pt. 36, App. B, pp. 608, 609. The regulatory definition developed by HEW to implement the Rehabilitation Act is incorporated verbatim in the ADA regulations. §36.104. The Justice Department went further, however. It added "HIV infection (symptomatic and asymptomatic)" to the list of disorders constituting a physical impairment. §36.104(1)(iii). The technical assistance the Department has issued pursuant to 42 U. S. C. §12206 similarly concludes that persons with asymptomatic HIV infection fall within the ADA's definition of disability. See, e.g., U. S. Dept. of Justice, Civil Rights Division, The Americans with Disabilities Act: Title III Technical Assistance Manual 9 (Nov. 1993); Response to Congressman Sonny Callahan, 5 Nat. Disability L. Rep. (LRP) ¶360, p. 1167 (Feb. 9, 1994); Response to A. Laurence Field, 5 Nat. Disability L. Rep. (LRP) ¶21, p. 80 (Sept. 10, 1993). Any other conclusion, the Department reasoned, would contradict Congress' affirmative ratification of the administrative interpretations given previous versions of the same definition. 28 CFR pt. 36, App. B, p. 609, 610 (1997) (citing the OLC Opinion and HUD regulations); 56 Fed. Reg. 7455, 7456 (1991) (same) (notice of proposed rulemaking).

We also draw guidance from the views of the agencies authorized to administer other sections of the ADA. See 42 U. S. C. §12116 (authorizing EEOC to issue regulations implementing Title I); §12134(a) (authorizing the Attorney General to issue regulations implementing the public services provisions of Title II, subtitle A); §§12149, 12164, 12186 (authorizing the Secretary of Transportation to issue regulations implementing the transportation-related provisions of Titles II and III); §12206(c) (authorizing the same agencies to offer technical assistance for the provisions they administer). These agencies, too, concluded

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that HIV infection is a physical impairment under the ADA. 28 CFR §35.104(1)(iii) (1997); 49 CFR §§37.3, 38.3 (1997); 56 Fed. Reg. 13858 (1991); U. S. Dept. of Justice, Civil Rights Division, The Americans with Disabilities Act: Title II Technical Assistance Manual 4 (Nov. 1993); EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act II-3 (Jan. 1992) (hereinafter EEOC Technical Assistance Manual); EEOC Interpretive Manual §902.2(d), pp. 902-13 to 902-14 (reissued Mar. 14, 1995) (hereinafter EEOC Interpretive Manual), reprinted in 2 BNA EEOC Compliance Manual 902:0013 (1998). Most categorical of all is EEOC's conclusion that "an individual who has HIV infection (including asymptomatic HIV infection) is an individual with a disability." EEOC Interpretive Manual §902.4(c)(1), p. 902-21; accord, *id.*, §902.2(d), p. 902-14, n. 18. In the EEOC's view, "impairments . . . such as HIV infection, are inherently substantially limiting." 29 CFR pt. 1630, App., p. 350 (1997); EEOC Technical Assistance Manual II-4; EEOC Interpretive Manual §902.4(c)(1), p. 902-21.

The regulatory authorities we cite are consistent with our holding that HIV infection, even in the so-called asymptomatic phase, is an impairment which substantially limits the major life activity of reproduction.

III

The petition for certiorari presented three other questions for review. The questions stated:

"3. When deciding under title III of the ADA whether a private health care provider must perform invasive procedures on an infectious patient in his office, should courts defer to the health care provider's professional judgment, as long as it is reasonable in light of then-current medical knowledge?"

"4. What is the proper standard of judicial review

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under title III of the ADA of a private health care provider's judgment that the performance of certain invasive procedures in his office would pose a direct threat to the health or safety of others?

"5. Did petitioner, Randon Bragdon, D. M.D., raise a genuine issue of fact for trial as to whether he was warranted in his judgment that the performance of certain invasive procedures on a patient in his office would have posed a direct threat to the health or safety of others?" Pet. for Cert. i.

Of these, we granted certiorari only on question three. The question is phrased in an awkward way, for it conflates two separate inquiries. In asking whether it is appropriate to defer to petitioner's judgment, it assumes that petitioner's assessment of the objective facts was reasonable. The central premise of the question and the assumption on which it is based merit separate consideration.

Again, we begin with the statute. Notwithstanding the protection given respondent by the ADA's definition of disability, petitioner could have refused to treat her if her infectious condition "pose[d] a direct threat to the health or safety of others." 42 U. S. C. §12182(b)(3). The ADA defines a direct threat to be "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." *Ibid.* Parallel provisions appear in the employment provisions of Title I. §§12111(3), 12113(b).

The ADA's direct threat provision stems from the recognition in *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 287 (1987), of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks, resulting, for instance, from a contagious disease. In *Arline*, the Court reconciled these objectives by construing the Rehabilitation Act not to require the hiring of a person who posed "a

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significant risk of communicating an infectious disease to others." *Id.*, at 287, n. 16. Congress amended the Rehabilitation Act and the Fair Housing Act to incorporate the language. See 29 U. S. C. §706(8)(D) (excluding individuals who "would constitute a direct threat to the health or safety of other individuals"); 42 U. S. C. §3604(f)(9) (same). It later relied on the same language in enacting the ADA. See 28 CFR pt. 36, App. B, p. 626 (1997) (ADA's direct threat provision codifies *Arline*). Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant. *Arline*, *supra*, at 287, and n. 16; 42 U. S. C. §12182(b)(3).

The existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence. *Arline*, *supra*, at 288; 28 CFR §36.208(c) (1997); *id.*, pt. 36, App. B, p. 626. As a health care professional, petitioner had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability. To use the words of the question presented, petitioner receives no special deference simply because he is a health care professional. It is true that *Arline* reserved "the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied." 480 U. S., at 288, n. 18. At most, this statement reserved the possibility that employers could consult with individual physicians as objective third-party experts. It did not suggest that an individual physician's state of mind could excuse discrimination without regard to the objective reasonableness of his actions.

Our conclusion that courts should assess the objective reasonableness of the views of health care professionals

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without deferring to their individual judgments does not answer the implicit assumption in the question presented, whether petitioner's actions were reasonable in light of the available medical evidence. In assessing the reasonableness of petitioner's actions, the views of public health authorities, such as the U. S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority. *Arline, supra*, at 288; 28 CFR pt. 36, App. B, p. 626 (1997). The views of these organizations are not conclusive, however. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* §32, p. 187 (5th ed. 1984).

We have reviewed so much of the record as necessary to illustrate the application of the rule to the facts of this case. For the most part, the Court of Appeals followed the proper standard in evaluating the petitioner's position and conducted a thorough review of the evidence. Its rejection of the District Court's reliance on the Marianos affidavits was a correct application of the principle that petitioner's actions must be evaluated in light of the available, objective evidence. The record did not show that CDC had published the conclusion set out in the affidavits at the time petitioner refused to treat respondent. 107 F. 3d, at 946, n. 7.

A further illustration of a correct application of the objective standard is the Court of Appeals' refusal to give weight to the petitioner's offer to treat respondent in a hospital. *Id.*, at 943, n. 4. Petitioner testified that he believed hospitals had safety measures, such as air filtration, ultraviolet lights, and respirators, which would reduce the risk of HIV transmission. App. 151. Petitioner made no showing, however, that any area hospital had these safeguards or even that he had hospital privileges.

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Id., at 31. His expert also admitted the lack of any scientific basis for the conclusion that these measures would lower the risk of transmission. *Id.*, at 209. (Petitioner failed to present any objective, medical evidence showing that treating respondent in a hospital would be safer or more efficient in preventing HIV transmission than treatment in a well-equipped dental office.)

We are concerned, however, that the Court of Appeals might have placed mistaken reliance upon two other sources. In ruling no triable issue of fact existed on this point, the Court of Appeals relied on the 1993 CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV. 107 F. 3d, at 945-946. This evidence is not definitive. As noted earlier, the CDC Guidelines recommended certain universal precautions which, in CDC's view, "should reduce the risk of disease transmission in the dental environment." U. S. Dept. of Health and Human Services, Public Health Service, CDC, Recommended Infection Control Practices for Dentistry, 41 *Morbidity & Mortality Weekly Rep.* No. RR-18, p. 1 (May 28, 1993). The Court of Appeals determined that, "[w]hile the guidelines do not state explicitly that no further risk reduction measures are desirable or that routine dental care for HIV-positive individuals is safe, those two conclusions seem to be implicit in the guidelines' detailed delineation of procedures for office treatment of HIV-positive patients." 107 F. 3d, at 946. In our view, the Guidelines do not necessarily contain implicit assumptions conclusive of the point to be decided. The Guidelines set out CDC's recommendation that the universal precautions are the best way to combat the risk of HIV transmission. They do not assess the level of risk.

Nor can we be certain, on this record, whether the 1991 American Dental Association Policy on HIV carries the weight the Court of Appeals attributed to it. The Policy does provide some evidence of the medical community's

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objective assessment of the risks posed by treating people infected with HIV in dental offices. It indicates:

“Current scientific and epidemiologic evidence indicates that there is little risk of transmission of infectious diseases through dental treatment if recommended infection control procedures are routinely followed. Patients with HIV infection may be safely treated in private dental offices when appropriate infection control procedures are employed. Such infection control procedures provide protection both for patients and dental personnel.” App. 225.

We note, however, that the Association is a professional organization, which, although a respected source of information on the dental profession, is not a public health authority. It is not clear the extent to which the Policy was based on the Association’s assessment of dentists’ ethical and professional duties in addition to its scientific assessment of the risk to which the ADA refers. Efforts to clarify dentists’ ethical obligations and to encourage dentists to treat patients with HIV infection with compassion may be commendable, but the question under the statute is one of statistical likelihood, not professional responsibility. Without more information on the manner in which the American Dental Association formulated this Policy, we are unable to determine the Policy’s value in evaluating whether petitioner’s assessment of the risks was reasonable as a matter of law.

The court considered materials submitted by both parties on the cross motions for summary judgment. The petitioner was required to establish that there existed a genuine issue of material fact. Evidence which was merely colorable or not significantly probative would not have been sufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 249–250 (1986).

We acknowledge the presence of other evidence in the

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record before the Court of Appeals which, subject to further arguments and examination, might support affirmation of the trial court’s ruling. For instance, the record contains substantial testimony from numerous health experts indicating that it is safe to treat patients infected with HIV in dental offices. App. 66–68, 88–90, 264–266, 268. We are unable to determine the import of this evidence, however. The record does not disclose whether the expert testimony submitted by respondent turned on evidence available in September 1994. See *id.*, at 69–70 (expert testimony relied in part on materials published after September 1994).

There are reasons to doubt whether petitioner advanced evidence sufficient to raise a triable issue of fact on the significance of the risk. Petitioner relied on two principal points: First, he asserted that the use of high-speed drills and surface cooling with water created a risk of airborne HIV transmission. The study on which petitioner relied was inconclusive, however, determining only that “[f]urther work is required to determine whether such a risk exists.” Johnson & Robinson, *Human Immunodeficiency Virus-1 (HIV-1) in the Vapors of Surgical Power Instruments*, 33 *J. of Medical Virology* 47, 47 (1991). Petitioner’s expert witness conceded, moreover, that no evidence suggested the spray could transmit HIV. His opinion on airborne risk was based on the absence of contrary evidence, not on positive data. App. 166. Scientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment. See *General Electric Co. v. Joiner*, 522 U. S. ___, ___ (1997) (slip op., at 7, 9).

Second, petitioner argues that, as of September 1994, CDC had identified seven dental workers with possible occupational transmission of HIV. See U. S. Dept. of Health and Human Services, *Public Health Service, CDC, HIV/AIDS Surveillance Report*, vol. 6, no. 1, p. 15, tbl. 11

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(Mid-year ed. June 1994). These dental workers were exposed to HIV in the course of their employment, but CDC could not determine whether HIV infection had resulted. *Id.*, at 15, n. 3. It is now known that CDC could not ascertain whether the seven dental workers contracted the disease because they did not present themselves for HIV testing at an appropriate time after their initial exposure. Gooch et al., Percutaneous Exposures to HIV-Infected Blood Among Dental Workers Enrolled in the CDC Needlestick Study, 126 J. American Dental Assn. 1237, 1239 (1995). It is not clear on this record, however, whether this information was available to petitioner in September 1994. If not, the seven cases might have provided some, albeit not necessarily sufficient, support for petitioner's position. Standing alone, we doubt it would meet the objective, scientific basis for finding a significant risk to the petitioner.

Our evaluation of the evidence is constrained by the fact that on these and other points we have not had briefs and arguments directed to the entire record. In accepting the case for review, we declined to grant certiorari on question five, which asked whether petitioner raised a genuine issue of fact for trial. Pet. for Cert. i. As a result, the briefs and arguments presented to us did not concentrate on the question of sufficiency in light all of the submissions in the summary judgment proceeding. "When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge v. Williams*, 397 U. S. 471, 476, n. 6 (1970). This consideration carries particular force where, as here, full briefing directed at the issue would help place a complex factual record in proper perspective. Resolution of the issue will be of importance to health care workers not just for the result but also for the precision

Opinion of the Court

and comprehensiveness of the reasons given for the decision.

We conclude the proper course is to give the Court of Appeals the opportunity to determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk. In remanding the case, we do not foreclose the possibility that the Court of Appeals may reach the same conclusion it did earlier. A remand will permit a full exploration of the issue through the adversary process.

The determination of the Court of Appeals that respondent's HIV infection was a disability under the ADA is affirmed. The judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

STEVENS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 97-156

RANDON BRAGDON, PETITIONER v. SIDNEY
ABBOTT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[June 25, 1998]

JUSTICE STEVENS, with whom JUSTICE BREYER joins,
concurring. >

The Court's opinion demonstrates that respondent's HIV infection easily falls within the statute's definition of "disability." Moreover, the Court's discussion in Part III of the relevant evidence has persuaded me that the judgment of the Court of Appeals should be affirmed. I do not believe petitioner has sustained his burden of adducing evidence sufficient to raise a triable issue of fact on the significance of the risk posed by treating respondent in his office. The Court of Appeals reached that conclusion after a careful and extensive study of the record; its analysis on this question was perfectly consistent with the legal reasoning in JUSTICE KENNEDY's opinion for the Court; and the latter opinion itself explains that petitioner relied on data that was inconclusive and speculative at best, see *ante*, at 27-28. Cf. *General Electric Co. v. Joiner*, 522 U. S. ___ (1997).

There are not, however, five Justices who agree that the judgment should be affirmed. Nor does it appear that there are five Justices who favor a remand for further proceedings consistent with the views expressed in either JUSTICE KENNEDY's opinion for the Court or the opinion of THE CHIEF JUSTICE. Because I am in agreement with the

STEVENS, J., concurring

legal analysis in JUSTICE KENNEDY's opinion, in order to provide a judgment supported by a majority, I join that opinion even though I would prefer an outright affirmation. Cf. *Screws v. United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result).

GINSBURG, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 97-156

RANDON BRAGDON, PETITIONER v. SIDNEY
ABBOTT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[June 25, 1998]

JUSTICE GINSBURG, concurring.

HIV infection, as the description set out in the Court's opinion documents, *ante*, at 8-10, has been regarded as a disease limiting life itself. See Brief for American Medical Association as *Amicus Curiae* 20. The disease inevitably pervades life's choices: education, employment, family and financial undertakings. It affects the need for and, as this case shows, the ability to obtain health care because of the reaction of others to the impairment. No rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible. I am therefore satisfied that the statutory and regulatory definitions are well met. HIV infection is "a physical . . . impairment that substantially limits . . . major life activities," or is so perceived, 42 U. S. C. §§12102(2)(A),(C), including the afflicted individual's family relations, employment potential, and ability to care for herself, see 45 CFR §84.3(f)(2)(ii) (1997); 28 CFR §41.31(b)(2) (1997).

I further agree, in view of the "importance [of the issue] to health care workers," *ante*, at 28, that it is wise to re-
mand, erring, if at all, on the side of caution. By taking
this course, the Court ensures a fully informed determina-
tion whether respondent Abbott's disease posed "a signifi-

GINSBURG, J., concurring

cant risk to the health or safety of [petitioner Bragdon] that [could not] be eliminated by a modification of policies, practices, or procedures . . .” 42 U. S. C. §12182(b)(3).

SUPREME COURT OF THE UNITED STATES

No. 97-156

RANDON BRAGDON, PETITIONER v. SIDNEY ABBOTT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 25, 1998]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, and with whom JUSTICE O’CONNOR joins as to Part II, concurring in the judgment in part and dissenting in part.

I

Is respondent—who has tested positive for the human immunodeficiency virus (HIV) but was asymptomatic at the time she suffered discriminatory treatment—a person with a “disability” as that term is defined in the Americans with Disabilities Act of 1990 (ADA)? The term “disability” is defined in the ADA to include:

- “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - “(B) a record of such an impairment; or
 - “(C) being regarded as having such an impairment.”
- 42 U. S. C. §12102(2).

It is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry. The Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made “with respect to an individual.” Were this

Opinion of REHNQUIST, C. J.

not sufficiently clear, the Act goes on to provide that the "major life activities" allegedly limited by an impairment must be those "of such individual." §12102(3)(A).

The individualized nature of the inquiry is particularly important in this case because the District Court disposed of it on summary judgment. Thus all disputed issues of material fact must be resolved against respondent. She contends that her asymptomatic HIV status brings her within the first definition of a "disability."¹ She must therefore demonstrate, *inter alia*, that she was (1) physically or mentally impaired and that such impairment (2) substantially limited (3) one or more of her major life activities.

Petitioner does not dispute that asymptomatic HIV-positive status is a physical impairment. I therefore assume this to be the case, and proceed to the second and third statutory requirements for "disability."

According to the Court, the next question is "whether reproduction is a major life activity." *Ante*, at 11. That, however, is only half of the relevant question. As mentioned above, the ADA's definition of a "disability" requires

¹ Respondent alternatively urges us to find that she is disabled in that she is "regarded as" such. 42 U. S. C. §12102(2)(C). We did not, however, grant certiorari on that question. While respondent can advance arguments not within the question presented in support of the judgment below, *Trans World Airlines, Inc. v. Thurston*, 469 U. S. 111, 119, n. 14 (1985); *Dandridge v. Williams*, 397 U. S. 471, 475, n. 6 (1970), we have rarely addressed arguments not asserted below. It was the United States, not respondent, that asserted the "regarded as" argument below. The Court of Appeals declined to address it, as should we. In any event, the "regarded as" prong requires a plaintiff to demonstrate that the defendant regarded him as having "such an impairment" (i.e., one that substantially limits a major life activity). 42 U. S. C. §12102(2)(C). Respondent has offered no evidence to support the assertion that petitioner regarded her as having an impairment that substantially limited her ability to reproduce, as opposed to viewing her as simply impaired.

that the major life activity at issue be one "of such individual." §12102(2)(A). The Court truncates the question, perhaps because there is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction² (assuming for the moment that reproduction is a major life activity at all). At most, the record indicates that after learning of her HIV status, respondent, whatever her previous inclination, conclusively decided that she would not have children. App. 14. There is absolutely no evidence that, absent the HIV, respondent would have had or was even considering having children. Indeed, when asked during her deposition whether her HIV infection had in any way impaired her ability to carry out any of her life functions, respondent answered "No." *Ibid.* It is further telling that in the course of her entire brief to this Court, respondent studiously avoids asserting even once that reproduction is a major life activity to her. To the contrary, she argues that the "major life activity" inquiry should not turn on a particularized assessment of the circumstances of this or any other case. Brief for Respondent Sidney Abbott 30-31.

But even aside from the facts of this particular case, the Court is simply wrong in concluding as a general matter that reproduction is a "major life activity." Unfortunately, the ADA does not define the phrase "major life activities." But the Act does incorporate by reference a list of such activities contained in regulations issued under the Reha-

² Calling reproduction a major life activity is somewhat inartful. Reproduction is not an activity at all, but a process. One could be described as breathing, walking, or performing manual tasks, but a human being (as opposed to a copier machine or a gremlin) would never be described as reproducing. I assume that in using the term reproduction, respondent and the Court are referring to the numerous discrete activities that comprise the reproductive process, and that is the sense in which I have used the term.

bilitation Act. 42 U. S. C. §12201(a); 45 CFR §84.3(j)(2)(ii) (1997). The Court correctly recognizes that this list of major life activities “is illustrative, not exhaustive,” *ante*, at 12, but then makes no attempt to demonstrate that reproduction is a major life activity in the same sense that “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” are.

Instead, the Court argues that reproduction is a “major” life activity in that it is “central to the life process itself.” *Ante*, at 11–12. In support of this reading, the Court focuses on the fact that “‘major’” indicates “‘comparative importance,’” *ibid.*; see also Webster’s Collegiate Dictionary 702 (10th ed. 1994) (“greater in dignity, rank, importance, or interest”), ignoring the alternative definition of “major” as “greater in quantity, number, or extent,” *ibid.* It is the latter definition that is most consistent with the ADA’s illustrative list of major life activities.

No one can deny that reproductive decisions are important in a person’s life. But so are decisions as to who to marry, where to live, and how to earn one’s living. Fundamental importance of this sort is not the common thread linking the statute’s listed activities. The common thread is rather that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual. They are thus quite different from the series of activities leading to the birth of a child.

Both respondent, Brief for Respondent Sidney Abbott 20, n. 24, and the United States as *amicus curiae*, Brief for United States as *Amicus Curiae* 13, argue that reproduction must be a major life activity because regulations issued under the ADA define the term “physical impairment” to include physiological disorders affecting the reproductive system. 28 CFR §36.104 (1997). If reproduction were not a major life activity, they argue, then it would have made little sense to include the reproductive

disorders in the roster of physical impairments. This argument is simply wrong. There are numerous disorders of the reproductive system, such as dysmenorrhea and endometriosis, which are so painful that they limit a woman’s ability to engage in major life activities such as walking and working. And, obviously, cancer of the various reproductive organs limits one’s ability to engage in numerous activities other than reproduction.

But even if I were to assume that reproduction is a major life activity of respondent, I do not agree that an asymptomatic HIV infection “substantially limits” that activity. The record before us leaves no doubt that those so infected are still entirely able to engage in sexual intercourse, give birth to a child if they become pregnant, and perform the manual tasks necessary to rear a child to maturity. See App. 53–54. While individuals infected with HIV may choose not to engage in these activities, there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a “limit” on one’s own life activities.

The Court responds that the ADA “addresses substantial limitations on major life activities, not utter inabilities.” *Ante*, at 14. I agree, but fail to see how this assists the Court’s cause. Apart from being unable to demonstrate that she is utterly unable to engage in the various activities that comprise the reproductive process, respondent has not even explained how she is less able to engage in those activities.

Respondent contends that her ability to reproduce is limited because “the fatal nature of HIV infection means that a parent is unlikely to live long enough to raise and nurture the child to adulthood.” Brief for Respondent Sidney Abbott 22. But the ADA’s definition of a disability is met only if the alleged impairment substantially “limits” (present tense) a major life activity. 42 U. S. C. §12102(2)(A). Asymptomatic HIV does not presently limit

respondent's ability to perform any of the tasks necessary to bear or raise a child. Respondent's argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease "disabled" here and now because of some possible future effects.

In my view, therefore, respondent has failed to demonstrate that any of her major life activities were substantially limited by her HIV infection.

II

While the Court concludes to the contrary as to the "disability" issue, it then quite correctly recognizes that petitioner could nonetheless have refused to treat respondent if her condition posed a "direct threat." The Court of Appeals affirmed the judgment of the District Court granting summary judgment to respondent on this issue. The Court vacates this portion of the Court of Appeals' decision, and remands the case to the lower court, presumably so that it may "determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk." *Ante*, at 29. I agree that the judgment should be vacated, although I am not sure I understand the Court's cryptic direction to the lower court.

"[D]irect threat" is defined as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aides or services." §12182(b)(3). This statutory definition of a direct threat consists of two parts. First, a court must ask whether treating the infected patient *without precautionary techniques* would pose a "significant risk to the health or safety of others." *Ibid*. Whether a particular risk is significant depends on:

"(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the

carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 288 (1987).

Even if a significant risk exists, a health practitioner will still be required to treat the infected patient if "a modification of policies, practices, or procedures" (in this case, universal precautions) will "eliminat[e]" the risk. §12182(b)(3).

I agree with the Court that "the existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation," as of the time that the decision refusing treatment is made. *Ante*, at 23. I disagree with the Court, however, that "[i]n assessing the reasonableness of petitioner's actions, the views of public health authorities . . . are of special weight and authority." *Ante*, at 24. Those views are, of course, entitled to a presumption of validity when the actions of those authorities themselves are challenged in court, and even in disputes between private parties where Congress has committed that dispute to adjudication by a public health authority. But in litigation between private parties originating in the federal courts, I am aware of no provision of law or judicial practice that would require or permit courts to give some scientific views more credence than others simply because they have been endorsed by a politically appointed public health authority (such as the Surgeon General). In litigation of this latter sort, which is what we face here, the credentials of the scientists employed by the public health authority, and the soundness of their studies, must stand on their own. The Court cites no authority for its limitation upon the courts' truth-finding function, except the statement in *School Bd. of Nassau Cty. v. Arline*, 480 U. S., at 288, that in making findings regarding the risk of

Opinion of REHNQUIST, C. J.

contagion under the Rehabilitation Act, "courts normally should defer to the reasonable medical judgments of public health officials." But there is appended to that dictum the following footnote, which makes it very clear that the Court was urging respect for *medical* judgment, and not necessarily respect for "official" medical judgment over "private" medical judgment: "This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied." *Id.*, at 288, n. 18.

Applying these principles here, it is clear to me that petitioner has presented more than enough evidence to avoid summary judgment on the "direct threat" question. In June 1994, the Centers for Disease Control and Prevention published a study identifying seven instances of possible transmission of HIV from patients to dental workers. See *Ante*, at 27. While it is not entirely certain whether these dental workers contracted HIV during the course of providing dental treatment, the potential that the disease was transmitted during the course of dental treatment is relevant evidence. One need only demonstrate "risk," not certainty of infection. See *Arline, supra*, at 288 ("the probabilities the disease will be transmitted" is a factor in assessing risk). Given the "severity of the risk" involved here, *i.e.*, near certain death, and the fact that no public health authority had outlined a protocol for *eliminating* this risk in the context of routine dental treatment, it seems likely that petitioner can establish that it was objectively reasonable for him to conclude that treating respondent in his office posed a "direct threat" to his safety.

In addition, petitioner offered evidence of 42 documented incidents of occupational transmission of HIV to healthcare workers other than dental professionals. App. 106. The Court of Appeals dismissed this evidence as irrelevant because these health professionals were not den-

Opinion of REHNQUIST, C. J.

tists. 107 F. 3d 934, 947 (CA1 1997). But the fact that the health care workers were not dentists is no more valid a basis for distinguishing these transmissions of HIV than the fact that the health care workers did not practice in Maine. At a minimum, petitioner's evidence was sufficient to create a triable issue on this question, and summary judgment was accordingly not appropriate.

Opinion of O'CONNOR, J.

SUPREME COURT OF THE UNITED STATES

No. 97-156

RANDON BRAGDON, PETITIONER *v.* SIDNEY
ABBOTT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

[June 25, 1998]

JUSTICE O'CONNOR, concurring in the judgment in part
and dissenting in part.

I agree with THE CHIEF JUSTICE that respondent's claim of disability should be evaluated on an individualized basis and that she has not proven that her asymptomatic HIV status substantially limited one or more of her major life activities. In my view, the act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons—"caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"—listed in regulations relevant to the Americans with Disabilities Act of 1990. See 45 CFR §84.3(j)(2)(ii) (1997); 28 CFR §41.31(b)(2) (1997). Based on that conclusion, there is no need to address whether other aspects of intimate or family relationships not raised in this case could constitute major life activities; nor is there reason to consider whether HIV status would impose a substantial limitation on one's ability to reproduce if reproduction were a major life activity.

I join in Part II of THE CHIEF JUSTICE's opinion concurring in the judgment in part and dissenting in part, which concludes that the Court of Appeals failed to properly de-

termine whether respondent's condition posed a direct threat. Accordingly, I agree that a remand is necessary on that issue.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. lists	re: Judicial Selection Meeting (6 pages)	07/09/1998	P2, P5

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Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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003. memo	Charles Ruff et al to POTUS; re: Court of Federal Claims Decision Memorandum (4 pages)	n.d.	P2, P5

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004. note	Paul Morris & Eldie Acheson to Mark Childress & Sarah Wilson; re: Judges (1 page)	06/04/1998	P2, P5

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005. agenda	re: Possible Judicial Nominations and So Forth (1 page)	07/09/1998	P2, P5

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United States Senate
WASHINGTON, DC 20510-3201

June 18, 1998

137-452

Dear Mr. President:

A long-standing arrangement initiated by this office establishes a system whereby my colleague, Senator D'Amato, will recommend a candidate to fill every fourth vacancy on the Federal District Court in New York.

In keeping with this tradition, it is my pleasure to forward to you a letter and supporting material from Senator D'Amato recommending Norman A. Mordue to fill an existing vacancy for the United States District Court in the Northern District. Mr. Mordue has my full confidence and support. Please contact Senator D'Amato directly for additional particulars.

Respectfully,



The President
The White House
Washington, D.C. 20500

Attachments

United States Senate

WASHINGTON, DC 20510-3202

June 17, 1998

The Honorable Daniel Patrick Moynihan
United States Senator
464 Senate Russell Building
Washington, DC 20510

Dear Pat,

I am most pleased to forward to you the resume and curriculum vitae of New York State Supreme Court Justice Norman A. Mordue, a potential nominee for an existing vacancy on the United States District Court in the Northern District.

Judge Mordue is a distinguished jurist; an educator at his alma mater, Syracuse University College of Law; and a ten year veteran of the Onondaga County District Attorney's office where he rose to the position of Chief Assistant District Attorney.

Judge Mordue is a native of Elmira, New York but has resided in Syracuse since ending his military service as a Captain in the U.S. Army. Of significant note, he was awarded the Bronze Star, Purple Heart, and Distinguished Service Cross for acts of valor while under fire in the field in Viet Nam. He is a family man who serves his community and is respected by all who know him as professional and wholesome.

I think that you will find, as a result of your own inquiries, that Judge Mordue is the kind of person who can serve with distinction on the Federal Bench and will commend him to the President, according to our long-standing agreement for recommendation of qualified candidates for the federal bench in New York.

Please keep me apprised as developments occur with respect to this candidate.

Sincerely,



Alfonse M. D'Amato
United States Senator

AMD:mk
Attachments

HEADQUARTERS
1ST CAVALRY DIVISION (AIRMOBILE)
APO San Francisco 96490

GENERAL ORDERS
NUMBER 3779

7 July 1967

AWARD OF THE BRONZE STAR MEDAL FOR HEROISM

1. TC 320. The following AWARD is announced.

MORDUE, NORMAN A. OF108795 FIRST LIEUTENANT INFANTRY United States Army
Company C, 1st Battalion (Airborne), 12th Cavalry

Awarded: Bronze Star Medal with "V" Device

Date action: 2 May 1967

Theater: Republic of Vietnam

Reason: For heroism in connection with military operations against a hostile force. First Lieutenant Mordue distinguished himself by heroism in action on 2 May 1967, while serving as a platoon leader with Company C, 1st Battalion (Airborne), 12th Cavalry during an air assault operation near An Do, Republic of Vietnam. When another platoon became pinned down by a numerically superior hostile force, Lieutenant Mordue, in an attempt to deploy his men in a flanking movement, came under intense enemy small arms fire. He immediately directed his maneuver elements to charge and succeeded in breaking through one sector of the enemy's defensive position and free the pinned down platoon. Lieutenant Mordue then moved forward through the withering enemy fire to organize his platoon's withdrawal. When aerial rocket artillery aircraft reached the area, Lieutenant Mordue braved concentrated small arms fire to mark his withdrawing platoon's position with smoke grenades. This well directed supporting fire, combined with Lieutenant Mordue's courageous leadership, permitted his platoon to pull out of the area without further incident. Lieutenant Mordue's courageous action and tenacious devotion to duty are in keeping with the highest traditions of the military service, and reflect great credit upon himself, his unit, and the United States Army.

Authority: By direction of the President, under the provisions of Executive Order 11046, 24 August 1962.

FOR THE COMMANDER:

OFFICIAL:

GEORGE W. CASEY
Colonel, GS
Chief of Staff


DONALD W. CONNELLY
LTC, AGC
Adjutant General

HEADQUARTERS
UNITED STATES ARMY VIETNAM
APO San Francisco 96375

GENERAL ORDERS
NUMBER 4667

14 September 1967

AWARD OF THE DISTINGUISHED SERVICE CROSS

1. TC 320. The following AWARD is announced.

MORDUE, NORMAN A OF108795 FIRST LIEUTENANT INFANTRY United States Army
Company C, 1st Battalion (Airborne), 12th Cavalry, 1st Cavalry Division,
APO 96490

Awarded: Distinguished Service Cross

Date action: 31 May 1967

Theater: Republic of Vietnam

Reason: For extraordinary heroism in connection with military operations involving conflict with an armed hostile force in the Republic of Vietnam: First Lieutenant Mordue distinguished himself by exceptionally valorous actions on 31 May 1967 while serving as platoon leader of an Airmobile platoon on a search and clear operation in the village of An Qui. When another platoon was pinned down by heavy machine gun and grenade fire from a numerically superior and well entrenched insurgent force, Lieutenant Mordue immediately led his platoon on a fierce attack to relieve the pressure on the engaged unit. Seeing two of his men wounded and pinned down, he grabbed a machine gun and braved withering enemy fire to rescue them. He then moved to the front of his platoon, completely ignoring his own safety, and personally destroyed two enemy bunkers and killed five hostile soldiers in the ensuing offensive. Severely wounded and unable to walk, Lieutenant Mordue refused medical aid and directed the withdrawal of his men as deadly artillery strikes were called in on the Viet Cong positions. His bravery and gallant leadership contributed greatly to the defeat of the enemy. First Lieutenant Mordue's extraordinary heroism and devotion to duty were in keeping with the highest traditions of the military service and reflect great credit upon himself, his unit, and the United States Army.

Authority: By direction of the President under the provisions of the Act of Congress, approved 25 July 1963.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. form	re: Part of Personal Data Questionnaire - Charles Gibbons (1 page)	n.d.	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 12689

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FOLDER TITLE:

Sotomayor - Miscellaneous [1]

2009-1007-F
jp1528

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

b(1) National security classified information [(b)(1) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



'You can get almost anything you want': A Baghdad street
IRAQ

For a Rich Few, Luxury

DESPITE U.N. TRADE SANCTIONS, BAGHDAD IS BECOMING a shopping mecca for luxury goods. Sleek BMWs, Suzuki Vitaras and Honda Civics stand out against the rusting taxis. A Benetton branch opened in February and movies like "Speed 2" and "Titanic" are showing up along with Indonesian tires, Japanese laptops and Italian sunglasses. For customers with disposable cash, which excludes about 99 percent of the population, "you can get almost anything you want," says one diplomat. Much of the merchandise arrives from Dubai, where it's moved to the port of Basra on small dhows that hug the shoreline, eluding multinational interdiction forces that can patrol only international waters. MIF officials say money from oil smuggling is fueling the illicit trade. "We don't see any major military items going in," says one.

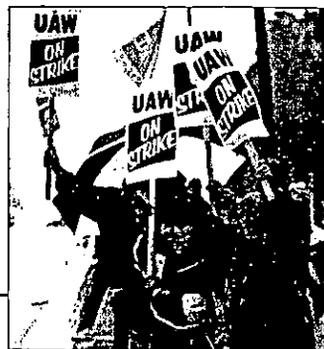
STRIKES

Don't Count on a Fast End

NEGOTIATORS IN THE GENERAL Motors strike seemed to be making progress by last weekend, but observers weren't betting on an early end to the standoff that could shutter most GM plants by the middle of this week. The reason: the United Auto Workers' convention is June 22, and union leaders won't want to take the stage with less than a full victory. At issue: plant employment levels and GM's efforts to cut costs.

Going into a convention during a headline-making strike energizes delegates, giving them a cause to rally round. "Internal union politics play zero role in this situation," says a UAW spokesman.

Outside GM's Flint, Mich., plant



UPDATE

A Patty Hearst Mini-Mystery

WHO SENT DRUGS TO PATTY Hearst Shaw? The tale, first reported in The New Yorker magazine, began Feb. 18, when a suspicious package was delivered to her Connecticut home. Shaw called the local police, but two Drug Enforcement Administration agents, tipped off by UPS that the box contained marijuana, showed up and questioned her for about an hour. Shaw thought that someone, perhaps the Feds, might be trying to hurt her chances for a presidential pardon on her 1976 bank-robbery conviction. Law-enforcement officials say there's "no evidence" linking Shaw or her husband to the package and no reason to believe it was tied to her pardon application. The episode, they say, is "a mystery."



Was she set up?



A hot collectible: The shack
UNABOMBER

Cabin Fever

THE SHACK WHERE UNABomber Theodore Kaczynski lived and plotted his deadly bombing campaign is in a guarded warehouse near Sacramento. But it is attracting interest from collectors, entrepreneurs and the just plain curious. While the cabin still belongs to Kaczynski, a federal magistrate would have to approve any plans for its disposal. "It may be a while before we deal with it," says Kaczynski's attorney, Quin Denvir. If it were sold, the proceeds would likely go to the Unabomber's victims. "We could probably make a fortune running cabin tours," says Randy Turtle, who operates SafeStore, where it is now housed. "But that seems like a demented thing to do."

CONVENTIONAL WISDOM WATCH

Pathetic Parties Edition

Some found last week's reference to Monica's waistline sexist. The CW would like to remind readers it's an equal opportunity bod-basher (cf. Bill Newt). Except when it comes to the CW.

Players	Conventional Wisdom
Dems	↓ The party that wants to make every tobacco lawyer a billionaire
GOPs	↓ The party that wants to destroy impeccable judicial nominees out of pure political spite
Reed	↔ Baby-faced Bible boy smooths GOP extremes. But watch the high profile, Ralphie
Swiss	↓ Neutrals turned away Jews in WWII; but happily brokered their gold fillings
McGwire	↑ Halfway home and none of the ugliness of the Maris chase. Go for 80. You, too, Junior
Palk	↑ Video artist suffers trouser drop in front of prez. Thank God he wasn't using Viagra

CLOCKWISE FROM TOP LEFT: DAIRYO BANDU/AP; RICH PEDRUSCELLI/AP; MATHON CURTIS/PAU; DAVE MERRIN/AP

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. fax	Helaine Grennfeld to Sarah Wilson; re; Sonia Sotomayor (5 pages)	06/08/1998	P2, P5

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69TH STORY of Level 1 printed in FULL format.

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The New York Times

September 25, 1992, Friday, Late Edition - Final

NAME: Sonia Sotomayor

SECTION: Section B; Page 16; Column 3; National Desk; Law Page

LENGTH: 1516 words

HEADLINE: A Breakthrough Judge: What She Always Wanted

BYLINE: By JAN HOFFMAN

BODY:

The views from Pavia & Harcourt's 12th-floor offices in midtown Manhattan are commanding, and the carpeted halls, in soft pastels, are adorned by modern Italian paintings. But Sonia Sotomayor, a partner at the commercial litigation firm, was boxing up her things the other day to take another job. The new one comes with a pay cut, scant carpeting, dingy lighting and a room without a view.

Ms. Sotomayor is thrilled.

"I've gotten letters from people who remember me in grammar school saying that this is what I wanted," she said.

What Ms. Sotomayor has wanted was to be a judge. Next Friday she is to take the oath for a seat on the Federal court of the Southern District of New York, the first Hispanic American to do so. She will also become one of seven women among the district's 58 judges.

But what attaches to her name in legal circles is less her breakthrough status than incredulity: Many of her colleagues say that in a time of skepticism about the quality of judicial appointments, Ms. Sotomayor seems too good to be true.

A Child of From the Projects

On paper, she comes across as a classic overachiever -- a child from the Bronx housing projects who graduated summa cum laude from Princeton, became an editor of the Yale Law Journal at Yale Law School, spent five years as a prosecutor with the Manhattan District Attorney, then developed her substantial civil practice as a commercial litigator.

But it was her pro bono activities that an admiring Senator Edward M. Kennedy of Massachusetts praised during her wrinkle-free confirmation hearing before the Senate Judiciary Committee in June.

For 12 years she was a top policy maker on the board of the Puerto Rican Legal Defense and Education Fund. She was also on the board of the State of New York Mortgage Agency, where she helped provide mortgage insurance coverage to low-income housing and AIDS hospices. In her leisure time she became a founding member of the New York City Campaign Finance Board, which distributes public money for city campaigns.

The New York Times, September 25, 1992

Senator Daniel Patrick Moynihan of New York, who recommended Ms. Sotomayor for the bench, gleefully recalled that when his judicial selection staff first suggested her name last year, they told him, "Have we got a judge for you!"

Not Every Inch Judicial

In person, with her round face and faint spray of summer freckles, Ms. Sotomayor looks younger than her 38 years and, wearing dangling earrings and a leather-and-gold bracelet, not every inch the judge. Neither does she have the studied charm nor dazzle factor of many judicial candidates who win accolades from lawyers and politicians.

Hers is a cumulative impression. She is plain-spoken and direct, good-humored but not exactly humorous. She is also seemingly without affectation, a trait that colleagues say helps her move as comfortably among her wealthy European clients as she does in her old Bronx neighborhood, where she recently returned to live. (The Federal Bureau of Investigation advised her not to disclose it.)

"You know anybody who wants to buy my cheap apartment in Carroll Gardens?" she asks in a street-scraped New York accent, referring to the section of Brooklyn.

She moved because Carroll Gardens is not in her judicial district. The courthouse is in Manhattan, but even on a judicial salary of \$129,000 -- modest compared with the potential earnings of a law partner -- Ms. Sotomayor has chosen moderation, and a longer commute from the Bronx, which is also in her district.

"I've never wanted to get adjusted to my income because I knew I wanted to go back to public service," she said. "And in comparison to what my mother earns and how I was raised, it's not modest at all." She paused, as if watching a slide show of memories, and laughed heartily. "I have no right to complain," she said.

Her mother, a nurse who recently retired from her job at a methadone clinic, raised Ms. Sotomayor and her younger brother, now a doctor, largely on her own. "I saw her working, being the emotional and spiritual leader in our family," Ms. Sotomayor said. "She had almost a fanatical emphasis on education. We got encyclopedias, and she struggled to make those payments. She kept saying, 'I don't care what you do, but be the best at it.' "

Her father, a tool-and-die worker with a third-grade education, died when Ms. Sotomayor was 9. Both parents were from Puerto Rico, and because her father spoke only Spanish, Ms. Sotomayor did not become fluent in English until after his death.

She had intended to become the Puerto Rican Nancy Drew, girl detective. That dream ended at the age of 7, when doctors told her she had diabetes and suggested she pick a more sedate career. She got a new idea from an episode of "Perry Mason" when a prosecutor character on the old television program said he did not mind losing when a defendant turned out to be innocent because his job was about justice.

"I thought, what a wonderful occupation to have," Ms. Sotomayor said. "And I made the quantum leap: If that was the prosecutor's job, then the guy who made

The New York Times, September 25, 1992

the decision to dismiss the case was the judge. That was what I was going to be."

Even as she speaks of the courts as often the "last refuge for the oppressed," Ms. Sotomayor, who has 400 cases awaiting her, defines a good judge as one who "has the ability to absorb a new area of law quickly, and has a commitment to take control of a case and move it forward."

When colleagues speak of her they emphasize her pragmatism. "I'm a down-to-earth litigator, and that's what I expect I'll be like as a judge," she said. "I'm not going to be able to spend much time on lofty ideals. I don't lose sight of the fact that they're important, but I also don't lose sight that 95 percent of the cases before most judges are fairly mundane. The cases that shake the world don't come along every day. But the world of the litigants is shaken by the existence of their case, and I don't lose sight of that, either."

Indeed, while she speaks of the pressure to crash-learn the Federal Rules of Criminal Procedure and the excitement of being fitted for black robes, she keeps returning to "the anxiety and the terror" that joining the Federal bench provokes when she thinks of the sentences and fines she will have to issue.

"I don't get paralyzed by making decisions, but I fear the extent to which I'll be tortured by the difficult decisions I'll have to make," she said.

John W. Fried, her bureau chief when she was a prosecutor, attests to Ms. Sotomayor's decision-making capacity, noting how she would scrupulously search for her own reasonable doubt before going forward with a case. Mr. Fried, now in private practice, said she "was the brightest, most eager assistant I ever worked with."

Then he laughed, recalling that when he met Ms. Sotomayor she asked where the courtroom was.

Although Ms. Sotomayor left the Manhattan District Attorney's office eight years ago, she remembers in detail the victims and the lasting effect that crime had on them. "The saddest crimes for me were the ones that my own people committed against each other," she said. She has received letters from Hispanic people from all walks of life expressing their pride in her confirmation. "I hope there's some greater comfort about the system to Hispanics because I'm there," she said.

Careful Responses

While Senator Moynihan is a Democrat, Ms. Sotomayor says she is politically independent, and her chatty expansiveness shuts down when she is asked about judicial philosophy. She allows that she is in the center. Then comes a tap dance around any questions on specific topics, her mouth twitching in amusement, her eyes bright, as if to say, "You're trying to cross-examine a cross examiner?"

How did she react to a recent appeals court ruling that disqualified Federal Judge H. Lee Sarokin from hearing a suit against tobacco companies because an opinion of his about the case appeared biased?

"I'm aware it will have an effect," she said. "Some judges will feel they don't have a right to be too passionate."

When Justice Clarence Thomas was introduced at a Second Judicial Circuit conference, was she among those who sat on her hands rather than give him a standing ovation?

"I'll take the Fifth," she said.

What does she think of the Federal Sentencing Guidelines, which many judges resent for limiting discretion?

"I am very aware of the controversy surrounding the guidelines" and expect to "experience some dislocation with them."

So what kind of music do you like?

"Soft rock," the centrist replied.

Judge Jose Cabranes of Federal District Court in New Haven, a longtime mentor who will be administering her oath, cautions that she will quickly find herself leading "a much more isolated life than before."

Ms. Sotomayor, who is divorced, said that becoming a judge is like joining a monastery. So she plans to spend this weekend before her swearing-in with friends in New Orleans, the last such fling for a while.

Rocking out, your honor-to-be?

"Yeah," she said, with a smile and a shrug, "I party."

GRAPHIC: Photo: "I'm a down-to-earth litigator, and that's what I expect I'll be like as a judge," said Sonia Sotomayor, who is about to take the oath for a seat on the Federal court of the Southern District of New York. She will be the first Hispanic American and one of only seven women in the district. (Marilynn K. Yee/The New York Times)

LANGUAGE: ENGLISH

LOAD-DATE: September 25, 1992

1ST STORY of Level 1 printed in FULL format.

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June 13, 1998, Saturday, Late Edition - Final

NAME: Sonia Sotomayor

SECTION: Section A; Page 1; Column 5; Metropolitan Desk

LENGTH: 1178 words

HEADLINE: G.O.P., Its Eyes On High Court, Blocks a Judge

BYLINE: By NEIL A. LEWIS

DATELINE: WASHINGTON, June 12

BODY:

Judge Sonia Sotomayor seemed like a trouble-free choice when President Clinton nominated her to an appeals court post a year ago. Hers was an appealing story: a child from the Bronx housing projects who went on to graduate summa cum laude from Princeton and become editor of the Yale Law Journal and then a Federal prosecutor.

Moreover, she had been a trial judge since 1992, when she was named to the bench by the last Republican president, George Bush.

But Republican senators have been blocking Judge Sotomayor's elevation to the appeals court for a highly unusual reason: to make her less likely to be picked by Mr. Clinton for the Supreme Court, senior Republican Congressional aides said in interviews.

The delay of a confirmation vote on Judge Sotomayor to the United States Court of Appeals for the Second Circuit, based in New York, is an example of the intense and often byzantine political maneuverings that take place behind the scenes in many judicial nominations. Several elements of the Sotomayor case are odd, White House officials and Democrats in Congress say, but the chief one is the fact that there is no vacancy on the Supreme Court, and no firm indication that there will be one soon. Nor is there any evidence of a campaign to put Judge Sotomayor under consideration for a seat if there were a vacancy.

Judge Sotomayor's nomination was approved overwhelmingly by the Senate Judiciary Committee in March. Of the judicial nominees who have cleared the committee in this Congress, she is among those who have waited the longest for a final vote on the floor.

Senate Republican staff aides said Trent Lott of Mississippi, the majority leader, has agreed to hold up a vote on the nomination as part of an elaborate political calculus; if she were easily confirmed to the appeals court, they said, that would put her in a position to be named to the Supreme Court. And Senate Republicans think that they would then have a difficult time opposing a Hispanic woman who had just been confirmed by the full Senate.

"Basically, we think that putting her on the appeals court puts her in the batter's box to be nominated to the Supreme Court," said one senior Republican

staff aide who spoke on the condition of anonymity. "If Clinton nominated her it would put several of our senators in a real difficult position."

Mr. Lott declined through a spokeswoman to comment.

Judge Sotomayor sits on Federal District Court in Manhattan, and the aides said some senators believe that her record on the bench fits the profile of an "activist judge," a description that has been used by conservatives to question a jurist's ability to construe the law narrowly. It is a description that Judge Sotomayor's supporters, including some conservative New York lawyers, dispute.

Senator Patrick Leahy of Vermont, the senior Democrat on the Judiciary Committee, was blunt in his criticism of the Republicans who are blocking a confirmation vote. "Their reasons are stupid at best and cowardly at worst," he said.

"What they are saying is that they have a brilliant judge who also happens to be a woman and Hispanic, and they haven't the guts to stand up and argue publicly against her on the floor," Senator Leahy said. "They just want to hide in their cloakrooms and do her in quietly."

The models for the strategy of putting candidates on appeals courts to enhance their stature as Supreme Court nominees are Judge Robert H. Bork and Judge Clarence Thomas. Both were placed on the Court of Appeals for the District of Columbia Circuit in part to be poised for nomination to the Supreme Court. Judge Bork was denied confirmation to the Supreme Court in 1987 and Judge Thomas was confirmed in 1991, in both cases after bruising political battles.

The foundation for the Republicans' strategy is based on two highly speculative theories: that Mr. Clinton is eager to name the first Hispanic person to the Supreme Court and that he will have such an opportunity when one of the current justices, perhaps John Paul Stevens, retires at the end of the current Supreme Court term next month.

Warnings about the possibility of Judge Sotomayor's filling Justice Stevens's seat was raised by the Wall Street Journal's editorial pages this month, both in an editorial and in an op-ed column by Paul A. Gigot, who often reflects conservative thinking in the Senate.

Although justices often announce their retirements at the end of a term, Justice Stevens has not given a clue that he will do so. He has, in fact, hired law clerks for next year's term. The Journal's commentary also criticized Judge Sotomayor's record, particularly her March ruling in a case involving a Manhattan business coalition, the Grand Central Partnership. She ruled that in trying to give work experience to the homeless, the coalition had violated Federal law by failing to pay the minimum wage.

Gerald Walpin, a former Federal prosecutor who is widely known in New York legal circles as a staunch conservative, took issue with the Journal's criticism.

"If they had read the case they would see that she said she personally approved of the homeless program but that as a judge she was required to apply the law as it exists," he said. "She wrote that the law does not permit an exception in this case. That's exactly what conservatives want: a nonactivist

The New York Times, June 13, 1998

judge who does not apply her own views but is bound by the law." Mr. Bush nominated Judge Sotomayor in 1992 after a recommendation from Daniel Patrick Moynihan, New York's Democratic Senator.

It also remains unclear how some Senate Republicans came to believe that Judge Sotomayor was being considered as a candidate for the Supreme Court. Hispanic bar groups have for years pressed the Clinton Administration to name the first Hispanic justice, but White House officials said they are not committed to doing so. The Hispanic National Bar Association has submitted a list of six candidates for the Supreme Court to the White House. But Martin R. Castro, a Chicago lawyer and official of the group, said Judge Sotomayor's name is not on the list.

On Sept. 30, the day of her confirmation hearing, Rush Limbaugh, the conservative radio talk show host, warned the Senate that Judge Sotomayor was an ultraliberal who was on a "rocket ship" to the Supreme Court. That day, Judge Sotomayor was questioned closely by Republicans.

In the end, the only Republicans to vote against her were Senator John Kyl of Arizona and Senator John Ashcroft of Missouri. The committee's other conservative members, including Orrin G. Hatch of Utah and Strom Thurmond of South Carolina, voted in her favor. Mr. Kyl and Mr. Ashcroft declined to comment today.

The confirmation delay comes as Ralph K. Winter, chief judge of the Second Circuit, has complained that unfilled vacancies on the court have created its worst backlog in history. In his annual report, Judge Winter, a conservative Republican, lamented that he had to declare judicial emergencies several times to allow retired judges and trial judges to sit on appeals panels.

GRAPHIC: Photo: Judge Sonia Sotomayor of Federal District Court in Manhattan. (Associated Press) (pg. B5)

Chart: "PROFILE: Sonia Sotomayor"

BORN: June 25, 1954.

BIRTHPLACE: New York City.

EDUCATION: Cardinal Spellman High School, New York City; Princeton University, B.A., 1976; Yale Law School, J.D., 1979.

CAREER: Assistant District Attorney, New York County District Attorney's Office, 1979-84; associate and then partner in the New York law firm Pavia & Harcourt, 1984-92; United States District Judge, Southern District of New York, 1992 to the present.

FAMILY: Divorced. No children.

HOBBIES: Running,
(pg. B5)

LANGUAGE: ENGLISH



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

CHAMBERS OF
SONIA SOTOMAYOR
UNITED STATES DISTRICT JUDGE

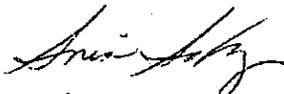
October 22, 1997

Hon. Orrin G. Hatch, Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I have enclosed for your review my responses to the additional questions posed by Senator Thurmond.

Very truly yours,



Sonia Sotomayor

cc: Sen. Leahy
tb
encls.

**RESPONSES TO QUESTIONS OF OCTOBER 21, 1997,
BY SENATOR STROM THURMOND FOR JUDGE SONIA SOTOMAYOR**

1. *Judge Sotomayor, you state in the Judiciary Committee Questionnaire regarding judicial activism, "Judges must provide fair and meaningful remedies for violations of constitutional and statutory rights to the parties before a court. Doing so can, at times, affect broad classes of individuals, may place affirmative burdens on governments and society and may require some administrative oversight functions by a court." Please give examples of proper judicial remedies "which would affect broad classes of individuals, which would require affirmative burdens on government and society, and which would require administrative oversight by a court."*

As I stated in my Judiciary Committee Questionnaire, courts should use such judicial remedies only in limited circumstances and "as a last resort." Where the parties themselves fashion remedies in class action settlements, for example, it may be unavoidable for a court to become involved in administering an agreed upon plan that affects a large class of litigants and imposes burdens on either government or society. Even in those circumstances, however, courts must exercise restraint and not permit remedies that go beyond the specific grievance at issue or which intrude upon the functions of other branches of government.

For example, last Spring, newspapers reported a major class action settlement affecting millions of Prudential policyholders in all 50 states. Plaintiffs in that action raised claims alleging widespread deceptive sales practices and various statutory violations by Prudential's sales agents. It is my understanding that the district court fashioned a judicial remedy consistent with the principles of restraint and deference that I emphasized in my Judiciary Committee Questionnaire. The district court chose to await the findings of a Multi-State Task Force investigating the company's activities, and the endorsement of affected state governments, before approving and overseeing the nationwide remediation of the thousands of policyholder claims.

2. Judge Sotomayor, a recent article in *The New Republic* on August 25, 1997, entitled "Defining Disability Down," the author referenced your recent opinion in *Bartlett v. New York State Bd. of Law Examiners* among others and stated, "Several Judges have recently ventured the enterprising claim that any person who is not performing up to his or her abilities in a chosen endeavor suffers from a learning disability within the meaning of the ADA." Is this an accurate representation of your holding in *Bartlett*? Please explain.

This is not an accurate representation of my holding in *Bartlett*. As I noted in footnote 4 of my decision denying defendants' motion for reconsideration, I reached my decision in that case only after determining -- on the basis of a painstaking examination of the voluminous scientific evidence placed before me -- that Ms. Bartlett's reading difficulties reflected a verifiable neurological impairment that required an accommodation under the ADA, and were not simply a function of "intelligence, educational, or emotional problems," for which the law does not provide an accommodation.

3. In *Bartlett*, you write, "I cannot find under these regulations that the practice of law is 'a specialized job or profession requiring extraordinary skill, prowess or talent.'" Please give examples of jobs or professions outside of athletics that would qualify as "specialized jobs or professions" under your interpretation of the regulations.

The regulation at issue states that a person should not be considered disabled if the person is "unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent." 29 C.F.R. Pt. 1630, App. Section 1630.2(j). The EEOC regulation, which I adhered to in my opinion, cites, aside from a baseball player with a bad elbow, only the example of a commercial airline pilot with poor vision. *Id.* My finding with respect to lawyering must be read in the full context of the governing regulation. As explained at length in my decision, any profession or job qualifies for an exemption from accommodation under the regulation to the extent that the impairment at issue affects a particular skill necessary in performing that job. The Bar Examiners in *Bartlett* represented that reading speed -- provided that a minimum threshold is met (which Ms. Bartlett concededly did meet) -- is not a necessary professional skill measured by the bar examination. Therefore, because Ms. Bartlett's impairment did not relate to a skill necessary to perform as a lawyer, her impairment was eligible for accommodation under the ADA.

4. *If your reasoning in Bartlett under the Americans with Disabilities Act is followed by other courts, do you believe it will have a significant impact on the ability of test-takers to receive special accommodations? If so, please explain?*

I do not anticipate that my reasoning in Bartlett, if applied by other courts, will have a significant impact on the ability of test-takers to receive special accommodations. My decision was based upon the unique facts of the specific case before me. As I emphasized throughout both of my Bartlett opinions, Ms. Bartlett made an unusually compelling showing -- supported with the presentation of an extraordinary amount of evidence -- confirming the existence of her neurologically based impairment.

5. *You held in Bartlett that the plaintiff should be compared not to the average population, but to the average person having comparable training, skills and abilities, in this case lawyers. Are you concerned that such a test will significantly increase claims brought under the ADA?*

It is the EEOC that has determined that a plaintiff bringing an action under the ADA for a disability affecting the major life activity of working should be compared to the "average person having comparable training, skills and abilities." As a judge, I considered it my obligation to give considerable deference to an interpretation promulgated by the executive agency charged by Congress to enforce its laws. Moreover, I consider it the sole responsibility of Congress to determine whether its laws need to be revised in order to avoid undesirable results, such as a significant increase in claims or accommodations.

6. *Please provide a copy of any published or unpublished ruling that you have issued in favor of the plaintiff in a case in which the Americans with Disabilities Act was the determining law in the case.*

With the exception of Bartlett, I have not issued any rulings -- published or unpublished -- in favor of a plaintiff in a case in which the Americans with Disabilities Act was the determining law in the case.

Anna S. Brown
10/22/97

QUESTIONS BY SENATOR THURMOND FOR JUDGE SONIA SOTOMAYOR

1. Judge Sotomayor, you state in the Judiciary Committee Questionnaire regarding judicial activism, "Judges must provide fair and meaningful remedies for violations of constitutional and statutory rights to the parties before a court. Doing so can, at times, affect broad classes of individuals, may place affirmative burdens on governments and society and may require some administrative oversight functions by a court." Please give examples of proper judicial remedies "which would affect broad classes of individuals, which would require affirmative burdens on governments and society, and which would require administrative oversight by a court."

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6. Please provide a copy of any published or unpublished ruling that you have issued in favor of the plaintiff in a case in which the Americans with Disabilities Act was the determining law in the case.

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SEPTEMBER 30, 1997, TUESDAY

SECTION: IN THE NEWS

LENGTH: 22735 words

HEADLINE: HEARING OF THE SENATE JUDICIARY COMMITTEE

SUBJECT: PENDING NOMINATIONS

CHAired BY: SENATOR ORRIN HATCH (R-UT)

NOMINEES:

RAYMOND C. FISHER, JR., TO BE ASSOCIATE ATTORNEY GENERAL

RONALD GILMAN, TO BE US CIRCUIT JUDGE FOR THE SIXTH CIRCUIT

SONIA SOTOMAYOR, TO BE US CIRCUIT JUDGE FOR THE SECOND CIRCUIT

RICHARD CASEY, TO BE US DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF
NEW YORK

JAMES GWIN, TO BE US DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO

DALE KIMBALL, TO BE US DISTRICT JUDGE FOR THE DISTRICT OF UTAH

ALGERNON MARBLEY, TO BE US DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF
OHIO

CHARLES SIRAGUSA, TO BE US DISTRICT JUDGE FOR THE WESTERN DISTRICT OF
NEW YORK

226 DIRKSEN OFFICE BUILDING

WASHINGTON, DC

2:00 PM

BODY:

SEN. ORRIN HATCH (R-UT): If we can begin. Today, the Judiciary Committee will hold a hearing on the nomination of Mr. Raymond C. Fisher of California for the position of Associate Attorney General of the United States.

Following this hearing, at 3:00 PM, the committee will consider the nominations of seven individuals for positions as United States Circuit and District Court Judges.

The position of Associate Attorney General is the number three position in our Justice Department. The Associate Attorney General assists the Attorney General in formulating and implementing departmental policies and programs pertaining to a broad range of civil justice matters.

The Associate Attorney General also supervises the non-criminal litigating components of the Justice Department including the Anti-Trust, Civil, Civil Rights and Tax Divisions.

Although efforts were made by some to eliminate the position of Associate Attorney General I believe it to be an office that is very important to the order of the administration of Justice. If confirmed to this position, Mr. Fisher, you will be responsible for coordinating the efforts of hundreds of attorneys engaged in the enforcement of some of our nations most significant laws.

In light of the scope and critical importance of the responsibilities of the Associate Attorney General, I am pleased that the President has finally sent us a nominee for the position.

It is unfortunate that the administration has moved somewhat slowly in nominating individuals to fill various high level vacancies within the department, such as the Assistant Attorney General -- or excuse me, the Associate Attorney General, the Solicitor General, and the Assistant Attorney

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in charge of the Criminal Division. That is now two years, two months without a Criminal Division head.

For my part as chairman of this committee, I can assure President Clinton and the American people that, as demonstrated by handling of the nomination of Eric Holder (sp) for the position of Deputy Attorney General, and now the nomination of Mr. Fisher as Associate Attorney General, his nominees for the Department of Justice will continue to receive thorough and prompt consideration by the committee.

Mr. Fisher, I note that you have had a very distinguished career. You served as a law clerk for the DC Circuit Judge Jay Scully Wright (sp), and then as a clerk for Supreme Court Justice William Brennan.

You've been a partner at a major Los Angeles firm and have enjoyed a distinguished public service record as well. You have tried, had extensive experience in complex litigation matters. For which you deserve accolades and I think much respect and I welcome you on behalf of the committee and am pleased by your willingness to serve the American people in this position of trust.

And I should note, however, that these are not the best of times for the department. Attorney General Reno's apparent unwillingness to appoint an independent counsel to investigate allegations of illegal fund raising by members of the administration casts a shadow over the entire department.

And I have to say in this regard I don't get all caught up in this business of phone calls made from government property. The law seems to indicate that that shouldn't be done and I think that most people try not to do that. But the fact of the matter is that I think that pales in significance compared to some of the allegations of misuse of soft money as hard money and some of the allegations concerning foreign influence in our political process.

And frankly, I don't see any reason in the world why the Attorney General should not request the appointment of an independent counsel. And I sincerely hope that General Reno will overcome any pressure she may be receiving from the White House and call for the appointment of an independent counsel. Because such an appointment will remove the appearance of any conflict that may exist and that's important in my eyes.

And Mr. Fisher, you're being nominated yourself to a position of great trust. You'll be advising our nations chief law enforcement officer on matters of serious national concern.

And although you naturally will feel loyalty to the administration which has forwarded your nomination, I hope this confirms that you'll be able to a all time stand above partisan politics and render the very best appropriate legal judgment that you can.

In the end the administration will be well served by that. I think this President knows that. At least my conversations with him indicates that he know that and expects that.

Remember, if confirmed, you serve not only the present administration but you serve all of us as American people as well. Your responsibility to all America must come before any partisan concerns. And I personally knowing you have confidence that you'll resist any political pressures that might be brought to bear on you. Be it from the White House or the Congress. You'll plenty of chance to have political pressures from the Congress I'm sure. My point is you'll give the Attorney General the benefit of your fine legal judgment and of your best legal judgment. So, I hope that's the case. I'll turn to Senator Torricelli who represents the minority at this time and then we'll swear you in shortly.

SEN. ROBERT TORRICELLI (D-NJ): Thank you, Mr. Chairman. I just want to point out I represent the minority, but I'm proud that we got equal numbers of votes in

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this committee as we stand here today. (Laughter.)

A rare moment in the Senate. It's a pleasure to see Mr. Campbell and Mr. Berman. Mr. Fisher, you are well served by having them as your introducers and advocates.

I want to welcome you to the committee as well, in what will be the completion of, I think, an extraordinarily talented group of individuals who will now be servicing Attorney General Reno.

I too hope that in your capacity, not simply with those direct responsibilities that you will possess, but in your advisory capacity to the Attorney General you will approach some obvious and extremely important issues on the merits with the respect for law and without regard to personal favoritism or partisanship. The chairman and I might disagree in interpretation of what that law might dictate but we do agree these judgments and the confidence in our system of justice for our people is so important. Having people of extraordinary integrity to make these decisions. And indeed in your own case to advise the Attorney General making them is very important to administration of justice in this country.

Mr. Chairman, I believe that Mr. Fisher is well suited for that role because he has been tested before. In times of, in our country, of great discord with the disturbances in Los Angeles that followed the unfortunate case of Rodney King. You were called upon and served the community well.

Serving as the General Counsel to the Christopher Commission, you received the praise of the Mayor of Los Angeles, who noted your professionalism, your knowledge of the law, your commitment to the community. I think, Mr. Chairman, that the President and the Attorney General have chosen well. And I'm very proud to be part of recommending this nomination.

SEN. HATCH: Well, thank you, Senator Torricelli.

Mr. Fisher if you would stand and raise your right hand.

(Nominee is sworn in.)

Thank you.

We are delighted to have two of our good colleagues here with us today -- people that I have great respect for -- both of them -- from two respective parties from California, and I can't remember which one of you is the more senior. I think you are, Howard, aren't you?

Shall we start with you, or do you want to with Tom?

REP. HOWARD BERMAN (D-CA) Oh, I'd prefer to start with the representative of the party in control of the Senate right now.

(Laughter.)

SEN. HATCH: That is so unlike you, you know.

(Laughter.)

SEN. HATCH: No, no, we're grateful to have both of you here. I didn't know which one to start with so we'll start with you, Congressman Campbell.

REP. TOM CAMPBELL (R-CA): Mr. Chairman, thank you. Senator Torricelli, it's a pleasure to see you here, and in once sense still be your colleague. I enjoyed our time together in the House.

What a pleasure and a unique opportunity for me to recommend favorable consideration for my friend, my colleague, my fellow Californian, Ray Fisher. In the interest of absolutely full disclosure but also I think to make an important point about bi- partisanship, I do wish to make public knowledge that Mr. Fisher helped me when I ran for United States Senate in 1992. Despite the fact that I am of the party of truth and light, and he was not.

SEN. HATCH: Well that's certainly going to happen to you, Mr. Fisher, as often

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as -- (laughter.)

REP. CAMPBELL: Nevertheless, he was not successful, so I hope he is more successful in this next effort. But that is as I say mostly in the interest of full disclosure, but also to show that we are speaking of a man here who I think will be very very careful against the temptation to which the chair referred -- which is a natural temptation.

I also note that my good friend and colleague, the Mayor of Los Angeles, has placed the highest trust in Ray Fisher by making him the president of the police commission at a very difficult time, as you noted and as Senator Torricelli noted.

The second area I wanted to comment on is his expertise in the field of law that he will be administering. As I think the chairman knows, I used to be a full time professor at Stanford. I'm now still on the faculty -- I only teach one class a year.

And I would stay, it's very important to recognize that we are, and the Department of Justice -- if he's confirmed -- will be in the presence of an expert in complex litigation, and really very knowledgeable individual, as well, in the field of anti-trust, which is a field that I used to teach. Particularly pleasing to me, is the alternative dispute resolution work that Mr. Fisher has done, because to both of us, I know, Mr. Chairman, that is critical.

I note in passing, but for me it would be determinative, that he was President of the Stanford Law Review. That should close any question as to his confirmation.

And lastly, I wanted to speak about his management ability. So, I begin with non-partisanship, I speak about knowledge and expertise in the fields he'll be administering -- complex litigation, anti-trust in particular -- and then management.

It's significant to me that he not only was the managing partner of Tuttle and Taylor (sp), but he was the founding and managing partner of Heller-Erman (sp) in Los Angeles. And that's really quite a testimony to Mr. Fisher's ability to handle the management part of the task he now undertakes.

With that I appreciate your continual and heartfelt kindness to me and urge very favorable consideration for this qualified -- exceptionally well qualified and, I believe you will find, distinguished nominee for the appointment of the Associated Attorney General.

SEN. HATCH: Thank you. That's high praise, Mr. Fisher, coming from, I think, one of the best legal minds in the Congress, for whom I have inestimable respect. And we're honored that you guys would come here. We have a vote going on, but I'm going to keep going for another 10 minutes so that we can let you go, because I know you're busy. And that's one reason why I decided to start up at this time.

Let just mention for the record that Senator Feinstein will be here. She also wanted to introduce you. But she's going to vote and then come, and I'll probably turn the committee over to her or whoever is here until we can get back from that vote. So, we'd like to proceed.

Mr. Berman we're honored, as you know, to have you here as well. We know what an influential member of the house you are, and what an influential person in California you are. So it's very important for you to take the time to come here and I think it's a tribute also to Mr. Fisher.

REP. BERMAN: Well, thank you very much, Mr. Chairman, and it's my honor to come here both to the committee and on behalf of Ray Fisher.

For twenty years he was my constituent. The last reapportionment, unfortunately, I did not control and so I was moved out of his area by a few blocks.

But I have known him for 22 years. And the man is a superb lawyer, a very

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rigorous and tough-minded individual who has been put in some of the most difficult positions.

I first met him when, soon after Edmund G. Brown, Jr. was elected Governor of California, when he was picked to run the whole labor management relations. Well, here you have a new Democratic governor elected with the strong backing of organized labor in charge of negotiating and bargaining with some of those very same unions.

This man calls them as he sees them. He is fiercely independent. He has showed a sensitivity in his job as president of the LA Police Commission, a position to which he was appointed by Mayor Richard Riordan at the most difficult time imaginable for Los Angeles, both to help build the guideline to strengthen the department and then deal with the very sensitive transition from one police chief to another. He did the job superbly.

My colleague, Tom Campbell, has mentioned that he was not only a prestigious litigator in a very well known Los Angeles firm, but in reference to your comments regarding his organizational skills, started and built the new office of a very well known San Francisco law firm in Los Angeles, exercising the organizational management and supervisory responsibilities that would be necessary in this job.

Ray Fisher will do the job the way it's meant to be done. He really is an excellent appointment and I hope you will see it the same way and confirm him, and I thank you very much for letting me have the time to appear on his behalf. SEN. HATCH: Well, thank you, Congressman Berman. We appreciate both of you being here and we appreciate you taking your time, and I'm sure Mr. Fisher and his wife and family do as well. You're both great. Thanks for being here with us.

REP. BERMAN: And I might add his wife, also a tremendously talented person in her own right, who has taught public schools in my district for a number of years now and if confirmed will probably have to leave that position. So, I have mixed feelings but it's a great family.

SEN. HATCH: Well, that's great. Thank you and we happy to have you here Mrs. Fisher as well. We appreciate that. Mr. Fisher do you have any comments you'd care to make at the beginning of this hearing?

MR. RAYMOND FISHER: If I might, Senator, I really do appreciate the kindness and courtesies you all have shown me and the kind words of my good friends Howard Berman and Tom Campbell. If I may introduce my family at this point would that be appropriate?

SEN. HATCH: Sure, we'd love to have you do that.

MR. FISHER: I'd like to introduce my wife, Nancy Fisher, who is a public high school teacher as you've heard.

My son, Jeff, who is also a public high school teacher and Jeff is representing the rest of our family. We have three grandchildren, two with Jeff and Rose his wife, Megan and Andrew. Megan is in kindergarten so she can't come and Andrew is a little to young.

And then our daughter, Amy -- Jeff's sister -- is an attorney in Northern California and married to her husband, James Allers (sp), and they have our newest granddaughter, Madeleine. So, Jeff is representing the younger part of the family, two generations.

We also have our friends from Maryland, for almost 30 years, the Rosenbergs (sp), Conrad and Judy Rosenberg, who are very dear friends. Mark Steinberg (sp), who has come, on a red-eye almost, to be here with us from Los Angeles recently in the Justice Department.

Judge Kim Wardlaw (sp), who couldn't stay away from a second chance to be on the Judiciary Committee. And she's a terrific --

SEN. HATCH: You just love her, I can see -- (laughs).

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MR. FISHER: -- a terrific judge in the Central District of California.

And so we're delighted to have them here.

SEN. HATCH: Well, we're delighted to welcome all of you here and appreciate having you here.

MR. FISHER: I'd hoped and would like to introduce my associate, Ken Charnoff (sp), from Heller and is also back with me and will come with me if I am confirmed.

SEN. HATCH: Great, that's great. Welcome.

MR. FISHER: I am very honored that Attorney General Janet Reno has recommended me, and that President Clinton has nominated me for the position of Associate Attorney General.

For me the Department of Justice has always represented the highest ideals of the legal profession, which is a commitment to excellence through independent judgement and to guaranteeing the rights of all Americans.

Serving in this department would be an extraordinarily high calling and I am grateful for the opportunity, if I am confirmed, of working with the Attorney General and Deputy Attorney General Eric Holder and overseeing the operations and working of the department and working with this committee.

As you know the associate attorney general does have responsibility essentially for the non criminal side of the department and does have a tremendous impact on the areas that affect deeply America lives such as the environment, the end of discrimination, anti-trust issues, ensuring competition in our market based economy. And it also has responsibility for a number of programs that directly affect law enforcement.

For roughly 30 years many of these issues have been the heart of my law practice which has ranged over a broad-spectrum anti-trust and civil issues as well as a variety of constitutional law matters.

As a trial attorney and as a general litigator I have represented a wide variety of businesses and individuals and as has been now mentioned I have also served as the managing partner of two very fine law firms. And I do expect these experiences will enable me to carry out my duties as associate attorney general.

I should say that my experience in the private practice of law has brought me face to face with the best aspects of our civil justice system, which is so important to all of us. By in large it works to resolve various controversies big and small but it has also shown me that there are some trouble spots including high costs, delays and regrettably uncivil tactics at many times.

Both as a courtroom trial attorney but also as a mediator charged with resolving problems outside the courtroom I have come to appreciate that good lawyering is not just an ability to win in court at all costs. It also involves an ability, when appropriate, to find ways of reaching just and sensible solutions outside of litigation particularly in the rapidly evolving area of alternative dispute resolution.

It is this kind of experience, real world experience, I hope to bring to the department. I would also look forward to the management side of dealing with the department drawing upon my experience in private law practice as well as the leadership function that I've performed with respect to the Los Angeles Police Commission and certain other organizations that I've been involved with.

Because there are very talented people in the department and I would try to use my experience to help them produce effective and efficiently as possible.

In reference to law enforcement efforts it is part of the associates responsibility to work to assist state and local governments in law enforcement and crime prevention efforts. And here too I would draw upon my prior experience largely in the public sector where I have worked on the Christopher Commission as mentioned. I have been a police commissioner and most recently

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served as President of the Los Angeles Police Commission.

I have seen first hand and at street level the realities of law enforcement, which involves not only the leadership issues confronting command officers, but to the responsibilities and problems confronting patrol officers on the beat. And I would definitely draw on that experience. I have several lessons that I think I can bring from that experience just briefly. Lesson number one I must say is the enormous respect I have developed for the men and women who participate in the difficult, dangerous, sometimes thankless and always vital task of law enforcement.

Secondly, my police commissioner experience has given me an appreciation for the viewpoint of state and local law enforcement officials as they work in cooperation with the federal government. And this goes to the heart of a successful community policing effort in our various communities.

And finally, I would simply say that combining my police commission experience with my family's long standing and multi generational, if you will, participation in public education has left me with a very special interest in issues of juvenile justice both in terms of prevention as well as enforcement. And I would draw upon my experiences in many years of working with children in our middle schools and high schools and the efforts that I undertook on behalf of the police department and police commission to bring the police department, our public and private schools, legislators and other civil organizations from non-profit to work on the various serious issue of juvenile and juvenile crime prevention. So, I thank you for allowing me to be here today. I thank you for all the courtesies that have been extended to me as I've had the opportunity to meet with you before today.

I, if am confirmed, look very much forward to working with all of you and I would be, of course, pleased to answer any questions you may have.

SEN HATCH: Well, thank you so much, Mr. Fisher. I'm going to have to run to vote. So, I'm going to turn the committee over to Senator Thurmond, if no one is here at recess, because I'm going to now have some questions for you when I return and it'll take me probably 15-20 minutes to get over to vote and get back -- assuming I don't get grabbed by everybody.

But that was an excellent statement and we look forward to questioning you know and asking some of the questions that the committee would like to have. So, Senator Thurmond will be in charge until I get back.

MR. FISHER: Thank you, Mr. Chairman.

SEN. STROM THURMOND (R-SC): Mr. Fisher we're glad to have you here.

MR. FISHER: Thank you, sir.

SEN. THURMOND: You have been nominated for one of the highest management positions at the Department of Justice. What experiences have you had to prepare you to be a top manager and administrator for a huge organization like the Department of Justice?

MR. FISHER: Senator I have had the experience of managing two law firms. So, I've had the experience of dealing with professionals as they carry out their activities and I think that --

SEN. THURMOND: Speak into your loudspeaker, so we can hear you.

MR. FISHER: Sure. I have had the experience of working as a managing partner of two law firms so I think I bring the experience of working with lawyers who are professionals and providing them the opportunity to carry out their duties. I've also most recently had the experience with the Los Angeles Police Department which has had some serious management issues and as the President of the Police Commission I was able to bring some experience and expertise to that endeavor.

SEN. THURMOND: Mr. Fisher, your Los Angeles Police Commission indulged a

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proposed ordinance in 1996 that would ban the manufacture and sale of certain handguns in Los Angeles. Do you believe that limiting the public's access to handguns is generally an effectual way to fight crime?

MR. FISHER: Senator, the ordinance that was being referred to was one that endorsed by the Los Angeles Police Department.

I believe in the right of people to hunt. I believe in the right of people to engage in target shooting for example, the lawful engage in sports. What the police departments are concerned about is the proliferation of particularly handguns, cheap Saturday night specials.

I've actually seen the body of a young police officer shot down in the streets by a 17 year old who was fleeing from a 7-Eleven with two six packs of beer turned around and shot a young police officer just two months out of the police academy. Shot him, killed him and left his two young children as orphans and his wife, of course, a widow. So, in that respect, I think this is important to keep the guns out of the hands of criminals, yeah.

SEN. THURMOND: Mr. Fisher, I'm concerned about the length of time it has taken the administration to nominate replacements for vacancies in the Department of Justice.

The Office of Associate Attorney General was vacant for six months before you were nominated. The Chief of the Criminal Division has been vacant for over two years.

If confirmed what will you do to make certain that nominees are quickly submitted for advise and consent positions in the Department of Justice.

MR. FISHER: Senator I will be working with the Attorney General and the Deputy Attorney General to pursue qualified candidates.

I understand that the Senate has an important function and an important role in advising to these appointments and I know that the department and the President are committed to getting the best- qualified candidates.

Sometimes that takes some time. But anything I can do to assist in that process I certainly will do so.

SEN. THURMOND: Mr. Fisher if you are confirmed you will have a major role in establishing policy for the Department of Justice. What are the primary goals on which you intend to focus?

MR. FISHER: Senator there are three that based on my examination of the department so far that I would like to focus on at least at the outset. First of those is to bring my management experience to bear on helping the Attorney General and the Deputy Attorney General manage the complexities of the department. And I think I can bring some experience and expertise to that. Secondly, I would like to keep repeating focus on juvenile justice, crime prevention and avoiding, as much as possible having kids dragged into lives of crime. I think I can bring both a perspective from the public education sector as well as the police sector.

And thirdly, based on my experience as a litigation attorney but also as a mediator I think there are tremendous opportunities to make an impact on the litigation functions of the department and throughout the country in the use of alternative dispute resolution. Those are areas where I think that I can make a contribution at the beginning.

SEN. THURMOND: I observed the able and beautiful senator from California just arriving. Would you care to endorse him?

SEN. DIANNE FEINSTEIN (D-CA): I would, Mr. Chairman.

I ran into both Representatives Campbell and Berman and they told me that they had been here and put in a good word, and so I thought I'd better show up and do the same thing and, if I may, I'll leave my statement for the record.

I think his biography amply identifies his qualifications. He is well known

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in the city of Los Angeles. I think his work on the Los Angeles Police Commission, his work for the Christopher Commission, his partnership in a very prestigious Los Angeles law firm all really stand him in very good stead for this position. So, if I may I won't take further time I'll just leave you --

SEN. THURMOND: Thank you.

SEN. FEINSTEIN: -- my statement for the record.

SEN. THURMOND: Incidentally, did you first suggest him for this position?

SEN. FEINSTEIN: I beg your pardon?

SEN. THURMOND: Did you first suggest him for this position?

SEN. FEINSTEIN: No. I wish I did. The Attorney General came up with this one all by herself.

MR. FISHER: Thank you very much.

SEN. FEINSTEIN: Thank you. Thank you, Mr. Chairman.

SEN. THURMOND: Thank you very much.

Mr. Fisher, you have anything else you want to say?

MR. FISHER: I simply, Senator, would like to affirm that I'd look forward to working with the members of this committee.

I enjoyed our conversation that we were able to have and I think those kind of constructive conversations can lead to a cooperative relationship at a personal level and also I think between the Senate and the department -- all of which I think is very helpful to all of us and to the American people.

SEN. THURMOND: Okay, the chairman has gone to vote -- he'll be back in just a minute. Let's take a recess till he comes back.

MR. FISHER: Thank you, Mr. Chairman.

SEN. THURMOND: He may have some more questions for you.

MR. FISHER: Thank you.

SEN. THURMOND: Now the audience feel free to talk now if you want to.

(Recess.)

(AUDIO BREAK)

MR. FISHER: -- would be about it.

There is also the line of cases, the Seattle case, where the court also found to be, on constitutional grounds, impermissible interference with the rights minorities or women to achieve lawful, affirmative action programs. And I think that certainly a signal issue that has to be addressed in the context of proposition 209. Proposition 209 was a general initiative and in the initiative process there isn't always the opportunity for fine tuning the legislation because it doesn't go through a committee process.

So, unfortunately I think that's one of the issues that has to be worked out in the courts as to whether or not Proposition 209 may have gone too far in terms of --

SEN. HATCH: It seems to me, lawful interpretation of Proposition 209, there are affirmative actions to quote the Seattle case is something that you can agree with while still upholding the constitutionality of Proposition 209.

MR. FISHER: Well, again Senator I recognize that the Supreme Court has indicated that affirmative action programs will be subject to strict scrutiny. I do understand that.

There are also question, again I am speaking in part because we've encountered some of the issues in Los Angeles where we had to deal with the diverse population and we had a very non diverse police workforce. So in some limited circumstances I think these are weighty issues that still have yet to be fully flushed out. And that's why I'm trying to be responsive as I am.

SEN. HATCH: Now, as you know, the department is required to defend the nation's law. Now what is your view of when the Department of Justice should elect not to defend an enacted statute?

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For instance, let me give you an illustration. The department recently decided not to defend a number of provisions that insure Medicaid and Medicare benefits for Christian Scientists. I must say that I personally am very troubled by that decision, because among these divisions there may arise constitutional questions.

In my view they're plainly not unconstitutional and should be defended in court and my personal view is that it's a dereliction for the department not to defend them. All I could ask for here is your commitment that you will revisit the department's litigation posture in that case and look it over carefully, and see if you can defend the statute.

MR. FISHER: I understand, Senator, that efforts have been made to redraft the statute to make it more broadly applicable and so, I would if confirmed certainly make it a priority of mine to review where that legislation is and how it can be defended.

It think the department's policy is to the extent that there is any reasonable basis to defend the statute. That is it's obligation so that is my understanding. SEN. HATCH: Alright, well, then the way I'm interpreting what you're saying here is that you find that the administration's position is correct in your view. Then you are basically trying to help us to write a statute that would remedy the defect.

MR. FISHER: I certainly look forward to working with the committee I think on a constructive basis. It think that is my understanding of one of the efforts that the department tries to engage in at least have a dialog with the committee.

SEN. HATCH: Okay. Mr. Fisher, although I recognize that you will not be responsible for criminal matters within the department, you will be in the position of advising the attorney general on numerous issues that may even overlap into the criminal area. As a consequence, I would like to ask you just a question or two about your thoughts about the recommendations for independent counsel. And your thoughts just on the independent counsel statute itself. First, do you believe that there is a conflict of interest, or at least the appearance of a conflict of interest, in having the Justice Department conducting an ongoing campaign finance investigation which clearly includes determining the extent to which a number of White House officials were aware of or conflicted in alleged violations of federal law?

MR. FISHER: Senator I have not been briefed on the area of the independent counsel on the facts and the lie. I have to say that I have the utmost trust in Attorney General Reno to do as she has repeatedly said she would. Which is to carefully look at the facts, carefully analyze the law and come to a decision as she sees appropriate without responding to pressure. And I believe her very much. She is a woman of the greatest integrity.

If I am confirmed and I am asked for my views about the matter, certainly would give her my best objective judgment.

But I don't know the facts, that it is a pending investigation and I would hesitate to go beyond that.

SEN. HATCH: Well, I recognize that you have just been nominated as Associate Attorney General and that as a consequence you have to fill us up with a degree of loyalty to the administration that nominates you.

Can you give us your commitment, however, that when asked to give your advise on sensitive matters such as whether or not to appoint an independent counsel to investigate the very people that have nominated you to this position? You will follow the law and will render your bests judgment unmoved by whatever your personal loyalties may be.

MR. FISHER: I can give you that commitment senator that is how I have tried to

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conduct myself in my public service to date.

SEN. HATCH: Well and that's the impression that I have from knowing you and knowing of your past background is that you'll call it the way it should be called. And I think that's very important because frankly she is being very badly misadvised at this time and I'm not the only one who thinks that.

I think virtually most everybody who knows anything about this thinks that but including a lot of the editorial boards of this country and especially the New York Times. But editorial boards are editorial boards. Sometimes they're right sometimes they're wrong.

What is important is that you give the best you can to this position and you will just serve whoever is attorney general and whoever is president if you don't do that. So, I'm just kind of bringing that home.

And I recognize that this is a tough position to be in but all I'm asking is that you do your duty because you represent all of us. And I would expect the same if it was a republican nominee here today for a republican president who maybe having some difficulties with his or her administration.

Now, one of the other areas for which you will be responsible is the anti-trust position and would you tell the committee for the record what experience you have in the areas of anti-trust. MR. FISHER: Senator, I have represented defendants in section two and section one monopolization that (strayed?) in trade cases. I have represented plaintiffs bringing similar claims. I've had experience under the (claymak?) in dealing with the Federal Trade Commission. So, I have a fairly broad experience. I'm not a specialist in anti-trust law but I am familiar with it's concept with the law and with the underlining economic theories I think. So, I think I have a fairly good understanding and grounding in anti-trust law.

SEN. HATCH: Tell us what your approach toward anti-trust litigation would be in the department and the enforcement of the nation's anti-trust laws. How are you going to approach that?

MR. FISHER: Well I would certainly in the first instance work closely with the Assistant Attorney General Joel Klein, who I happen to know and respect greatly. And there are a number of statutes including the ones I have mentioned.

Of course, more recently enacted statutes where the department has major responsibilities. I would certainly work with Attorney General Klein to make sure that those laws are being carried out as they are intended to be and that the interest of competition, free and open competition, in the country are well served.

SEN. HATCH: Thank you. Senator Thurmond, do have any further questions or comments.

SEN. THURMOND: Thank you, Mr. Chairman. I have already asked Ray a number of questions. I've already asked those. Thank you very much.

SEN. HATCH: Well, let me just say this. My experience in knowing you is that not only have you earned a very good reputation in the practice of law, but that you've given a lot to the community and that it hasn't just been an easy job being the community leader. These have been difficult jobs and you've given what you can to the community and have done so with distinction.

I think the administration should be complimented for nominating people like you to serve at Justice. And I just hope that as you get there you'll recognize that there are a lot of us up here on Capital Hill are very concerned with what you're doing. That you need to work with us in order to function clearly effectively down there as well.

And there are things that you may be able to help us with as you noticed that the inadequacies with the law. We would love to have your advised as to how to change or to rectify those inadequacies and you'll find there are plenty of them. One of the laws you might find to be terrifically, poorly written is

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the independent counsel statute.

My personal belief is that that needs to be narrowed very carefully. I have come to the conclusion that probably it's essential to have an independent counsel statute. But, I do think that it can be over used.

In this case, I think the attorney general is wrong not to have requested the appointment of an independent counsel and I have high hopes that she'll recognize that and will remedy that problem, that I have deliberately not poured it on over the last several months hoping that she'll arrive at that conclusion by herself and I hope that she will, because there is a lot of concern up here on Capital Hill and not just in the mind of Republicans -- among others as well. So, if you serve there, I hope that you'll consider how important good advice is and that it's best to call it the way it is. Do what is right and honest in every case, because over the long run that will pay off for you, the department, the government and whoever is president. And my impression and experience with you is that that's exactly what you'll do.

So, I just want to compliment you on being willing to accept this position, being willing to make the sacrifices that it takes to come here to Washington and to do a job that's going to perhaps make you work harder than you've ever worked in your life. And that's had to say with any attorney who's worked very hard as you have all your legal life.

And I'm just very pleased you're willing to come and I certainly think your wife will add a great deal to this community and I think you ought to make your son come back take school here in the District for a while we can lift the District a little bit too. If we can do that. I hope you'll can teach in this area. That would be great.

MR. FISHER: Thank you senator.

SEN. HATCH: Do we have any questions from anybody?

SEN. TORICELLI: Mr. Chairman.

SEN. HATCH: Senator Torricelli?

SEN. TORICELLI: I wanted only to make sure that you understand for many of us the center piece of the current administration's efforts to fight crime and help our communities has been the COPS Program. My understanding is that will be under your jurisdiction?

MR. FISHER: That's correct.

SEN. TORICELLI: This for all of us that have invested so much money and so much of our attention in this program, I simply wanted to underscore what it's administration means to all of us.

It means that you are not simply part of and many of our estimations, the administrations fighting of crime, you are the center of it. That we've invested everything in this program and will continue to do so. And I wonder at this point if you could just give some assessment yourself of successes or your hopes for it or what you've learned about it today.

MR. FISHER: Well, Senator, I can speak from first hand experience with Los Angeles. That's my primary focus. We have been the beneficiaries of COPS funding in two accounts.

One, we have 2000 more police officers on the street and I think people in Los Angeles would agree that's been a very good thing, and we've also received COPS grant money for some technological improvements much needed in a department that has been under resourced.

So, I think I do bring that perspective and good contacts within the local law enforcement community.

So, I look forward to the COPS administration part of this position. I think it's a vital part of what the government has been able to do help state and

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local law enforcement.

SEN. TORRICELLI: And if this really occupies your good judgement in administration here is so important. Because although 70 to a 100,000 police officers is a significant number, it is a very large country. And if we do not manage this tightly and local police forces simply substitute federal money with their own resources because we're not watching closely -- or police officers for political or other reasons are sent to communities where the need is not the greatest. Then we are squandering a great resource.

In the communities I know in New Jersey which are making the most progress in fighting crime where there's a change in the quality of life. This has been the only resource we've had to bring to the table. This is it and for you that becomes an enormous responsibility. And I simply wanted to underscore it to you how much all of our hopes are invested in you and the program. Mr. Chairman I have no further questions.

SEN. HATCH: Thank you, Senator. With that, Mr. Fisher, I intend to move your nomination as quickly as we can. We're not going to have a committee mark up this Thursday because of Rosh Hashanah, the holiday, but we probably will the next Thursday and hopefully you'll be on that mark up.

And hopefully we can get you down there and get you operating and working as quickly as possible. We'll try not to delay this and we appreciate you coming, we appreciate your willingness to serve and we commend you for that willingness as well.

MR. FISHER: Thank you senator.

I look forward to working with all of the members and with the committee.

SEN. HATCH: Oh forgive me, I had forgotten. They tell me Senator -- well, then what an easy time you've had of it -- (laughter) -- is all I can say. I guess we'll have to be mean to the judges in the next hearing. Thank you, sir.

MR. FISHER: (Laughs.) Senator thank you very much.

SEN. HATCH: Thanks, Mr. Fisher, appreciate it.

With that I'm going to switch gavels. Senator DeWine is going to conduct a traditional nomination proceedings, and I'll be here for part of it.

SEN. MIKE DEWINE (R-OH): I would invite my colleagues, Senator Glenn, Senator Bennett, to come immediately to the table. We are now proceeding to hearing for two circuit court judges and five district court judges.

We need to be out of here by 4:30, which I assume we can be. I would say to all of the prospective judges who are here that it certainly is possible that we may want to submit some questions for the record either because we've run out of time or there may be members who are not here or members who have to leave. So you should be prepared to receive those questions. Let me start, if I could, with the chairman of the committee, Senator Hatch.

SEN./MR. : Okay. It's okay.

SEN. ORRIN G. HATCH (R-UT): Well thank you, thank you -

SEN. DEWINE: Again, I would ask if all of you could just please pull that door shut back there as your come in. Thank you, Roger.

SEN. HATCH: Thank you, Mr. Chairman. I appreciate this opportunity to appear before the committee for and on behalf of Dale Kimball, who has been nominated for district court judge for the District of Utah.

And I'm also happy to be here with my friend and colleague, Senator Bennett, as well. Mr. Kimball obtained his BS from Brigham Young University in August of 1964, his Juris Doctorate from the University of Utah in 1967. He became an associate with the largest law firm in Utah and one of the most prestigious, was a partner and then helped form one of the major law firms in Salt Lake City, Kimball, Parr, Watiks, Brown and Gee (sp). He has been the senior partner in that law firm from 1975 till the present.

He has been an associate professor of law at the Brigham Young University

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School of Law from 1974 to 1976, adjunct professor from 1976 to 1979. He has had extensive experience in the practice of law and was engaged in general practice title work, oil and gas and mineral matters, contract negotiations and litigation including securities law, (striking?) disputes, administrative agency matters and criminal defense.

Since 1975 he has been engaged primarily in business litigation including securities fraud, insurance anti-trust, contract and energy cases. Among them are some arbitrations and municipal litigation.

He's had extensive experience in the practice of law, in the practice of teaching law and as a fine lawyer in the Utah area. He has authored several articles. He is a member, of course, of the appropriate bar associations and is one of the finest people I know.

Dale Kimball is not only an excellent lawyer, he is a person of the highest of integrity, the highest ability, a person we can rely upon, a person who understands the role of judging and a person who literally I think will elevate the federal bench in this country. There's so much more we could say.

He's still with his wonderful wife. I've know him for a long time. I have total respect for him as I think do all people in Utah and especially all members of the bar association.

As you know in any of these situations it's very difficult to make a decision as to who should replace another federal district judge. And, there are so many people who can be qualified for that position and there are a number in Utah who certainly qualify for this position. But I know of none better, non greater and non with more ability than Dale Kimball.

I think he will become one of the great judges in America. And I would expect no less from him. So, I recommend to the committee that they approve this nomination as quickly as possible and help us to resolve the problem of an open seat on that bench which has been open since June of this year.

SEN. DEWINE: Senator thank you very much. Let me turn now to the junior senator from Utah. Senator Bennett.

SEN. ROBERT F. BENNETT (R-UT): Thank you, Mr. Chairman. Being the junior senator and not being a member of the Judiciary Committee, where the senior senator, the chairman of the Judiciary Committee, usually means that my activity with respect to the appointing of federal judges is a fairly minimal one.

I will say that Senator Hatch has been more than solicitous however of my opinion and he came down to see me early in this process to tell me of the various people that were being considered for this particular vacancy. And to tell me that his recommendation would be Dale Kimball.

This would have made it very easy for me to say yes without any kind of demure or objections. I won't go over the specifics in Dale Kimball's background. Senator Hatch has already done that and they are available to the committee generally. I will share with you this personal experience.

I was the CEO of a company that grew very rapidly and finally got to the point where if investors were to get any of their money out it had to go public. And the decision was made that it would go public and go directly to the New York Stock Exchange.

That meant underwriting by two of the nations largest investment bankers, Merrill Lynch and Smith Barney and I said to the people who were then handling it I had other things on my mind at the time this was done I had gotten involved in the senate race. I assume this means we're going to hire a very expensive law firm in either New York or San Francisco or possibly both.

You don't go public with a hometown lawyer when you're going to go directly to the New York Stock Exchange. The folks at Merrill Lynch said actually you have one of the finest law firms in the country dealing with this particular issue

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in Kimball, Parr. And we would recommend as a New York investment banker that the law firm that handles the public offering for Franklin, Gee, Kimball, Parr. That was the first time I had heard Mr. Kimball's name. And as I associated with the people at Kimball Parr both in an official manner and in the unofficial question of how I handle my own shareholdings I have come to realize how wise they were in making that recommendation.

Mr. Kimball is the founder of that firm. His name is the first in the list of named partners and it has demonstrated a capacity that some who are a little less parochial than I might not normally associate with Salt Lake City, Utah, but think of at a high legal track than that.

He would be qualified to serve on any bench in any jurisdiction and I'm happy to add my endorsement to that of Senator Hatch's based on that personal experience with him and his legal background.

SEN. DEWINE: Senator, thank you very much. Let me now turn to my senior senator from the state of Ohio, my colleague, John Glenn. SEN. JOHN GLENN (D-OH): Fine, thank you very much, Mr. Chairman, and members of the committee. It is a pleasure to be here today to introduce to the committee two Ohioans who have been nominated by the President to serve as federal district court judges. They are products of our judicial review commission that advises me on these selections as the chairman knows. These individuals Judge James Gwin and Mr. Algernon Marbley are certainly worthy of appointment. And I've asked them to come up and sit with me up here while I introduce them if I could.

Mr. Marbley and Judge Gwin would come up please. Thank you.

They both have had very distinguished careers and before I go on to describe some of the qualities in these gentlemen that I believe make them well suited to serve on the federal bench, I want to take just a moment to recognize their families who have traveled with them here today to share in this proud moment. So, as I read your names if you would just stand back where I'd appreciate it so you could be recognized. We have Mr. Marbley's wife Janet Green (sp) Marbley as well as their two sons Algernon, Jr. and Arron Marbley. Their both here. They're joined by Mr. Marbley's mother Anne Johnson. We thank you for coming in today.

We also have Judge Gwin's wife, Bonnie Gwin. Their two sons, John and Michael Gwin, and Judge Gwin's mother, Carol Gwin.

So, thank you all for coming here today. I still don't know who's minding the store back home, Mr. Chairman, back home but you have quite a contingent in here. This committee has a large amount of information on these nominees. I won't try to go through it all. I'll just sort of summarize their highlights, some of the things I believe make them outstanding nominees.

Jim Gwin returned to the Stark County Court a common plea's judge where he has presided for the last seven years. Judge Gwin has earned a reputation for hard work.

Since 1989 he has presided over more jury trials than any other general division judge in the state of Ohio. Judge Gwin has provided over 440 jury trial including 225 felony trials 19 of which were murder trials.

Where the average is 15 jury trials per year Jim Gwin has averaged more than 50 jury trials per year. So, we definitely would be getting a hard worker, Mr. Chairman, when we get Jim Gwin.

When not hearing cases, Judge Gwin has been active with the Ohio Judicial Conference chairing the Court Technology Subcommittee and serving as a member of the court reform committee.

He has also worked in the community on behalf of the Central Stark County United Way, the Central Stark County Mental Health Center, the East Central Ohio

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Juvenile Diabetes Foundation and the Canton Group Home.

Judge Gwin has also been a lecturer at the Ohio Judicial College. In my opinion Judge Gwin has demonstrated the talent, intellectual capacity and commitment to public service to make an exceptional addition to the federal bench in the Northern District of Ohio.

I'd also like to introduce to the committee Mr. Algernon Marbley, or Marty Marbley, as he is better known. Mr. Marbley is a partner of Ory, Satter, Seymour and Peas (sp).

He too is exceptionally qualified to serve on the federal bench. He's had 18 years of excellent as a trial lawyer both in the public sector for the United States Department of Health and Human Services and in the private sector with Ory Satter.

Mr. Marbley has had substantial trial experience at the federal and state levels in civil and criminal matters both in jury and non jury trials. Marty Marbley has significant academic experience as an adjunct professor at both the law school and undergraduate levels and he has taught trial advocacy to lawyers at the National Institute for Trial Advocacy for the past ten years.

Like Judge Gwin, Mr. Marbley has also taken the time to plan an active role in his community. He has worked as a leader in organizations assisting disadvantaged youth in the Columbus area.

He has served as secretary and counsel to the board of directors of the Big Brother and Big Sisters Association of Franklin County. He has served for seven years on the board of directors and two years as president of the Sylesian Boys and Girls Club which serves economically disadvantaged inter-city youth.

He also has served in leadership positions for the Franklin County United Way Campaign and the United Negro College Fund. In 1995 he was honored as one of the top ten outstanding young citizens of Columbus, Ohio. Mr. Chairman I recommend Jim Gwin and Marty Marbley without any reservation whatsoever and I believe both of them will make very very fine federal judges.

They have the demonstrated ability and they have the temperament to be able to dispense justice fairly and impartially. And, I am confident the committee will agree with this assessment and I hope to see their very swift confirmation.

Thank you very much, Mr. Chairman.

SEN. DEWINE: Senator Glenn, thank you for that fine statement. Let turn now to a colleague from New York, Senator D'Amato.

SEN. ALFONSE D'AMATO (R-NY): Thank you very much, Mr. Chairman. Might I ask that as I introduce the nominees they have an opportunity to come forward.

First, it is my pleasure on behalf of both myself and Senator Moynihan who has submitted an extensive statement and let me just read a little part of it. He said today is great day for New York and he talks to the honor and privilege it is for him to put forth and join with me in support of three of the wonderful nominees that will be before this committee.

So, I'm going to introduce Mr. Richard Casey, who is the President's nominee for the southern district. This nomination also follows a nomination of Mr. Casey by President Bush. Not very often that we get one nominee nominated by two presidents for the same job, two presidents of different parties.

And I think that is a testimony both to both of our president's administrations, the Justice Department and to the caliber of the nominee.

And secondly, Judge Sotomayor, who comes before the committee is no stranger, for the second time. It was less than five years ago when the judge was nominated for the Southern District, in a position that she has held now for almost five years.

And she is now nominated to one of the most important courts in the land, the Second Circuit Appellate Court.

And then Judge Charles Siragusa, from Rochester, whose daughter went to law

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school, coincidentally, with my son, Christopher. I think she helped him get through.

By the way, I want you to know that this is not a payback (laughter). That indeed, I have been privileged to support this nomination, as I think it was brought, Judge Siragusa, to the attention of the president, by Senator Moynihan. Were it not for Senator Moynihan being somewhat, feeling somewhat under the weather, he's had a heavy, heavy, heavy, heavy cold, and he would be here. I want you to know that. And I'm going to ask that his statement be in the record.

SEN. DEWINE: His statement will be made a part of the permanent record.

SEN. : Mr. Chairman, I have three statements from him.

Senator D'Amato, do you have all three statements, the same I have?

SEN. D'AMATO: Yes. Yes. All three of them. And that's why I wanted to characterize his statement as this being a great day for the judicial system of this country, but particularly as it relates as to these three magnificent individuals.

And I say they're magnificent. And let me say, I'm going to ask that my full statement be included in the record as --

SEN. DEWINE: It will be made a part of the record.

SEN. D'AMATO: -- in its entirety, because I have these loquacious speech writers who have gone into every detail of all of the candidates and their lives.

Some they might want to hear. Others would be -- well, no.

But, let me say that it's a great privilege and honor to nominate Dick Casey.

Dick Casey's impressive legal career is quite extraordinary.

And I think more extraordinary is the fact that over the past five years, Mr. Casey's legal work has shifted slightly as a result of his blindness. He is blind.

He would be the first district court judge who would be nominated for this position, and take the bench, as a person who has no sight and is legally blind. There is no doubt as to his legal acumen. There is no doubt as to the brilliance of this academic record, and his distinguished career before the bar. But thereafter, after he lost his sight, he remained vigorous, vigorous in actively practicing the law, probably more than most. His tenaciousness towards justice and fairness will never be impeded by his loss of sight. Let me also suggest that we had a distinguished panel of jurists before our committee came forward with this nominee, to explore the question as to whether or not he would be able to discharge the duties as a trial justice.

This was headed by the former chief justice of the Seventh District. Their recommendation was unanimous, in terms of indicating that Dick Casey could do the job.

I believe that not only is he eminently qualified, by way of his background and his experience, but his success in the face of the disability that he has had to deal with, will give further testimony, living proof, to his great personal strength, and it will be an inspiration to Americans, and many others, that we are winning the battle against the prejudices towards the disabled. As always, he will be a trailblazer, opening new doors for others.

And let me just add for the record, just some of his credentials. And I might mention that those who know him best have come forward and are here today. Not only his family, but one of the great US attorneys from the Southern District of New York, a great prosecutor in his own right, is here today, to loan his support to his friend and colleague. And that is the former US attorney Otto Obermeier (sp).

Mr. Casey's impressive legal career began as an assistant US attorney in the Southern District, in the criminal division. He joined the special commission

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for the State of New York investigating public corruption. And for over three decades he's been practicing with Brown and Wood (sp) in New York City. So, it is my distinct pleasure to put forth this nominee. As it relates to Justice Sotomayor, what can one say but "only in this country." The daughter of a humble working family has risen by way of her legal, scholastic stewardship to the highest trial court in the federal district of, and premier district I might add with some prejudice, of the Southern District of New York where she has distinguished herself. And I predicted to this committee, almost five years ago, that Judge Sotomayor would be an exemplary, outstanding justice. She has demonstrated that, repeatedly. She has shown compassion, wisdom, one of the great intellects on the court. Her experience, both as a prosecutor, civil litigator, and federal trial judge, makes her an exceptionally qualified candidate for the Second Circuit. And she's here with her beautiful mama. And I wonder if we could have her, your mother, Mrs. Sotomayor.

Congratulations to you.

Last, but not least, Judge Siragusa, and I want you to know that the judge comes with one of the highest rated records, as a great trial judge, sitting in the Supreme Court of Monroe County, having served as an assistant district attorney, first assistant district attorney, and thereafter being recognized by more groups than one could possibly mention, in terms of his service to community, and in terms of his legal stewardship.

Of all of his great accomplishments, I might add, is the fact that the judge graduated from a wonderful school. And you know that my chief and top administrative assistant put this in. He said, "after graduating from a wonderful college, Le Moyne college in Syracuse."

So I want you to know, Judge, that Mike Cansella (sp) has never forgotten that kinship. And we share that with this committee today.

I recommend him to this committee, along with Senator Moynihan, recognizing that the president has chosen well.

And also that this district is tremendously one of the busiest districts, most overworked districts in the country. And they certainly could use the judge as quickly as possible.

So, Mr. Chairman, it's a great honor to recommend these three nominees, and join with our senior senator in presenting them to the committee today.

SEN. DEWINE: Senator D'Amato, thank you very much for joining us.

Let me turn now to my colleague from the state of Tennessee, Senator Thompson.

SEN. FRED THOMPSON (R-TN): Thank you, Mr. Chairman, should I remain here, Mr. Chairman?

SEN. DEWINE: That would be fine.

SEN. THOMPSON: Is that all right with you? SEN. DEWINE: That will be fine.

SEN. THOMPSON: Mr. Gilman, would you come forward please.

SEN. DEWINE: I see our colleague from Tennessee, also, Mr. Frist, is here -- Senator Frist.

SEN. THOMPSON: Mr. Chairman, fellow members of the committee, I'm pleased to come here today, before you to introduce Ronald L. Gilman, the president's nominee to fill a vacancy in the United States Court of Appeals for the Sixth Circuit.

I want to start by acknowledging my gratitude, the gratitude of all lawyers who practice before the Sixth Circuit, to our chairman for scheduling a hearing on Mr. Gilman's nominee so promptly.

Before I summarize Mr. Gilman's accomplishments to the committee and explain why I believe he merits the committee's approval, I want to say a brief word to

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recognize Judge Ted Milburn (sp), whose seat Mr. Gilman will be filling, if he's confirmed.

Judge Milburn has served the people of Tennessee and the United States as a judge for almost a quarter of a century, first as a state trial judge, and since 1983, a federal judge.

Judge Milburn is widely regarded throughout the Sixth Circuit as a leader on the court. On behalf of all Tennesseans, I want to thank him for his service and wish him well in his retirement. Mr. Gilman has big shoes to fill.

Let me turn now to the nominee before you today. Mr. Gilman is a native of Memphis, and attended high school at Christian Brothers Academy in Memphis, from which he graduated as valedictorian.

He left Tennessee for college and law school in Massachusetts, attending Massachusetts Institute of Technology and Harvard Law School. After graduating cum laude from Harvard in 1967, Mr. Gilman returned to Memphis, where he practiced ever since in one of Tennessee's leading law firms, Ferris, Matthews, Gilman, Brennan, and Hellin (sp).

I might point out that the Matthews in this firm name is former Senator Harlan Matthews. I might also point out that my son is a member of that firm.

Mr. Gilman rapidly became established as a leader of the Memphis Bar, serving as the president of the Young Lawyer Division of the Memphis Bar Association, and president of the Young Lawyer's Conference of the American Tennessee Bar Association.

He subsequently served a term as president of both the Memphis Bar Association and the Tennessee Bar Association. As recognition of Mr. Gilman's leadership at the bar, he was appointed to served on the Tennessee Court of the Judiciary, which hears disciplinary cases against state judges. And he's also served occasionally as a special judge in the state courts in Memphis.

Mr. Gilman has been a leader, not just in the Memphis Bar, but in the Memphis community as well. He served on the board of directors of the Chickasaw Council for the Boy Scouts of America, the Memphis Jewish Home, the Memphis Senior Citizens Services, among other groups.

In 1981, Mr. Gilman was awarded the Sam A. Meyer Jr. (sp) Memorial Award for outstanding service to the legal profession and the Memphis community.

Perhaps most interesting of all Mr. Gilman's memberships, is in the Society of Memphis Magicians, of which he serves as president since 1986. While it gives me a little concern, I assume he will restrict himself from pulling rabbits out of the hat, and not judicial decisions.

Mr. Gilman is an extremely well qualified, and unusually well rounded nominee. While his practice has concentrated on litigation, particularly commercial litigation, he also engaged in estate planning and general business law.

Not only is he experienced in civil law, but in criminal law, as well. He has represented a number of indigent criminal defendants in federal courts.

More recently Mr. Gilman's practice has focused on the practice of alternative means of dispute resolutions, such as arbitration and mediation. Mr. Gilman has also served as an arbitrary mediator for groups like the American Arbitration Association, and the National Association of Securities Dealers.

With the backlog in civil litigations throughout the nation, I think it's important to recognize the importance of the nominee's experience in this area. Not only is this experience similar to the experience of being a judge, but will no double help him bring a special insight to the variety of procedural issues, to help the civil litigation system work better.

I know his wife Betsy is here today. I know he wants to introduce her.

I want to thank again Chairman Hatch for scheduling this hearing, and you, Mr. Chairman, for presiding today. And I'm confident that after the hearing for Mr. Gilman, the committee will favorably report it's nomination that the full

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Senate will confirm him promptly.

Thank you very much.

SEN. DEWINE: Let me turn to our, the other Senator from the state of Tennessee, Senator Frist.

SEN. WILLIAM H. FRIST (R-TN): Thank you, Mr. Chairman.

SEN. DEWINE: And also, I saw Congressman Ford back there. Congressman, can you come on up and join us.

SEN. FRIST: Thank you, Mr. Chairman and I'll join my colleague from Tennessee in welcoming the opportunity to introduce Mr. Ron Gilman, who has been nominated to fill the vacancy in the Sixth Circuit Court of Appeals.

The president has chosen wisely in his selection of Ron Gilman of Memphis, Tennessee, to fill this vacancy. And it is an honor for me to be here to speak on his behalf.

I've heard from many Tennesseans since the nomination, from across the state, and uniformly, and unanimously, they have called to express their support, their full support for this nomination.

Mr. Gilman will make an outstanding judge and do a tremendous job in serving Tennessee, as well as the entire Sixth Circuit.

His experience, which has been outlined for you, is diverse and impressive. His reputation, throughout Tennessee, is fair and deliberative, all of which speaks volumes for his integrity.

I'm proud to support this outstanding nominee, was glad to have the opportunity to meet his family earlier today, and look forward to completion of this nomination process.

SEN. DEWINE: Senator Frist, thank you very much. Congressman Ford, welcome.

REP. HAROLD E. FORD (D-TN): Thank you. And I certainly thank my senators, Mr. Thompson and Mr. Frist for their leadership on this. I welcome my friend and certainly the future Sixth Circuit jurist, Mr. Gilman and his family.

I know his wife, Betsy, if she would not mind standing, his daughter Sherry (sp), who's there in the back. I know Laura (sp) was not able to be with the soon-to-be-jurist today. But I'm sure she would be proud of her father.

I thank Chairman Hatch, and certainly again my senators, for moving this process forward in a way that they were able to, and did. I would certainly say that Mr. Gilman's nomination, the way that this Senate has conducted itself, I believe is a fair illustration of how this process can and should work when partisan politics takes a back seat to the pressing needs of our judiciary.

I thank you, again, Mr. Chairman, for scheduling this hearing, and I congratulate my friend, Mr. Gilman, again.

SEN. DEWINE: Congressman, thank you very much.

I have a statement that I will place in the record, that Senator Leahy has asked me to place in the record. It will be made, without objection, a part of the record today.

We will now proceed with our circuit court judges. And so I would ask our two nominees if they could come up. And we apologize for moving everyone around. But I think what we will do is do this in two panels, and we will start with the circuit court judges.

And as you come up, I'll just ask you to remain standing and both take the oath. (Nominees sworn in.)

SEN. DEWINE: Thank you both for joining us today. We will start with Mr. Gilman.

Mr. Gilman, if anyone in the audience is with you that has not been introduced that you would like introduce. I think this is just, it's sort of a family

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day here today, which is just fine with me.

MR. RONALD L. GILMAN: Well, I appreciate it, Mr. Chairman.

I have my wife, I believe has been introduced, and my daughter Sherry (sp).

Also I have my cousins from Chevy Chase, Mary and Leon Bloom (sp). SEN. DEWINE: Let's have them all stand up -- or maybe they're standing up already.

MR. GILMAN: And I've got three friends of my daughter, Sherry, Rhonda Rivins, Alison Isaacman and Stuart Frisch (sp) are all here, living in the Washington, DC, area.

Thank you very much.

SEN. DEWINE: Mr. Gilman, we have, all of us have interest in all of the nominees. I obviously have a little special interest because you will be in the Sixth Circuit, and the state of Ohio, of course, also happens to be part of the Sixth Circuit.

Let me ask you, I notice in your resume that you've worked as an arbitrator, mediator for the American Arbitration Association. I think you also worked as a referee in the Dock and Shield (ph) litigation.

You've written on this topic. And I wonder if you could just comment for us, what do you think are, well do you think our system uses mediation enough, both at the federal level and at the state level?

MR. GILMAN: Well I think that my own experience, of course, is in the Tennessee courts, and it is just coming of age. It was just this year, as a matter of fact, that the Tennessee Supreme Court adopted an official rule for mediation. The Western districts of Tennessee just set up its program this year. And I believe it's something that has quite been helpful. I know the Sixth Circuit, several years ago, set up the special counsel's office to try to resolve disputes, even when they reach the Court of Appeals.

It seems to me a way of churning the process of what resolving civil cases. And the statistics show that in about 80 percent of the cases that are mediated, end up being resolved.

So I think the parties are better off. And I think the courts are better off because it unclogs the system a good bit.

SEN. DEWINE: What is your opinion? Are we using this to the maximum in the federal system?

MR. GILMAN: It is not yet, in my own experience, in the Western district of Tennessee, not being fully, but it's just in the process of being utilized. I expect though, as I talk to colleagues in the states, for example, Texas and Florida, where it's been in existence for approximately ten years. I understand it's gotten to the point in those states where you can't go through trial until you first try mediation.

And that's probably the direction that we're going in, which, in fact, I think is healthy, particularly mediation is not binding, and it's not, the parties aren't obligated to settle. But if they have to go to court they certainly have the opportunity and the legal right to do so.

But on the other hand, many of these civil cases get resolved far earlier, and with far less expense to the parties, than if they had to go through traditional litigation.

SEN. DEWINE: Mr. Gilman, during your tenure as president of the Tennessee Bar Association, the Association drafted a professional creed for Tennessee lawyers. Anything particularly unique about that professional creed that we should take note of?

MR. GILMAN: Only that the, probably the thing that seems most important is the need for attorneys to disagree without being disagreeable. There, unfortunately, seems to be, more and more, as the profession grows, or the lawyers don't have regular contact with each other on a repeated basis, that you find less civility in the process.

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And that then reflects on the cost to the litigants, and the prolonging of the litigation, and the need for lawyers to be able to cooperate, particularly on procedural matters that don't affect the substance of the case.

But rather than just schedule a deposition date, and then have problems -- Well, I'm going to be out of town -- to talk to each other first, and do things informally, where it doesn't affect the merits, but yet greatly aids in the case being processed through the system.

And that's really the heart of the professionalism in the creed's standard.

SEN. DEWINE: Senator Thurmond.

SEN. STROM THURMOND (R-SC): Thank you, Mr. Chairman.

Judge, you pronounce it Sotomayor? Is that the way you pronounce it?

MS. SOTOMAYOR: Sotomayor, Senator. Sotomayor. It is a difficult name, Senator.

SEN. THURMOND: A former Supreme Court justice had expressed his view of Constitutional interpretation as follows, and I quote, we look to the history of the time of framing of the Constitution, and the intervening history of interpretation. But the ultimate question must be, what do the words and the text mean in our time? End quote.

Do you agree with this statement?

MS. SOTOMAYOR: No, sir. Not fully.

I agree with the first two parts of it. If you look at the Constitution and what it meant at the time. The last suggests that I would be trying to change it's meaning today. And no.

I think the first two would inform what the last results should be, which is what does it mean today, and how to apply new facts to that, if the issue is new facts.

SEN. THURMOND: Mr. Gilman.

MR. GILMAN: Senator, I think that --

SEN. THURMOND: Do you want me to repeat that or did you remember?

MR. GILMAN: If you would, that would be fine.

SEN. THURMOND: We look to the history of the time of framing of the Constitution, and the intervening history of interpretation. But the ultimate question must be, what do the words and the text mean in our time?

MR. GILMAN: I think that we need to look more of the text of the Constitution, as it was written. The words are important. And I think if the Constitution is to have enduring meaning, the concept obviously has to be applied to current circumstances.

New events arise all the time. But I think the Constitution has got to be interpreted within the meaning of its text.

SEN. THURMOND: Now, this question is for both of you.

You have both had some involvement with the American Bar Association. Do you believe, that the ABA should take positions on social and public policy issues, such as abortion, and aid to the homeless?

MR. GILMAN: I would be glad to answer first. I was actually in the House of Delegates for the last eight years. I'm no longer in the House. My term ended in August of this year.

I believe the ABA does a tremendous amount of good in areas like continuing legal education, and professionalism, and providing legal services.

My own opinion it should not, Senator, be involved in these issues that are primarily social and moral, and which lawyers have no particular expertise. . . And I in fact have voted against those kinds of resolutions, when they came up before the House.

MS. SOTOMAYOR: I've only been an inactive member of the Bar. I joined it largely because of it's educational importance.

The American Bar Association regularly issues studies on the current state of

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the law, and analysis of where the law is, and what's happening in that area. And I receive their publications and read them for that purpose. I am aware, obviously, as any reader of newspapers, that they have taken larger positions on social issues. I believe, like Mr. Gilman, that that perhaps would not be terribly helpful to them, generally, because it undermines their effectiveness on the central issues of their mission, which is the education of lawyers.

SEN. THURMOND: My next question is for you.

It is a sad fact that many young people get involved in selling drugs. Based on your experience as a judge, why do you believe many young, poor youth become drug dealers?

MS. SOTOMAYOR: Senator, I wish I had the answer. If we had the answer, we'd have solutions to one of the worst ravages on our society, drugs. And I don't. The reasons why kids become in drugs, as I've learned as a judge, vary enormously: some because of the lure of easy money -- something that perhaps they should not be tempted by, but they are; others through their own self-ignorance about the damage they're doing to society and to themselves. I simply don't have one reason I can give you. The reasons are myriad and complex.

SEN. THURMOND: Now, another question.

Do you oppose mandatory minimum sentences for drug offenses?

MS. SOTOMAYOR: No, sir.

SEN. THURMOND: Another question.

Some argue that the federal sentencing guidelines do not provide enough flexibility for the sentencing judge. And some even say they should be abolished. What is your view of the federal sentencing guidelines, based on your experience with them?

MS. SOTOMAYOR: Thus far, sir, in the vast majority of cases I have found the guidelines to be very helpful in giving some comfort to me, as a judge, that I am not arbitrarily imposing sentences based on my personal feelings.

I believe that congressional sentiment, as reflected in the guidelines, is important, because it permits me, not to impose my personal views, but to let the democracy impose the society's views.

With respect to your second point, Senator, the guidelines already provide mechanisms for departures in appropriate circumstances.

In my experience, when there are principles and reasons, grounds to depart, the guidelines already permit it.

Now, there's obviously discussions going on, I'm very well aware of it, of issues that the Senate is taking up on changes within the guidelines, with respect to some crimes or others, or with respect to some issues or other.

I expect, as has happened during the last ten years, that the Sentencing Guidelines Commission will continue to take up those issues, and revisit them when they're appropriate.

SEN. THURMOND: Thank you both for your presence and your testimony.

SEN. DEWINE: Senator Sessions.

SEN. JEFF SESSION (R-AL): Mr. Gilman, I think you're correct that we do need to look for ways to develop alternatives to litigation. I think we can do a better job of settling controversies many times without the expense and trauma of a full-fledged litigation.

I am impressed that you've tried 37 cases, according to the record, to judgement. I think that helps you bring something to the circuit that would be the kind of experience and understanding of what it's like to be in the pits, trying cases. So, I congratulate you for that.

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I notice that you're an Eagle Scout. I'll ask you a legal opinion. Do you feel like that the Washington Zoo appropriately denied the Boy Scouts the right to have a Court of Honor there, because scouts affirm a belief in a superior being. Do you think that would be an appropriate decision for them to make under the Constitution?

MR. GILMAN: I don't have any immediate opinion on that. I was not familiar with the issue, Senator.

SEN. SESSIONS: Well, apparently that's been somewhat of a controversy, and I think they backed down. Originally that was an explanation I understand they gave. I think sometimes we do need to respect differences. We need to respect people's religious views, and under the Constitution, the right to exercise those views. I don't think they should be discriminated against because of it. With regard to the Constitution. I think you were pretty clear about that. Do you take the view, and would you not agree that the Constitution was fundamentally a contract between the people and its government -- first three words, We the people.

And that it was a contract with the people, and we should be very careful before we alter the meaning of the contract which the people ratified. Is that a fact?

MR. GILMAN: I fully agree with that, Senator.

SEN. SESSIONS: And if we -- Judge Sotomayor, if you -- would you agree that if we respect that Constitution, we have to enforce it, the good and bad parts?

MS. SOTOMAYOR: Absolutely, sir.

SEN. SESSIONS: Even if we don't agree with a part of it?

MS. SOTOMAYOR: Absolutely.

SEN. SESSIONS: And we really undermine and weaken that Constitution when we try to bend it to make it fit our contemporary feelings of the moment?

MS. SOTOMAYOR: Sir, I don't believe we should bend the Constitution under any circumstance. It says what it says. We should do honor to it.

SEN. SESSIONS: And when we honor it, as it's written, I think we strengthen it and make it available to protect us when any great threat to our liberty arises. I agree with you on that.

You mentioned the sentencing guidelines, Senator Thurmond asked you about. I did notice that you had on occasion stated that you disagree with the mandatory minimums. Is that correct? I've heard that. MS. SOTOMAYOR: I don't believe, sir, I don't ever remember saying that. There have, may have been situations in which, in a particular set of facts, I was unhappy with the results. But I don't believe that I have ever stated that I was unhappy with mandatory minimums, as a policy question. No, sir.

SEN. SESSIONS: I think you made a good point about the fact that, I think a judge would be easier to sleep at night, if you basically have a guideline to help you decide what that sentence should be, rather than having it totally on your burden from zero to twenty years. And I think, in some ways it provides more uniformity and would be easier on a judge.

MS. SOTOMAYOR: Unquestionably, sir.

SEN. SESSIONS: You find it that way?

MS. SOTOMAYOR: I have no idea how the judges before me ever set a consistent standard by which to sentence individuals. The guidelines do provide that framework, in a very helpful way.

SEN. SESSIONS: Well, they did not, and I've been in courts where you saw the person might get probation, they get 15 years, and vice-versa -- you thought they might go to jail, and they get probation.

And I think something is not healthy when you have that much flexibility. So I do believe in the guidelines, and I think in the long run they're helpful. But I do note, in one case, that you issued a sentence and you were very critical of the guidelines. You said, "I hope that jurors -- referring to, I believe,

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Luis Gomez' case -- will be among the many that will convince our new president and Congress to change these minimums. The only statement I can make is, this is one more example of an abomination being committed before our sights. You do not deserve this, sir. I'm deeply sorry for you and your family, but the law requires me to apply the minimum. I have no choice." Would you like to comment on that?

MS. SOTOMAYOR: Sir, that's the case where the facts and my personal feelings would have imposed a different result. But I didn't. I imposed what the law required. If that is -- I'm sorry, the name of the case is?

SEN. SESSIONS: I think it's Luis Gomez.

MS. SOTOMAYOR: Can you tell me how far back that case was, sir?

SEN. SESSIONS: In '93.

MS. SOTOMAYOR: If I am not mistaken, sir, that was before the safety valve provisions that were passed by Congress.

And I believe, and I could be completely mistaken, because it's been a very long time, and I've have many sentences since, that I may have been talking about the mandatory minimums that met more of the guidelines, in a first offense -- exactly what Congress later did, which was to say, in a first offense situation, with someone who's willing to cooperate, as that gentleman was, but had nothing to give, and he has no history of violence and none was used, that you could depart from the guideline minimums in that regard, or lower them.

So I may be mistaken, sir, but I do believe that that was the situation, and that Congress did do what I had earlier stated, which was to look at the factual situations and the impact, and make changes when they're appropriate.

SEN. SESSIONS: Well, I think the Congress should do that, and I don't disagree with a judge calling on Congress and suggesting that they should consider making any changes in the law.

However, I do think that a judge, would you not agree, has to be careful in conducting themselves in a way that reflects respect of the law.

MS. SOTOMAYOR: Absolutely. But --

SEN. SESSIONS: Do you have any second guess about --

MS. SOTOMAYOR: Maybe I wouldn't have called it an abomination, but I was thinking more of the factual outcome in that case.

But no question, that all I meant in the context of that case, was the fact that that particular case, which Congress did come, very shortly thereafter, to change.

So obviously my strong feelings were reflected sufficiently that Congress, not because of me obviously, I doubt they knew who I was at the time. And may not all know who I am now, but it was because of the hardship that was created in many situations that caused the safety valve provision to be passed.

I do agree, however, that great respect, both for the law, and for the process, is terribly important. And as I underscored there I do what the law requires. And I think that's the greatest respect I could show for it.

SEN. SESSIONS: Well, I think it is important to follow the law, and I think, though, in cases like this, had you not, it would have been reversed, I suppose. But I think that perhaps had you expressed your criticism with the skill you've done today, it might be a little better, as far as conduct for a judge.

I just think, as you know, when you set a set of guidelines, everybody's not going to fit perfectly within it. And maybe you have a responsibility to help that defendant to understand that, though it may be unfortunate, and you personally wouldn't have given as much, that there is a rationality to this law that so much drugs require so much sentence.

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MS. SOTOMAYOR: I have done that on numerous occasions, Senator. And there I was very, it was very shortly, at the time that I took the bench. And I believe that since then I have always been very careful, and I say it repeatedly at sentencing, when I am faced with emotionally difficult situations for the defendants and their families, often I get a lot of letters from heart-broken family members. And at sentencing I would explain to them that as much as I understand their pain, that I have a greater obligation to society, to follow the law in the way that it's set forth.

SEN. SESSIONS: One more thing. I notice the New York Times article that indicated that you had not applauded or not stood and applauded Justice Thomas appeared at the Second Circuit conference.

MS. SOTOMAYOR: Well, I never did say that, sir.

I took the Fifth Amendment when the New York Times asked me that, because of the raging controversy at the time. I thought it made no sense for a prospective nominee to enter that kind of political fray, by any statement. But I don't think I ever did, sir.

SEN. SESSIONS: Okay. Well, that might explain this. The question in the article was, when Justice Clarence Thomas was introduced at the Second Circuit conference, the question of the reporter was, were you among those who sat on her hands, rather than give him an ovation, a standing ovation. And you said, I'll take the Fifth. MS. SOTOMAYOR: I explained to her clearly, as I did to you now, I did that because I thought, at that point, as a confirmed nominee, and as judge, that I should never be making political statements to the press, or anyone else. And I thought that was a politically charged question.

SEN. SESSIONS: Well, let me just ask you. Did you see fit to stand and applaud when --

MS. SOTOMAYOR: He was my Supreme Court Justice of my circuit. I stood up.

SEN. SESSIONS: Thank you very much.

SEN. DEWINE: Sen. Ashcroft.

SEN. JOHN ASHCROFT (R-MO): Thank you, Mr. Chairman. I appreciate the opportunity.

Mr. Gilman, I was interested in Senator Sessions' question about the Boy Scouts, who for a time were deprived of an opportunity to conduct the ceremony at the zoo, because their organization espoused a belief in a supreme being. I was more interested in your response. You seemed to express some uncertainty about whether or not there could be a disabling characteristic of an organization. Do you think that organizations, or groups of people that express a religious belief in a supreme being, should be subject to differential access to public facilities, or should have fewer rights than others?

MR. GILMAN: Oh, absolutely not. I think I just expressed I was not familiar with that situation, Senator. No, I certainly would be -- frankly, I'm shocked that that would be basis for denying the Boy Scouts of America access to a public facility.

SEN. ASHCROFT: I would hope that that would be the way you would approach the First Amendment. Thank you for clarifying that. It wasn't something I knew anything about, but I've come to trust my colleague from Alabama.

SEN. SESSIONS: I'm relying on an Eagle Scout, Mike Enzi, who examined that recently.

SEN. ASHCROFT: Judge Sotomayor, at one time you were asked to rule on a case of a prisoner who was removed from his food service job in prison because he was an open homosexual.

The plaintiff sued, under the 1983 provisions, arguing that prison officials violated his Constitutional rights by transferring him from the food service job.

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Prison officials argued that he was reassigned from his food service job to prevent disciplinary problems that could arise from having open homosexuals prepare food. Sotomayor denied -- you denied the motion for a summary judgment on procedural grounds.

But you wrote that a person's sexual orientation, standing alone, does not reasonably, rationally, or self-evidently implicate mess-hall security concerns. You ruled that prison officials did not present evidence that having homosexuals prepare food was a real threat.

I wonder, as a federal judge --

MS. SOTOMAYOR: Sir, may I --

SEN. ASHCROFT: -- how much deference --

MS. SOTOMAYOR: Sir, may I just interrupt one moment, and I apologize greatly. It wasn't a motion for summary judgment. It was a motion to dismiss, which has a different standard.

And so, I'm somewhat surprised when you say that I criticized them for not producing evidence. Because on a motion to dismiss they don't produce evidence. I have to take the prisoner's allegations on their face.

And I'm sorry, but I wasn't -- I didn't know if that affected your, the premise of your question.

SEN. ASHCROFT: I'm going to find out here in a minute, when I get the question out.

MS. SOTOMAYOR: Okay.

SEN. ASHCROFT: I guess what I really want to know is, what level of deference does a federal judge owe the prison officials, when trying to figure out what security risks there are in prison?

MS. SOTOMAYOR: Enormous.

The rational basis, which means any government interest, as long as there's a reasoned, rational basis for it, and it's not arbitrary and capricious, prison officials can do what they like.

In that particular case, sir, as I said, it was a motion under 12-B-6. I believe it's 12-B-6. It could have been 12-B-6 or 5. But under either, you take the prisoner's, you take the plaintiff, in this case the prisoner's fact, as stated. You don't in any way pay attention to what the defendants are saying. You take just the pleading.

And the pleadings in that case, alleged that there was, the plaintiff claimed that there were no security threats against overt homosexuals whatsoever. That he was not aware of any threats. None had been directed in prison.

Sir, the reason I know this case so well, Senator, is I just tried it last week. And it turns out the jury found in favor of the prison guards, because there was one fact that was slightly different. The prison claimed that it never removed him from the food line. That was a factual dispute between them. They say that they asked him to leave, and that he consented to leave because of the threats that had been made. And in fact the jury credited the prison guards on that claim, and held for the defendants.

SEN. ASHCROFT: You say, you just tried this case last week?

MS. SOTOMAYOR: Yes.

SEN. ASHCROFT: Is this on a second appearance before you, then? Is this the Holmes v. Artus (sp).

MS. SOTOMAYOR: Holmes v. Artus.

SEN. ASHCROFT: I have that as a 1995 case. Am I mistaken about that?

MS. SOTOMAYOR: It was. What happened, sir, in that case, is if you noticed, because it was a motion to dismiss I had invited pro bono counsel to take on the case. They came on a bit later. I don't remember exactly when. And we just

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got it to trial last week.

SEN. ASHCROFT: And what was the outcome of the case?

MS. SOTOMAYOR: As I said, the jury found for the defendants on the initial question, which is that the prison had not removed him without his consent, that he had, in fact, consented to the removal.

But those are issues of facts that a judge can't decide on paper, sir. Those are factual questions always for a jury -- did X or Y happen? SEN. ASHCROFT: I think those are evidentiary questions.

MS. SOTOMAYOR: Exactly.

SEN. ASHCROFT: It's not possible that a judge --

MS. SOTOMAYOR: Exactly.

SEN. ASHCROFT: -- possible that a judge can decide evidence in question in the absence of a jury.

MS. SOTOMAYOR: Well, in some circumstances.

SEN. ASHCROFT: Do you believe that there's a constitutional right to homosexual conduct, by prisoners?

MS. SOTOMAYOR: No, sir. There isn't. Case law is very clear about that.

The only constitutional right that homosexuals have, is the same constitutional right every citizen of the United States has, which is not to have government action taken against them arbitrarily and capriciously. The Supreme Court said that last term, in *Evans v. Romer* (sp). But outside of that, that's a basic constitutional right, not to them in particular, but to the world that constitutes the US.

SEN. ASHCROFT: Do you think there should be one, a special constitutional right.

MS. SOTOMAYOR: I don't think that we should be making constitutional rights any greater than they exist right now. The Constitution should be amended sparingly, sir, as it has been throughout our history.

It is something that should be done only after much history and much thought.

SEN. ASHCROFT: Do you agree with the amendments that have been made to date?

MS. SOTOMAYOR: Yes, sir. It's the document that I live by.

SEN. ASHCROFT: I agree with them. And think it's good that they were amended.

So, I, you know, I accept the process.

So, in your judgment, you wouldn't read additional rights into the Constitution, like a right for homosexual conduct on the part of a prisoner.

MS. SOTOMAYOR: I can't do it, sir. I can't do it because it is so contrary to what I am as a lawyer, and as a judge.

The Constitution is what it is. We cannot read rights into them. They have been created for us.

SEN. ASHCROFT: The Constitution then, as a matter of policy, you would like see protected?

MS. SOTOMAYOR: I never thought about that in a while, sir. I know--

SEN. ASHCROFT: My time's not up.

MS. SOTOMAYOR: I think I --

SEN. ASHCROFT: In your opinion, do you think Congress has the right, constitutionally, to restrict the jurisdiction of the lower federal courts?

MS. SOTOMAYOR: You know, I haven't examined that question in the longest time. But I can't, I'm not thinking, we were created by legislation of Congress, so I would think that if Congress created it, Congress can take it away.

What you can't do is take away that which the Constitution would give the courts. I think that was established in *Marbury v. Madison*. But after that, not looking at the question, or studying it in depth, I can't give a better answer than that.

SEN. ASHCROFT: Thank you. That will be all. Thank you.

SEN. DEWINE: Judge, one of the great burdens of being a federal district court

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judge must be to deal with prisons.

I have a little familiarity with that. When I was Lt. Governor in Ohio, one of my jobs was to oversee our prison system. So I have a great deal of sympathy with judges who have to deal with the litigation. And there's a tremendous amount of litigation.

And so I say that and preface it by way of apology because I'm going to turn to one more prison, prison question, if I could. And I do not have a name for this case, but I suspect you will recall it.

Now the date I have is 1994, and the issue is multi-colored necklaces, under the clothing of prisoners. Do you remember that case?

MS. SOTOMAYOR: Yes I do.

SEN. DEWINE: Do you remember the case?

MS. SOTOMAYOR: It's my Campos (ph) case. It's better known as the Santeria Beads Case, or at least colloquially known that way, I should say..

SEN. DEWINE: My understanding is that there was a dispute involving the wearing of these beads. And again, I'm going to summarize, and you can correct me and then tell me a little bit about this case. What I'm trying to get is how you reason as a judge.

My understanding is that prison officials argued hat the beads were gang symbols that provoked fights. Contrary to that, I assume, the argument is, this is a religious freedom question.

Do you want to walk through for me how you balance that. And ultimately to we get back to what we were just talking about a minute ago, a factual question?

MS. SOTOMAYOR: In that case, sir, yes, prison officials had taken the position that the wearing of beads of colors were a symbol of gang membership. The prisoners in turn had asked the prison officials to permit them to wear the beads under their shirts, as opposed to visibly. So the question for me was, was it rational for the government not to permit that alternative, when I was balancing a religious right against a security concern.

The Supreme Court in these cases has held that you must give heightened deference to prison security concerns and other concerns, but that prisoners do not lose fundamental rights, like religion, in prison. And so that, unlike the standard rational basis review that is given -- this is before the Religious Restoration Act, Senator. It's not a part of --

SEN. DEWINE: I understand.

MS. SOTOMAYOR: -- the jurisprudence tied to that. The court has said that it's a slightly different review in that context, that the context there is that you must balance, as a judge, the security concerns with readily accessible alternatives.

There is no bright line rule. But there, unlike the traditional rational basis test, where you take, as a presumption, that the government is doing what it thinks is right, that as a jury or a fact-finder, you must weigh whether there are reasonable alternatives that could be just as effective.

And, my reasoning, in that particular case, is the opinion stated, was that, in essence, hiding the beads was a reasonable alternative, because they couldn't show.

I don't know if any opinion, but I know when I spoke to the prison officers later, I said to them, if it turns that they're finding ways to evade that, then obviously we can steps that are different.

But until that was tried first, because it was a reasonable inexpensive alternative, and not terribly costly, that I felt that that was consistent with the Supreme Court precedent on this area.

SEN. DEWINE: I appreciate that explanation.

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Let me move to one final case. 1993, Gonzalez (sp) case. Let me quote from you in the case.

"We understand that you," referring to the defendant -- "were in part a victim of the economic necessities of our society. But unfortunately there are laws that I must impose."

Do you recall that case at all?

MS. SOTOMAYOR: Not much, sir.

SEN. DEWINE: I --

MS. SOTOMAYOR: I do --

SEN. DEWINE: I understand that because, you know, we sit up here and we can look at all these cases, and you have to try on the spot to remember a case that may have occurred, in this case, four or five years ago.

MS. SOTOMAYOR: I've had two or three Gonzalez (sp) cases, and I can't, meaning not the same defendant, but different ones.

SEN. DEWINE: Let me give you additional facts, and if it refreshes your memory, fine, and you can tell me about it. If it doesn't, we'll just move on.

My understanding is Gonzalez (sp) had been convicted of constructively possessing at least 600 grams of cocaine. He exercised dominion control over an apartment in which the cocaine was found. He also stated he knew someone else was supposed to pick up the cocaine, to sell it, and distribute it to others.

Do you recall anything about it? MS. SOTOMAYOR: No. I am terribly embarrassed to say that type situation is also extraordinarily common.

SEN. DEWINE: And I can understand that. I appreciate it.

Any other questions from any members of the committee?

Senator Sessions.

MS. SOTOMAYOR: If you would like me to, I'm sorry, Senator --

SEN. DEWINE: Go ahead.

MS. SOTOMAYOR: I think if you have a question generally about something I might have said, perhaps --

SEN. DEWINE: Well, I think it's difficult, frankly, if you don't recall. I think it would be unfair to you to ask you any further about that, if you don't recall it.

MS. SOTOMAYOR: Thank you, sir.

SEN. DEWINE: Senator Sessions.

SEN. SESSIONS: You mentioned that you appointed a pro bono counsel in this prison case?

MS. SOTOMAYOR: We don't appoint them, sir.

In our -- there are no funds to appoint counsel in civil cases, as you may know. What we do is put the case on a pro bono list, which is made up of volunteer lawyers.

And the volunteer lawyers decide whether they want to take the case or not. And so, if I used the word, appoint, the lawyer there, what it means, in essence is putting them on the list, so that they are eligible to get a lawyer, from that volunteer list, if a lawyer chooses to take the case.

SEN. SESSIONS: Those turn out to be, often, very expensive processes and I think sometimes it's easy for a judge to call in a lawyer, and encourage them to the state. I'm not saying you did, but I've seen that before.

But the state has the expense of going through this whole process -- it went on from '95, until I guess last week. And a lot of expense goes into that. I think we've got to learn to do a better job in determining what's worthy of the courts time, and what's not.

MS. SOTOMAYOR: Senator, if I may add, I put people on a pro bono list very, very rarely. I'm on the pro se committee of our court. I do it only when, generally after some discovery has happened so I can take a look at what's there and determine whether there's some substance to the claim, and not initially, in

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all cases.

And where there may be a complex legal question. For example, in that case, and a few others, in that *Holmes v. Artus*, where I did that, the Supreme Court was just considering an equal protection claim that I mentioned might elucidate this area.

In a case like that, where there is an unsettled legal question, and you can define that by something where the circuits are split, or the Supreme Court is hearing an issue.

Then I'll usually ask for a lawyer, because then the questions are so complex that one needs some help, in terms of making sure that you've thought of all the arguments. You want the lawyer, and not a pro se prisoner, to brief them.

SEN. DEWINE: I want to thank both of you very much, and thank you for your patience.

And I would, just again state that there may be questions from members of the committee who were not here today. They will be submitted to you. They may not be.

Also, I would invite you, if you want to elaborate on any answers, you want to submit anything in writing to us, the committee would be more than happy to receive that.

MS. SOTOMAYOR: Senator, may I take just half a second just to introduce my mother again, and my fiancée.

SEN. DEWINE: I think that's very appropriate.

MS. SOTOMAYOR: My mother, Celina Sotomayor is here, and my fiancée, Peter White. And respecting your time, I will not introduce individually, all of the wonderful supportive friends I have here, but other than my Godson, who is a Boy Scout.

SEN. DEWINE: Well, tell the godson to stand up then.

MS. SOTOMAYOR: No, he's probably gone.

SEN. DEWINE: He's standing anyway.

MS. SOTOMAYOR: He's in the back standing up.

S SEN. DEWINE: So, thank you very much.

MR. GILMAN: Thank you, Senator.

SEN. DEWINE: Thank you very much.

We are going to, let me just make a, kind of a personal comment. As a father of eight kids, I've rarely seen children so quiet. We have a roomful of children here. And I congratulate all of you for staying with it.

I would ask our next panel to come up. We're going to take about a four or five minute break. Ask you to come up. We're going to start this at about, well we're start at 15 after. So we'll take a couple of minute break, but we're going to plow right on here.

Thank you very much.

(Pause to change panels.)

SEN. DEWINE: Well, let me thank all of you for coming today, and thank you also for your patience.

Let me just start from my left, with you Judge Siragusa.

MR. SIREGUSA: Yes it is.

SEN. DEWINE: Judge, is there anyone in the room, you want to introduce. We're going to go right down, and do that to begin with, because I don't want you leaving here and getting home with someone you hadn't been introduced. And I think we may have missed somebody.

MR. SIRAGUSA: Mr. Chairman, at the risk of correcting a United States Senator, this is my wife, Lisa, who attended law school with Senator D'Amato's son, although I'm sure of two things, that she's very flattered by his comments, and she'll never let me forget it. (Laughter)

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My wife Lisa's here, and my in-laws, James and Lucille (Furio?) and I thank them for being here.

Thank you.

SEN. DEWINE: Thank you very much. Mr. Marbley.

MR. ALGENON MARBLEY: Yes, Senator, I've been fortunate, I've had some very good support throughout this process and I have some law school classmates, who were with me back in the old days at Northwestern, who came. And I like to have them acknowledged for the record, if I may.

One is Thomas Preston, who is with the IRS. And then another friend of mine, Antoinette Cooke-Butch (sp) was here -- I don't know whether -- she left -- she was a former staffer, now partner at Scad- Knotts (sp). And then I have Ronald Sullivan, who was like an understudy, but he's a Harvard lawyer now, so I can't call him that anymore.

And he's a Washington attorney now.

Thank you very much.

SEN. DEWINE: Mr. Kimball.

MR. DALE KIMBALL: Thank you, Senator. I'm grateful to my wife, Rachel here. She's a nurse, and I hope I don't need her medical services during the hearing. Our of six children and 16 grandchildren are scattered around the country taking care of each other and working.

SEN. DEWINE: Judge Gwin.

MR. JAMES GWIN: I'm pleased to have my wife Bonnie, and my sons Michael and John here. I would also introduce my sister, Mary Jo Wiess (sp) and her husband Ed Wiess and their sons, Robert and Edward, and also my mother Carol.

I've also some special friends that have been helpful and these include John Lewis of the Squire-Sanders firm, and John Heider (sp) who is the executive vice president of B. F. Goodrich, and John Manos (sp) had been here -- Judge John Manos -- but he may have stepped out, and I thank them for their help during this process.

SEN. DEWINE: Thank you. Mr. Casey.

MR. RICHARD CASEY: Mr. Chairman, I'd like to introduce -- I have my sister here, Mrs. Carol Brunell (sp). Unfortunately my son Richard, Jr., is unable to be here today. But I do have with me my nephew, Christopher Brunell, and his daughter Kelly (sp), and my nephews, Frank Casey and Tom Casey.

I also have with me, Senator, some of my very dearest friends who have been so supportive to me, from years back, and since I lost my eyesight. With me here today is Mr. Richard McCarthy, Mr. Otto Obermeier, who the senator identified as the former US attorney. Another friend who was supposed to be here, Suzanne Brown, and she, unfortunately, couldn't make it.

But I also have with us today, several members of the National Federation of the Blind, and some other blind organizations. I'm not sure if all have arrived, but I'm very grateful for their support.

Thank you, Senator.

SEN. DEWINE: Very good. Thank you all very much.

One of the privileges of having this gavel is you get to ask whatever questions you want, and --

MR. CASEY: Excuse me, Senator, I'm sorry -- I'd be remiss, and I couldn't go home -- I have two of my partners here. Mr. Thomas Sutter, and Mr. Robert Petersack (sp), and life wouldn't be too good when I got home.

(Cross talk.)

SEN. DEWINE: I appreciate that very much.

Let me just say to the nominees that the questions that we ask are frankly difficult to frame, because most of us who sit here and who have the

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obligation to confirm or not confirm presidential appointments have some very definite ideas about what we think a judge should be, particularly those of us who have appeared before judges, we have our ideas. But it's difficult sometimes to phrase questions that can get at what we're really looking at. I'm just going to be very candid with you and then I'm going to start, Judge with you, if I could and we'll just go from my left, to all the way down.

We often talk about judicial temperament. I don't particularly like the term. I don't even know what it means. But I think we generally know what we're talking about.

And one of the things that I am always concerned about, and frankly it's difficult asking somebody this question, and getting an answer doesn't tell you a whole lot. But, maybe I'm just saying it so that two years from now, or ten years from now, at some point, maybe you'll remember what some United States Senator said during the confirmation hearings.

But, one of the things that troubles me is that occasionally, when someone is either elected to the bench, but frankly, maybe more often, when they are appointed to the bench you have life tenure, they become what I would call arrogant. They become out of touch with the community. They become out of touch with the people whom they dealt with before.

And I'd just like for you to maybe talk a little bit, in turn, about any kind of judicial temperament.

MR. SIRAGUSA: I think --

SEN. DEWINE: Let me, let me just, before I give you the substantive questions, let me ask you now to stand, and we'll actually swear you in, which is the normal procedure of the committee.

(Nominees sworn in.)

MR. SIRAGUSA: Mr. Chairman, I think I think there's three basic qualities that go into a good judicial temperament. But the first is commitment.

I think that you have to be committed to be the very best judge you can be.

That involves a commitment to work hard, a commitment to demand no more of attorneys who appear in front of you, than you demand of yourself.

It involves a commitment to, a judgeship is not just a profession, but really a way of life, to excel the best you can.

I think the next broad trait would be dedication. You have to be dedicated to the oath that you take. I have been a trial judge, and you have to understand the responsibility of the trial judge is to resolve the cases and controversies that come in front of you, and not to think of yourself as a talisman to solve the social ills that plague society.

The third, I think, is humility. I think you have to have an appreciation that it's the position that's important and not the individual. I've tried a lot of cases as a litigant. I've had interaction with a lot of judges following my election, and I think there's a danger that sometimes people get what I refer to robitis, that because you put on the robe it doesn't make you a better person. It's well to remember, and perhaps it's most important, that it is the position that's important, and not the individual.

Thank you.

SEN. DEWINE: Certainly none of us have ever known anybody in that position. Mr. Marbley.

MR. MARBLEY: Certainly one of the advantages of going second, Mr. Chairman, is that you can adopt --

SEN. DEWINE: Mr. Casey's the most -- (laughter) -- he gets the last shot at this thing. He doesn't know we're going to start with him next time.

MR. MARBLEY: -- the testimony of Judge Siragusa, but I think that one of the

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key traits that a judge has to have is a commitment to fairness. I think that a judge has to be fair to the litigants who appear before him or her. I think that another key consideration is the quality of being courteous. You have to be courteous to the litigants, and I think that that will permeate your courtroom.

Once you've established that you're going to be courteous, and that civility will carry the day, the litigants who appear before you, understand that they are to perform their behavior accordingly. So we won't have the problem of non-civility in an otherwise charged, adversarial relationship.

I think that humility is perhaps one of the most single important qualities because you have to realize that you have within your hands, often, the ability to affect the course of events, or alter people's lives. So you have to be humbled with that type of responsibility.

And finally, I think you have to be thoughtful. When someone has reposed the faith in you to allow you to sit in that position, and be a neutral arbiter of cases of controversy, the least you could do is to be very thoughtful in your deliberation.

I think all of those qualities in addition to the qualities that Judge Siragusa pointed out, make a sound judicial temperament.

SEN. DEWINE: Kimball.

MR. KIMBALL: Thank you, Senator. I certainly agree with what the two gentlemen have said. A judge must be fair, a judge must be impartial, a judge must be patient, a judge must be well prepared and informed, and render timely and thoughtful, well-explained decisions.

I believe the best example of judicial temperament I know is the judge I hope to replace, Judge David Winger (sp), and one of the reasons he is such a great judge is because he has always remembered that, as he said, what it is like on the other side of the bench, from the lawyers, and the participants, the party side of the bench. And I would hope to be as he is.

Thank you.

SEN. DEWINE: Judge.

MR. GWIN: Thank you.

I think it's -- I would adopt just by referencing the comments made earlier. But I've also been impressed with, it's so important for judges and people in the judicial system to understand that for most litigants, they come before a court, one time in their life, perhaps two or three times.

And if those people have gone away from the court believing that their concerns, their claims, their defenses that they're given, got short shrift, I think that they walk away with a diminished respect for our legal system.

So I think it's extremely important in every case that all the participants, but especially the judge, give our concern to that, and treat people with respect and treat people with an open mind.

So those would be the qualities I would hope to bring to the bench for the Northern District of Ohio?

SEN. DEWINE: Mr. Casey.

MR. CASEY: Senator, I love the profession of the law, and I have the greatest admiration for it, and affection.

The Southern District of New York, it's where I started, and I'm going to be fortunate enough that, if I'm confirmed, to be with several colleagues that I started out with.

But I think what has made me love being a trial lawyer is the wonderful experiences before some great judges in that district. There's nothing quite

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as pleasurable for a trial lawyer as to try a case before a intelligent judge, who has compassion and understanding, at the same time he understands his function, and moves the administration of justice along. But just as important, one who has the sense of humor that we all need in life. And I would hope to emulate some of those that I've had the pleasure of appearing before, over the years.

SEN. DEWINE: Thank you very much.

Let me turn to my second question. Mr. Casey, I will start with you if that's all right.

If each one of you is confirmed you will be taking over a specific court, with a docket. And I would ask you to maybe reflect, have to have given it some thought about some of the things you want to do.

And what I'm looking for is not substance, in the sense of how you decide cases, but I'm looking at more procedure. How you would run the court.

What you've observed in federal courts, or in other courts that works, that does not work. What you like. What you don't like. What you, how you would really run your court. Because one of the things that litigants want is a disposition. They want the case resolved. And so the speed of which cases can be brought to trial is important, or if they can be resolved in some way is important. So if you can just really comment on that, maybe reflect on the use of support staff, reflect on the use of law clerks, reflect on the use of arbitration, or whatever the local rule might allow.

That's the type response I'm looking for -- what have you thought about that, and what is important to you, what is not important.

MR. CASEY: Well, Senator, I think one thing, at least in the course of my experience, I spend a substantial amount of time, in private practice, at least, involved in major securities litigation.

And I would think that a major step to handle the administration of the court, if I were to be confirmed, is to get involved early, especially in large cases, to get a handle on the issues of the case are before things can get out of hand, in order that you can move them along.

I have served on committees involving discovery reviews and I think much of that can be prevented, if the judge is to get in early, get his or her hands on the case, assist the lawyers in setting the discovery schedule, and move the case along, and always, of course, keep in mind that an early trial date frequently helps things to move along, as well.

As far as the staff, certainly, it's a team effort with the law clerks and everyone involved. I would certainly keep a keen eye to things that various judges I know in the Southern District have experimented with, as to how they move their dockets along. And I would certainly try to inquire of them, and utilize all their experience as well.

SEN. DEWINE: Mr. Gwin.

MR. GWIN: I think it's so terribly important that cases move along to an expeditious conclusion.

After conversations with numerable people who have been involved in litigation, I find that one of their biggest concerns is how destructive and debilitating it is to have litigation pending. That's true for individuals. It's perhaps equally, or more true for businesses. It's just to have the uncertainty of a litigation pending -- it's very damaging.

So I think it's extremely important for litigation to move along swiftly. I think the ways we do are well known, in so far as an early intervention by the judge, in terms of setting a reasonable, but firm date for preparation of motions and trial.

It requires a judge can stick to those dates, it requires the judge to quickly

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supervise discovery disputes. And it requires the judge to quickly rule and supervise dispositive motions.

The things that move the case along, I think are well known, but it does require the hands-on effort of the judge. And those are things I would like to have an opportunity to give to the Northern District.

Finally I would comment, I am a big believer in alternative dispute resolution. And I find that in many cases it can help us narrow the differences between the parties, even if it's not able to bring about a conclusion of the matter.

So that would be another area where I would give emphasis.

SEN. DEWINE: Mr. Kimball.

MR. KIMBALL: Thank you, Senator.

I agree with Judge Gwin that the litigation process can be very destructive in people's lives and it's very important that it move along.

I would also say it can be very, very expensive. And some of that expense can be saved by good management by judges, and that ought to be done.

I've been an arbitrator. I've been a mediator. I've represented clients in front of arbitrators and in front of mediators, and I would encourage the voluntary, but not mandatory, use of those ADR processes.

I believe in the early intervention and management that has been discussed. Perhaps there's no more important case management technique than timely and well explained decisions. And I would hope to be able to render those.

I believe it's important to utilize the magistrate judges. And I consider myself a good manager and would utilize the various management techniques for moving things along and keeping them orderly, that I've utilized in my last docket.

SEN. DEWINE: Marbley.

MR. MARBLEY: Thank you, Mr. Chairman.

Perhaps the single most important feature is the early entry of the judge into the fray. That is important because the judge can counsel the litigants on the expense of litigation, perhaps reach an early resolution of the matter, and settlement, or otherwise -- judges tend to be able to help the parties close the gap and resolve their differences.

Also the judge, I think, should counsel the litigants about the advantages of alternative dispute resolution. And I know that in our district there are options in that respect. And so that would be another method to move the cases along.

Third, I think that it would be important to resolve motions that are pending, particularly discovery motions, or dispositive motions.

Certainly magistrate judges can be used for that. And those magistrate judges who perhaps have their own backlog cannot do it, you certainly can rely on your law clerks to get much of that research done to resolve pending motions.

And finally, and perhaps most importantly, is to establish a reputation for setting realistic discovery deadlines, and file dates, and sticking to them. A judge who has a reputation for having firm trial dates, is a judge who moves his docket along with a great deal of dispatch.

And I think that once the litigants in your district realize that you are going to adhere to those trial dates, and that they are firm, then you will see a lot more motion interms of getting matters resolved.

SEN. DEWINE: Judge.

MR. SIRAGUSA: As I listen to my colleagues, the old maxim of, justice delayed is justice denied, comes to mind. And I think it's true. And I think the ultimate responsibility is with the presiding judge to manage his caseload.

Certainly the techniques that have been suggested are good ones, but I think it starts with a judge who is actively is involved in his case, who utilizes scheduling orders, and I agree to set realistic demands and not grant

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adjournments unless there is a legitimate reason.

Certainly, in federal court, the use of magistrate judges to deal with both non-dispositive, and dispositive motions.

I agree that it's important for a judge to establish a reputation that the judge is prepared and willing to do the work. And I think you do that by rendering prompt decisions.

I found that attorneys can live with a decision that goes against them because then they can proceed to the next step. What they can't live with is decisions that pend for months upon end.

And certainly the use of mediation, or alternative methods of dispute resolution is something that I think can be utilized to deal with our backlog.

Thank you.

SEN. DEWINE: Judge, let me continue with you, if I could. You, in April of this year, had a writing that had to do with cameras in the courtroom. Do you want to tell us about that?

MR. SIRAGUSA: Sure, I--

SEN. DEWINE: And the conclusions you reached.

MR. SIRAGUSA: I was careful not to give any conclusions in the presentation. But basically I was asked, as part of a continuing education program, to present both the pros and cons on cameras in the courtroom. And I made that presentation. I'd be glad to comment on it.

I should preface it by saying, in June of this year, the New York experiment on cameras in the courtroom ceased. There is no legislation now, so since I am a sitting judge, I'll speak to what my experience has been on cameras in the courtroom.

In New York the purpose of promulgating rules on cameras in the courtroom was a recognition by the legislature that it was important to enhance the citizens' understanding of our criminal justice system, and thereby promote both confidence in the judiciary, but also to promote the fair administration of justice. And that's why these rules for cameras in the courtroom were initially enacted back in 1987.

In my experience, in New York, both in trying cases that were, some televised live, and in presiding on cases, the goals of the experiment have been approached. But it think it primarily depends --

SEN. DEWINE: The goals have been --.

MR. SIRAGUSA: Approached.

SEN. DEWINE: Approached.

MR. SIRAGUSA: Approached. I'm not going to say --

SEN. DEWINE: What does that mean?

MR. SIRAGUSA: Well, I mean I think that it might be naive to say that we've achieved exactly what the legislature intended, but I think that in New York they've been approached. And it think it largely falls because of three reasons, the responsibility of the media, the responsibility of the attorneys, and the responsibility, of course, of the judge.

In my experience in Monroe County, the media has been responsible about not being intrusive in the positioning of cameras, and following the dictates of the judge.

The litigants have not engaged is histrionics. There hasn't been theatrics. They haven't been playing to the cameras.

And I hope, myself as a judge, and certainly the judges who have presided that I've tried in public sight, have kept control of their courtrooms and were consistent in the demeanor that was established in the courtroom, whether the presentation was televised or not.

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SEN. DEWINE: Any unintended consequences, based on either your personal experience, or what you found out?

MR. SIRAGUSA: No, I think the, to share an aside, I mean, and why I said the goal was approached. When I was in the DA's office, I tried a case that was televised live for 12 weeks, and after the case was over, more than one citizen came up and said they were impressed by the professionalism both of the prosecutor, the defense attorneys, and the judges.

And I think that speaks toward the purpose of approaching the goal.

SEN. DEWINE: Mr. Kimball, let me refer to something that you wrote a few years ago, I believe, "The Constitutional Convention, Its Nature and Powers, and the Amending Procedure," Utah Law Review. It's been a few years ago --

MR. KIMBALL: A lot of years ago.

SEN. DEWINE: And I guess maybe the lesson that people take away from these hearings is, don't ever write anything and you won't have questions. I hope that's not the lesson.

But, considering the job that you have been nominated for, I wonder what you learned from that, the research for that law review article that might be on any relevance to your service on the federal bench.

MR. KIMBALL: As I recall, that law review article, it was basically about state Constitutions and the amending process and problems that arose, and how conventions were called, and what powers they had, and so on.

I think I gained a greater respect for both what the Constitution says, and what the people say through their, whatever it be, whether it's the writing of the Constitution or the writing of the legislation. That that has to be given great deference by a judge, that's one thing I learned through writing that article.

SEN. DEWINE: Let me ask each one of you, we'll start with Mr. Casey.

You had the opportunity, I think you all were in the room when the circuit court nominees were here. And we engaged in a series of questions, in regard to a problem that federal court judges have to deal with. Frankly quite often, which has been my experience, and that is state prison systems.

And I wonder if, based on what you heard today, you have any additional comments about that, about your philosophy and how you approach that type of a case.

And I understand that -- I'm not asking you -- please understand, I'm not asking you to comment about any particular case. I'm not asking you, obviously, to comment about anything we've already discussed. I would just like your approach, in general.

And you had the opportunity to hear the two judges talk earlier, and I wonder if you have anything to add to that.

Mr. Casey.

MR. CASEY: Well, Senator, I was very interested by the comments of the two candidates. It is a problem which I think many members of the court in the Southern District are concerned about.

However, it is the responsibility of the judge, regardless of who the litigants are, to give them a fair and reasonable hearing, just as they would to anyone else.

SEN. DEWINE: Mr. Gwin.

MR. GWIN: I would generally think that in all cases there are to be differentiated management, and so I think it's important for the judge on the case to take an early perspective on the case, the claims made, and put it on the track that leads to a final disposition commensurate with the claims made and the defenses asserted.

I use that as background to say that I think it's important for judges to separate the wheat from the chaff, in terms of this type of litigation and

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others, and to set these type of cases of a path where they come to final disposition fairly, but not running a case that should be resolved quickly through a long history of litigation before a final resolution is reached. So I would comment, Mr. Chairman, I think that's important in all civil litigations. And I think it applies equally to a prison litigation. It applies similarly to habeas corpus litigation.

SEN. DEWINE: The prison cases are, to some extent, unique, in the sense that we have had experience with special masters who -- it goes on and on for years. And I know that's not totally unique to prisons. It happens to other areas as well. It might happen in a school district. But some of these cases go on, and on, and on.

And, you know, that is something that I think I have some sensitivity to because of the previous position I had, and some of the problems that I saw.

And I know it's very difficult to comment in general about that.

Mr. Kimball.

MR. KIMBALL: I agree with what these two gentlemen on my left have said.

But I would also say that it seems to me that it would be a very unusual and unique set of circumstances that would require, or even allow, a judge to really get into the management business, which I think is part of what you're talking about.

I don't really see that as part of the job description.

SEN. DEWINE: Mr. Marbley.

MR. MARBLEY: Yes. I think that I can answer your question in two respects.

First, these matters have to be dealt with expeditiously because they are administrative matters, and an early resolution is important to everyone involved, the inmates as well as prison officials.

Secondly, and perhaps importantly, they have, you have to subject them to the same type of analysis that you would most other cases. You start with whatever existing precedent is, and then, as far as the issues that were discussed here today, it appears that as long as there are no suspect classifications involved, you'd use a rational relationship test. And in doing so, you give substantial deference to officials who are enacting a particular program, or whatever the issue may be before the court.

So, as long as you take that sort of analytical approach that we, as lawyers, are trained to do, and abide by a doctrine of stare decisis, as we as Article 3 judges are obligated to do, I think that you can pretty much dispose of that litigation expeditiously and fairly.

SEN. DEWINE: Judge.

MR. SIRAGUSA: Again, I don't know if I'll add anything new, but, I do believe that deference should be given to administrative decisions. Obviously, if there's a rational basis for an administrative decision affecting an inmate, it should be upheld.

If cases get to the court system, then I think it's the responsibility of the judge, where possible, to separate the frivolous lawsuits out, and to deal with them expeditiously.

SEN. DEWINE: Let me thank each one of you for your patience today and for coming. And I will again state that the record will remain open, and you may get additional questions.

If any of you want to supplement any of your answers, you're more than welcome to do that by contacting somebody's staff. And you can do that in writing.

And, again, I appreciate it, and appreciate the patience of the members of your family, and particularly the young members of your family.

MR. CASEY: Senator.

SEN. DEWINE: Thank you.

MR. CASEY: Senator, could I just -- because I have to ride home with them on

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the plane -- that I ask the chair to recognize Mr. and Mrs. Dahl (sp), who came with me, too.

That would be a long ride home.

SEN. DEWINE: It would be. Thank you, Mr. Casey, very much.

Thank you.

(Bangs gavel.)

END

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