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Series: Liberman, Lee S., Files
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OA/ID Number: 45172
Folder ID Number: 45172-002

Folder Title:
Court of Appeals for the D.C. Circuit [2]

Stack:	Row:	Section:	Shelf:	Position:
G	12	10	2	1

ID #

273648 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

LSL recd.
9/26

- ☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
 Date Correspondence
 Received (YY/MM/DD) 1/1

Name of Correspondent:

E. Harvey Bradley (Buck)

☐ MI Mail Report

User Codes: (A) _____

(B) _____

(C) _____

Subject:

Recommendation of Peter Rusthoven
for D.C. Court of Appeals.

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
	<u>Cuofc</u>	ORIGINATOR	<u>91, 09, 25</u>		<u>C</u>	<u>91, 12, 19</u>
	<u>Cuato7</u>	Referral Note:	<u>A 91, 09, 26</u>	<u>WS</u>	<u>BE</u>	<u>91, 12, 08</u>
		Referral Note:				
		Referral Note:				
		Referral Note:				
		Referral Note:				

ACTION CODES:

- A - Appropriate Action
 C - Comment/Recommendation
 D - Draft Response
 F - Furnish Fact Sheet
 to be used as Enclosure

- I - Info Copy Only/No Action Necessary
 R - Direct Reply w/Copy
 S - For Signature
 X - Interim Reply

DISPOSITION CODES:

- A - Answered
 B - Non-Special Referral
 C - Completed
 S - Suspended

FOR OUTGOING CORRESPONDENCE:

- Type of Response = Initials of Signer
 Code = "A"
 Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
 Send all routing updates to Central Reference (Room 75, OEOB).
 Always return completed correspondence record to Central Files.
 Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

THE WHITE HOUSE

WASHINGTON

December 19, 1991

Dear Buck:

Thank you for your letter recommending Peter Rusthoven for appointment to the United States Court of Appeals for the D.C. Circuit.

I have shared your personal recommendation with members of the President's Federal Judicial Selections Committee. You can be assured that your suggestions will be given every consideration.

With best regards.

Sincerely,



C. Boyden Gray
Counsel to the President

Mr. C. Harvey Bradley
1310 South State Road, 421
Zionsville, Indiana 46077

27364000

C. HARVEY BRADLEY
1310 S. STATE RD. 421
ZIONSVILLE, INDIANA 46077

Sept. 22, 1991

Mr. C. Boyden Gray
Counsel to the President
1000 Pa. Ave.
White House
Washington, D.C.

COUNSEL'S OFFICE
RECEIVED

SEP 25 1991

Dear Boyden:

I recently learned that Peter Rusthoven of Indianapolis is a candidate for the expected vacancy on the U.S. Court of Appeals for The District of Columbia. I am aware of his excellent academic, public and professional accomplishments. However, the purpose of this letter is to be sure you are aware that Peter early on demonstrated his support for the President when the chips were down. I recall clearly asking in the Fall of 1987 (as Indiana Finance Chairman of the then Vice President's campaign) for support. Some gave the usual evasive answers for the picture then was cloudy..not Peter. He immediately volunteered support and came through. I thought you should know his support for the President is no phony.

Best to you.

Yours,

Buck

If you believe appropriate ,please pass this on to the President.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

L8d recd
11/25
3:45

- ☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING

Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: SENATOR ARLEN SPECTER

- ☐ **MI Mail Report** User Codes: (A) _____ (B) _____ (C) _____

Subject: Forwards letter from Judd Shoval, who recommends John M. Nannes
for U.S. Court of Appeals for the D.C. Circuit

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUOFC		DJ ORIGINATOR	9/11/22		C	9/11/23
CUAT 07		DJ Referral Note:	9/11/25	BG	A	9/11/23
		Referral Note:		letter to Specter		
		Referral Note:				
		Referral Note:				
		Referral Note:				

ACTION CODES:

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Comments: _____

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THE WHITE HOUSE
WASHINGTON

December 23, 1991

Dear Arlen:

Thank you for your recent letter and a copy of the letter from your constituent, Mr. Judd Shoval, recommending John M. Nannes to serve on the United States Court of Appeals for the District of Columbia Circuit. Please be assured that we will give careful consideration to Mr. Shoval's comments as we consider the candidates for this position.

With best regards.

Sincerely,



C. Boyden Gray
Counsel to the President

The Honorable Arlen Specter
United States Senate
Washington, D.C. 20510-6275

2886666

STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
HANK BROWN, COLORADO

United States Senate

WASHINGTON, DC 20510-6275

November 19, 1991

COUNSEL'S OFFICE
RECEIVED

NOV 21 1991

Dear Boyden:

I have been contacted by a constituent and friend from Wilkes-Barre, Pennsylvania, Mr. Judd Shoal, who has requested that I write to urge the Administration to nominate John M. Nannes, Esquire, to the United States Court of Appeals for the D.C. Circuit. I have enclosed a copy of Mr. Shoal's letter.

I do not know Mr. Nannes personally. As you can see, however, Mr. Shoal has given me a glowing report on Mr. Nannes's personal qualities; I can attest to Mr. Shoal's judgment. A glance at his resume demonstrates that Mr. Nannes is professionally well-qualified to serve on the court. He attended one of our nation's finest law schools, the University of Michigan, where he was an editor of the law review. After clerking for Judge Robb on the D.C. Circuit and for Justice Rehnquist, Mr. Nannes served in the Antitrust Division of the Justice Department. Since 1981, he has been associated with Skadden, Arps, Slate, Meagher & Flom in Washington.

I believe that the D.C. Circuit needs more lawyers who practiced in the local community. The nomination of Judge Randolph last year was an important start. Following that appointment with the nomination of another exceptional local practitioner would be well-received in Washington. Appointing someone of Mr. Nannes's professional credentials would be well-received throughout the country. Therefore, I request that the Administration give Mr. Nannes's appointment to the D.C. Circuit the most serious consideration.

My best.

Sincerely,

Arlen Specter

AS/rah

Enclosure

Y. Judd Shoval

November 5th, 1991

Honorable Arlen Specter
The Hart Building
Room 303
Washington, D.C. 20510

JJB → RY
WP ASS W

Dear Senator Specter:

I am writing to seek your support for the nomination of John Nannes to fill the seat on the United States Court of Appeal for the District of Columbia Circuit recently vacated as a result of Judge Clarence Thomas's elevation to the Supreme Court. Mr. Nannes is an exceptional candidate who is on the "short list" of candidates according to the Washington Post and the Wall Street Journal. His appointment is currently under consideration at the White House, and I believe it would be quite helpful to his candidacy if you would contact White House Counsel Boyden Gray and Acting Attorney General Barr on his behalf.

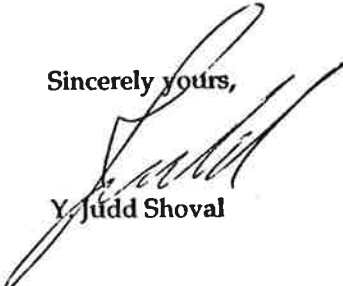
Mr. Nannes is under consideration because he has outstanding academic and law practice credentials, as demonstrated by the enclosed resume. He is highly regarded by clients, friends and other members of the bar for his intellect, legal skill and knowledge of the law. He shares those talents with his colleagues by devoting a great deal of time to bar association activities. John's even temperament, strong sense of fairness and unwavering belief in the judicial process also make him a perfect candidate for the federal bench. As a result, his nomination would be well-received and uncontroversial.

Mr. Nannes has strong tie to the Washington community in which he has lived and worked for more than eighteen years. He is familiar with the work of the D.C. Circuit, having clerked for Judge Roger Robb on that court after graduating from law school. Subsequently, he served as a law clerk to Chief Justice Rehnquist, with whom he has maintained a personal relationship during the intervening years. Prior to joining his firm Mr. Nannes served in the Justice Department during the Ford Administration. In addition to his bar association and related activities, Mr. Nannes is also active in his synagogue and local schools.

I strongly believe that John Nannes would be an excellent addition to the D.C. Circuit. It is my understanding that a decision with respect to the vacancy will be made very soon, and a timely contact is therefore likely to be especially effective. I hope that you will be able to assist him.

Thank you for your consideration.

Sincerely yours,


Y. Judd Shoval

Enclosure

JOHN M. NANNES

LEGAL EMPLOYMENT

Partner (1981 to date) and associate (1977 to 1980),
Skadden, Arps, Slate, Meagher & Flom, 1440 New York
Avenue, N.W., Washington, D.C. 20005, (202) 371-7400.

Special Assistant to the Assistant Attorney General
in charge of the Antitrust Division, United States
Department of Justice, 1975 to 1977.

Law clerk to the Honorable William H. Rehnquist,
Associate Justice of the Supreme Court of the United
States, 1974 to 1975.

Law clerk to the Honorable Roger Robb, Circuit Judge
of the United States Court of Appeals for the
District of Columbia Circuit, 1973 to 1974.

LEGAL EDUCATION

Juris Doctor Magna Cum Laude, University of Michigan
Law School (1973).

Scholastic record: 4.00 average; ranked 3rd out of
453; Order of the Coif.

Extracurricular activities: Articles & Book Review
Editor, Michigan Law Review, Volume 71 (1972-1973);
Associate Editor, Michigan Law Review, Volume 70
(1971-1972).

UNDERGRADUATE EDUCATION

Bachelor of Business Administration (BBA) with High
Distinction, University of Michigan School of
Business Administration (1970).

ADMITTED TO PRACTICE

Supreme Court of the United States
United States Court of Appeals for the District of
Columbia Circuit
United States District Court for the District of
Columbia
District of Columbia Court of Appeals

PROFESSIONAL ACTIVITIES

Member, Advisory Committee on Procedures, United States Court of Appeals for the District of Columbia Circuit, 1990 to present.

Chairman, Transportation Subcommittee of the Industry Regulation Committee of the Antitrust Section of the American Bar Association, 1987 to present.

Vice-Chairman, Federal Trade Regulation Committee of the Antitrust and Trade Regulation Section of the Federal Bar Association, 1987 to present.

Vice President, Association of Transportation Practitioners, 1987-1990.

Antitrust Editor, Committee on Publications, Association of Transportation Practitioners, 1986 to present.

Adjunct Professor of Law, Georgetown University Law Center, 1979-1981 and 1983-1984.

HONORS

National Vice-Chair, University of Michigan Law School Fund, 1991 to present.

Committee of Visitors, University of Michigan Law School, 1987-1991.

Invited by the United States Supreme Court to brief and argue case as amicus curiae, 480 U.S. 904 (1987).
See United States v. Rausto, 484 U.S. 439 (1988).

PERSONAL INFORMATION

Age:	43
Born:	August 30, 1948, Evansville, Ind.
Marital Status:	Married, August 9, 1970
	Two children
Residence:	7914 Springer Road, Bethesda, MD.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

LSL recd.
7/18
7:00pm.

☒ O - OUTGOING

☒ H - INTERNAL

☒ I - INCOMING

Date Correspondence
Received (YY/MM/DD) 1/1

Name of Correspondent: J. Gregory Sidak

☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: In the case of a vacancy on D.C. Circuit, nominates Geoffrey Miller of U. of Chicago.

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>Cuofc</u>		ORIGINATOR	<u>9110716</u>		<u>C</u>	<u>9110131</u>
<u>CUAT 07</u>		Referral Note: <u>A</u>	<u>9110717</u>	<u>BG</u>	<u>A</u>	<u>9110831</u>
		Referral Note:	<u>1/1</u>	<u>letter to Sidak</u>		<u>1/1</u>
		Referral Note:	<u>1/1</u>			<u>1/1</u>
		Referral Note:	<u>1/1</u>			<u>1/1</u>
		Referral Note:	<u>1/1</u>			<u>1/1</u>

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Always return completed correspondence record to Central Files.

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THE WHITE HOUSE
WASHINGTON

October 31, 1991

Dear Greg:

Thank you for your letter recommending Professor Geoffrey Miller for appointment to the U.S. Court of Appeals for the D.C. Circuit. It's an interesting idea that I'll bear in mind.

With best regards.

Sincerely,

A handwritten signature in dark ink, appearing to read "C. Gray", with a stylized flourish extending to the right.

C. Boyden Gray
Counsel to the President

Mr. J. Gregory Sidak
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044

255/53C
COUNSEL'S OFFICE
RECEIVED

JUL 16 1991

1201 PENNSYLVANIA AVENUE, N. W.
P. O. BOX 7566
WASHINGTON, D. C. 20044

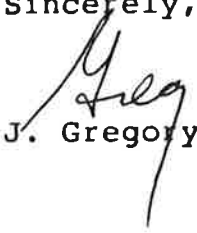
July 13, 1991

C. Boyden Gray, Esq.
Counselor to the President
The White House
Washington, D.C. 20500

Dear Boyden:

In the expectation that a vacancy will be opening soon on the D.C. Circuit, I would like to put forward a suggestion for a nominee: Professor Geoffrey Miller of the University of Chicago. He is an expert on administrative law and constitutional law (as well as corporate law) and one of two editors of the prestigious *Journal of Legal Studies*. His scholarship on the separation of powers is the best being produced on the subject in my view.

Sincerely,


J. Gregory Sidak

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: AUGUST 16, 1991

NAME OF CORRESPONDENT: THE HONORABLE HANK BROWN

SUBJECT: RECOMMENDS JUDGE KENNETH B. KRAMER TO FILL
THE VACANCY ON THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LSL recd
8/27
4:50

ROUTE TO:		ACTION		DISPOSITION	
OFFICE/AGENCY	(STAFF NAME)	ACT CODE	DATE YY/MM/DD	TYPE RESP	C COMPLETED D YY/MM/DD
FREDERICK MCCLURE		ORG	91/08/16	Fm	A 9/1/8/19 TC
Cuofc	REFERRAL NOTE:	4	9/10/82	TC	C 9/1/12/03
LA Dyer	REFERRAL NOTE:	I	9/10/82		C 9/1/08/26 TC
99DOJ	REFERRAL NOTE:	I	9/10/82		C 9/1/08/27 TC
PP Bull	REFERRAL NOTE:	I	9/10/82		C 9/1/08/26 TC
Cuat87	REFERRAL NOTE:	A	9/1/08/29	CS	B 9/1/94/03
COMMENTS: ENCLOSURES answered by McClure 8/19/91					

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 1220
MAIL USER CODES: (A) END (B) (C)

*ACTION CODES:	*DISPOSITION	*OUTGOING	*
*	*	*CORRESPONDENCE:	*
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS	*
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	*OF SIGNER	*
*D-DRAFT RESPONSE	*C-COMPLETED	*CODE = A	*
*F-FURNISH FACT SHEET	*S-SUSPENDED	*COMPLETED = DATE OF	*
I-INFO COPY/NO ACT NEC		*OUTGOING	*
*R-DIRECT REPLY W/COPY			*
*S-FOR-SIGNATURE			*
*X-INTERIM REPLY			*

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE
(ROOM 75, OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING
LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS
MANAGEMENT.

August 19, 1991

Dear Hank:

Thank you for your recent letter to the President recommending Judge Kenneth B. Kramer for appointment to the U.S. Court of Appeals for the District of Columbia Circuit.

The President is pleased that so many qualified individuals are willing to serve in the Federal judiciary. We sincerely appreciate your contacting us and offering your personal endorsement on behalf of Judge Kramer. I have shared your letter with the appropriate officials for their careful consideration.

Thank you again for your interest in writing.

With best regards,

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

The Honorable Hank Brown
United States Senate
Washington, D.C. 20510

FDM:JHH:

bcc: w/ copy of inc to C. Boyden Gray - for appropriate action
bcc: w/ copy of inc to Jim Dyer - FYI
bcc: w/ copy of inc to Dept. of Justice - FYI
bcc: w/ copy of inc to Katja Bullock - FYI

HANK BROWN
COLORADO

245500
COMMITTEES:
BUDGET
FOREIGN RELATIONS
JUDICIARY

Free Clare

United States Senate

WASHINGTON, DC 20510-0804

August 14, 1991

The Honorable George Bush
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

As you know, the confirmation of Judge Clarence Thomas to the U.S. Supreme Court will lead to a vacancy on the U.S. Court of Appeals for the District of Columbia Circuit. I strongly urge your consideration of Judge Kenneth B. Kramer to fill that vacancy.

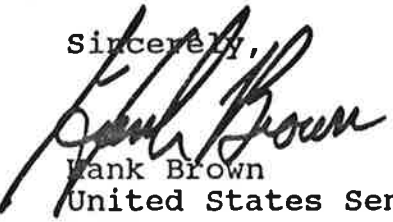
Ken now serves as an associate judge of the U.S. Court of Veterans Appeals, a position he has held since 1989. He previously served as Assistant Secretary of the Army for Financial Management, and for four terms was Colorado's Fifth District congressman in the U.S. House of Representatives. He also served two terms in the Colorado General Assembly.

A graduate of Harvard Law School and a member of Phi Beta Kappa, Ken has a outstanding legal background, working as a prosecutor and a civil litigator. Just as importantly, he shares the sort of judicial philosophy that is so vital to our nation's federal bench -- the idea that judges should interpret our laws, not make the laws.

As a Republican, Ken was a Bush supporter. He served as a member of your campaign's National Steering Committee and co-chair of the Bush campaign in Colorado.

Mr. President, Judge Ken Kramer has the right credentials to be a strong candidate to replace Judge Thomas. Some background material about Ken is enclosed. Your consideration of him for this position on the Court of Appeals at the appropriate time would be appreciated.

Sincerely,


Hank Brown
United States Senator

HB/jdk

Enclosure

KENNETH B. KRAMER
730-B South 15th Street
Arlington, Virginia 22202
(703) 553-4307 (home)
(202) 501-5886 (work)

Education

J.D., Harvard Law School, Cambridge, Massachusetts (1966)
B.A., University of Illinois, Champaign, Illinois (1963)

Phi Beta Kappa, Honors and High Distinction, and Distinguished ROTC Military Graduate

Professional Credentials

Member of bars of: Supreme Court of the United States, United States Court of Military Appeals, Supreme Court of the State of Colorado, State of Illinois Supreme Court (former)

Chairman, Committee on Veterans' Benefits, Administrative Law Section, American Bar Association (1990-present)

Project: The Pro Se Problem Facing the United States Court of Veterans Appeals

Commissioner, National Commission on Uniform States Laws, Chicago, Illinois (1977-1978)

Employment

Associate Judge, United States Court of Veterans Appeals, Washington, D.C. (1989-Present)

Author of numerous opinions and orders and article, "Judicial Review of the Theoretically Non-Reviewable: An Overview of Pre-COVA Court Action on Claims for Veterans Benefits", 17 Ohio N.U.L.Rev. 99 (1990)

Assistant Secretary of the Army, Financial Management, Washington, D.C. (1988-1989)

Distinguished Civilian Service Medal

Vice President, Aries Properties, Inc., Colorado Springs, Colorado (1987)

U.S. Representative, 5th Congressional District, Colorado (1978-1986)

State Representative, 18th Representative District, Colorado (1973-1978)

Partner, Floyd, Kramer & Lambrecht, Colorado Springs, Colorado (1975-1978)

General law practice

Associate, Holme, Roberts and Owen, Colorado Springs, Colorado (1972-1974)

Business law practice

Deputy District Attorney, Fourth Judicial District, Colorado (1970-1972)

Prosecutor

Associate, Lord, Bissell and Brook, Chicago, Illinois (1970)

Civil litigation law practice

Employment - continued:

Captain, United States Army, Judge Advocate General's Corps (1967-1970)

Military law practice

Army Commendation Medal

Legal Researcher, Kirkland and Ellis, Chicago, Illinois (1966)

Business law practice

Civic Activities (Present and Former)

Founder and Director, U.S. Space Foundation, Colorado Springs, Colorado (1983-present); Board of Visitors, U.S. Air Force Academy, Colorado Springs, Colorado (1979-86); Director, American Security Council Foundation, Washington, D.C. (1987-88); Director, March of Dimes, Mountain Valley Chapter, Colorado Springs, Colorado (1982-84); Director, Pikes Peak Mental Health Center, Colorado Springs, Colorado (1976-1978).

Political Activities (Former)

Bush for President: member, National Steering Committee (appointed May, 1987) and Colorado co-chair (appointed mid-1987); Vice Chairman, National Republican Congressional Committee, Washington, D.C.; Vice Chairman, Republican Study Committee, Washington, D.C.; member, Colorado State Republican Finance Committee; member, Colorado State Republican Central Committee; member, El Paso County Republican Central Committee; Chairman, El Paso County Young Republicans; delegate, Republican National Convention; delegate, numerous Colorado state and county conventions; worker and contributor for numerous Republican candidates.

Other Awards

Who's Who in America; Who's Who in Government; Who's Who in the West; Who's Who in Colorado; Outstanding Young Men in America; Distinguished Americans; Taxpayers Best Friend, National Taxpayers Union; Guardian of Small Business, National Federation of Independent Business; Watchdog of the Treasury, National Associated Business, Inc.; Distinguished Service Award, Production Credit Association; Distinguished Service Award, Americans for Constitutional Action; Distinguished Service Award, Colorado Air Force Association; Medal of Merit, Colorado Air Force Association; Congressional Award of Merit, National Coordinating Council on Emergency Management; Legislative Award for Outstanding Service, Coalition for Peace Through Strength; Distinguished Service Award, Colorado Springs Chamber of Commerce; Honorary Member, Rotary Club of Colorado Springs; Honorary Member, Tri-Lakes Chamber of Commerce.

SIGNIFICANT INVOLVEMENT OF KEN KRAMER
WITH PRESIDENT BUSH

Mr. Kramer was a delegate at the Republican National Convention where Mr. Bush was nominated to be Vice-President. When some members of the Colorado delegation threatened to oppose Mr. Bush's nomination, Mr. Kramer urged them to support the nomination. (Detroit, Michigan, 1980)

Mr. Kramer made appearances in Colorado for Reagan-Bush campaigns. (1980, 1984)

Mr. Kramer made a one-half hour, one-on-one, presentation to Mr. Bush at his office in the U.S. Capitol regarding the founding and purpose of the United States Space Foundation. (1983)

Mr. Bush made a campaign visit to Colorado Springs, Colorado on behalf of Mr. Kramer's Senate candidacy. (1986)

Mr. Kramer worked on the "Bush for President" campaign as follows:

Member, National Steering Committee (appointed May 1987) and Colorado co-chair (appointed mid-1987); made telephone calls and appearances during 1987 on behalf of the President's candidacy; contributor, 1988. (See attached letters)

NEIL MALLON BUSH

May 11, 1987

Mr. Ken Kramer
c/o Aries Properties
111 So. Tejon, Suite 700
Colorado Springs, CO 80903

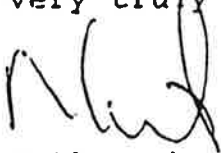
Dear Ken:

I have been traveling with some frequency having visited recently the states of New Hampshire, Iowa, and Pennsylvania. I can report first hand that politically George Bush has never been stronger. Fund raising is going well and I think he will do surprisingly well in the early states. We won't rest until Dad is nominated and then elected.

I was thrilled to hear of your commitment of support for Dad. That you have joined the National Steering Committee is a major boost to his effort. At some point, when you are in Denver or when Gregg Petersmeyer and I are in Colorado Springs we would love to sit down with you to strategize. We have had some luck in the state and would like to get your advice.

Again many thanks for your early support of Dad.

Very truly yours,

A handwritten signature in dark ink, appearing to be 'Neil Bush', written over the typed name.

Neil Bush

C. GREGG PETERSMEYER

Dear Ken,

With George Bush officially
announcing his candidacy this week
I want to take the opportunity to
thank you again for being one of his
Colorado Co-Chairmen. You have
already helped the campaign by the
key telephone calls you are making
to ask for commitments and by
proxy speeches you have agreed to
make. And I just want you to
know that I am personally grateful
for your early, public and effective
support for George Bush.

Warm regards,

Guzz

October 15, 1987

NEIL MALLON BUSH

10.18.87

Dear Ken,

A short note of thanks
for agreeing to be either
a Bush Dinner Co-Chair or
part of the Dinner Committee.

Dad looks forward to seeing
you and your fiancée Nov. 24th.
We are going to have a very
successful fundraiser.

Thanks also for making the
organizational calls. With your
help and the help of so many others who
are committed to Dad - Colorado will
be Bush Country. Best wishes,
Neil



COLORADO REPUBLICANS

1275 Tremont Place, Denver, Colorado 80204 (303) 893-1776

August 22, 1988

The Honorable Ken Kramer
1400 South Joyce Street, #B1708
Arlington, Virginia 22202

Dear Ken,

Neil Bush passed along to the state party your \$250.00 contribution to George Bush for President. Since the National Bush campaign cannot accept personal contributions, each state party office has established a separate federal account to accept personal contributions on behalf of the presidential race. This federal account is called the Victory '88 account and will support the direct mail, voter ID and GOTV efforts of the Colorado Bush campaign.

I wanted to let you know where your contribution was placed and to thank you for your generosity. On behalf of Neil and all of the Victory '88 Bush for President state workers, we very much appreciate your support!

I hope you are enjoying Washington and your directorship of the financial management for the Army. We miss you in Colorado and wish you all the best in D.C. You'll have to get back to see us now and again.

Take care Ken, and thanks again for your very helpful contribution.

Sincerely,

Margaret L. Haas
Executive Director

MLH:as

NEIL M. BUSH
410 17TH STREET, SUITE 810
DENVER, COLORADO 80202

November 18, 1988

Dear Ken,

Many thanks for your thoughtful note. Sharon and I feel great pride in what Dad has accomplished. It's still hard to believe he'll be sworn in as our 41st President.

Best wishes from our part of the First Family - Elect.

Sincerely,



Let me know what you
want to do. I'd love to
throw in a plug.

C. GREGG PETERSMEYER

December 6, 1988

Mr. Kenneth B. Kramer
1400 S. Joyce Street C801
Arlington, VA 22202

Dear Ken,

Bob Lee has forwarded to me information about you, including your interest in serving in George Bush's Administration. It has taken me longer than I would have liked for me to get back to you, but I spent most of the two weeks following the election away from Denver.

I have forwarded your resume to a recently formed Colorado Transition Advisory Committee at the Republican State Party. Bruce Benson is chairing the committee of which Neil Bush, myself and a couple of others are a part. The purpose of the committee is to recommend and coordinate the interests of qualified Coloradans who want to serve in the Bush Administration. I know that the committee is going to be in touch with shortly.

Sincerely,



C. Gregg Petersmeyer

P.S. As you can imagine, Ken, I will be enormously supportive of you. I am very grateful for your early support for George Bush in Colorado which was critical at the time. So I want to do whatever I can for you. Incidentally, the other members of the committee are Kay Riddle, Jim Nicholson and Dick Wadhams. I do hope that you are well and that I will see you soon.

ID# 280617

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: OCTOBER 24, 1991

NAME OF CORRESPONDENT: THE HONORABLE DAN COATS

SUBJECT: RECOMMENDS PETER RUSTHOVEN FOR APPOINTMENT
TO THE U.S. COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

FG059-01

L&A recd.
11/6

ROUTE TO: OFFICE/AGENCY (STAFF NAME)		ACTION ACT CODE	DATE YY/MM/DD	TYPE RESP	DISPOSITION C COMPLETED D YY/MM/DD
FREDERICK MCCLURE		ORG	91/10/24	FM	91/11/25
REFERRAL NOTE:		A	91/11/24		91/11/24
REFERRAL NOTE:		I	91/11/24		
REFERRAL NOTE:		I	91/11/24		
REFERRAL NOTE:		I	91/11/24		
REFERRAL NOTE:		PD	91/11/24		
REFERRAL NOTE:		A	91/11/05		91/12/04
COMMENTS: answered by McClure					see comments

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 1220
MAIL USER CODES: (A)END (B) (C)

*ACTION CODES:	*DISPOSITION	*OUTGOING	*
*	*	*CORRESPONDENCE:	*
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS	*
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* OF SIGNER	*
*D-DRAFT RESPONSE	*C-COMPLETED	* CODE = A	*
*F-FURNISH FACT SHEET	*S-SUSPENDED	*COMPLETED = DATE OF	*
*I-INFO COPY/NO ACT NEC		* OUTGOING	*
*R-DIRECT REPLY W/COPY	*		*
*S-FOR-SIGNATURE	*		*
*X-INTERIM REPLY	*		*

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE
(ROOM 75,OEOb) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING
LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS
MANAGEMENT.

October 25, 1991

Dear Dan:

Thank you for your recent letter to the President recommending Mr. Peter Rusthoven for appointment to the United States Court of Appeals for the District of Columbia Circuit.

The President is pleased that so many qualified individuals are willing to serve in the Federal judiciary. We sincerely appreciate your contacting us and offering your personal endorsement on behalf of Mr. Rusthoven. I have shared your letter with the appropriate advisors for their careful consideration.

Thank you again for your interest in writing.

With best regards,

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

The Honorable Dan Coats
United States Senate
Washington, D.C. 20510

FDM:TBA:

bcc: w/ copy of inc to C. Boyden Gray - for appropriate action
bcc: w/ copy of inc to Jim Dyer - FYI
bcc: w/ copy of inc to Dept. of Justice - FYI
bcc: w/ copy of inc to Katja Bullock - FYI

DAN COATS
INDIANA

407 RUSSELL SENATE OFFICE BUILDING
(202) 224-5623

INDIANAPOLIS OFFICE:
ROOM 447, 46 EAST OHIO STREET
INDIANAPOLIS, INDIANA 46204
(317) 226-5555

200211
COMMITTEES:
ARMED SERVICES
LABOR AND HUMAN
RESOURCES

United States Senate

WASHINGTON, DC 20510

October 21, 1991

Free Oliver

The President
The White House
Washington, DC 20500

Dear Mr. President:

With the successful confirmation of Judge Thomas to the Supreme Court now finally, and thankfully, behind us, I would like to take this opportunity to personally call to your attention an outstanding individual whom I feel is extremely well qualified to fill the new vacancy on the United States Court of Appeals for the District of Columbia Circuit -- Peter Rusthoven of Indiana.

I have known Peter for some time, dating back to my days in the House of Representatives. Based on my personal experiences with him, I am convinced that his long and distinguished record of service and accomplishment makes him an ideal candidate for our Nation's second highest court.

Peter is an Indianapolis native, and currently resides in the city of Carmel. His formal education is from Harvard College and Harvard Law School where he served as editor of the Harvard Law Review and graduated magna cum laude as both an undergraduate and postgraduate student. After practicing law for five years in Indianapolis, he was appointed Associate Counsel to President Reagan, where he served in the Administration from 1981 to 1985. At that point he returned to Indiana to continue private practice, only to return to Washington in 1986 to serve as Counsel to the Presidential Commission on the Space Shuttle Challenger Accident. Peter also provided legal assistance to the 1988 Bush/Quayle campaign in Indiana, as well as the U.S. Attorney General's Advisory Board on Missing Children. Currently, Peter is a partner in the Indianapolis office of Barnes & Thornburg, Indiana's largest law firm, practicing corporate law and appellate litigation.

I am taking the time to personally recommend Peter to you not only because of his qualifications, but also due to the importance of the D.C. Circuit Court of Appeals. As you know, aside from the Supreme Court, the D.C. Circuit is the single most influential bench in the Federal judicial system. This "national court" routinely is forced to deal with issues that are crucial to the operation of our government.

A seat of this importance needs an appointee who brings to the bench not only the highest intellectual and legal background, but also an understanding of the inner workings of our government and how it affects the individuals and businesses who live and work under its laws. Peter Rusthoven has this unique background.

Peter's intellectual qualifications to serve have been established by his educational accomplishments. His character, dedication, and integrity have been displayed through his service to the political process. I also know from my personal experience that Peter is committed to the values that you, Vice President Quayle, and I share regarding the most important issues of our day. I have spoken with the Vice President directly about Peter's qualifications and I know of a number of other strong supporters, including my colleague Senator Lugar.

I am convinced that Peter's experience, both inside and outside of Washington, makes him an ideal nominee for such an important appointment and I cannot recommend him highly enough. Lastly, I believe that Peter would be a readily confirmable nominee.

I would be happy to discuss Peter's recommendation with you, and I sincerely thank you for your consideration of this matter.

With warmest regards,

A handwritten signature in dark ink, appearing to read "Dan Coats", with a large, stylized initial "D" and "C".

Dan Coats
United States Senator

DC/dmt

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Talking Points	Re: D.C. Circuit [FOIA RESTRICTIONS REDACTED] [DOCUMENT FOLLOWS] (1 pp.)	n.d.	~~P2, P3~~ , (b)(6)	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Liberman, Lee S.
Subseries: Circuit Courts of Appeals Files
WHORM Cat.:
File Location: Court of Appeals for the D.C. Circuit [2]

Open on Expiration of PRA
 (Document Follows)
 By NGD (NLGB) on 12/12/2007

Date Closed: 9/14/2004
FOIA/SYS Case #: 1998-0205-F
Re-review Case #:
P-2/P-5 Review Case #:

OA/ID Number: 45172-002

MR Case #:
MR Disposition:
Disposition Date:

Appeal Case #:
Appeal Disposition:
Disposition Date:

RESTRICTION CODES

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

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 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. Removed as a personal record misfile.

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

(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]
 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (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

J.C. [unclear]

Talking Points re: D.C. Circuit

--The President does not need to nominate a Hispanic to this seat to demonstrate commitment to reaching out to Hispanics. We have just tentatively selected a Hispanic for the Eleventh Circuit, Federico Moreno, and Ricardo Hinojosa has finally agreed to go forward for the Fifth Circuit.

--Thus, if all the Hispanics already tentatively selected get cleared and confirmed, President Bush will already have appointed

- o the highest percentage of Hispanics to the bench.
- o more than twice the percentage, and twice the total number, of Hispanics appointed to the courts of appeals by Carter, who has the second highest percentage and number ever. See chart.

--Although we could try to persuade Moreno to be nominated for the D.C. Circuit instead of the Eleventh (we could not persuade Hinojosa), I would recommend against that.

--From the perspective of grooming a candidate for the Supreme Court, the D.C. Circuit is not the best place. Scalia, Bork, Ginsburg and Thomas were all nominated from there, making the idea somewhat passe; there are no Senators from there, hence no natural base of support; it brings no geographical balance; and the Carter appointees there have an incestuous relationship with the Judiciary Committee and Washington press corps and carry disagreements over cases to the confirmation process. Wald, for example, lobbied Senator Kennedy against Doug Ginsburg, and somebody leaked a draft Thomas opinion to the press.

--From a political perspective, although a nominee for the D.C. Circuit would get the attention of the national Hispanic organizations, nominees to the Fifth and Eleventh Circuits would get much more attention from the populations of the states in those circuits, most notably Texas and Florida.

--Finally, the D.C. Circuit has a specialized docket that is important in its own right because of the separation of powers issues it gets. In some ways it is more important on these issues than the Supreme Court. Therefore appointees must really understand those issues or the Presidency can be badly hurt. See how that court has handled the Iran-Contra prosecutions; 2-1 decision finding the law unconstitutional (2 Reagan judges versus 1 Carter judge), 2-1 decision vacating North conviction (2 Reagan versus 1 Carter), 2-1 decision reversing Poindexter conviction (2 Reagan versus 1 Carter).

[REDACTED]

--We do have a superstar non-Hispanic candidate, on the other hand, John Roberts, who would handle these issues superbly. Bill Barr agrees about Roberts.

[REDACTED]

Syracuse University School of Law, 1988. *Member:* The District of Columbia Bar; State Bar of Michigan. [Capt., USAF, 1966-1970]

STEVEN B. EPSTEIN, born New York, N.Y., November 3, 1943; admitted to bar, 1969, New York; 1972, District of Columbia; 1975, Maryland; 1982, U.S. Supreme Court. *Education:* Tufts University (B.A., 1965); Columbia University (LL.B., 1968). *Member:* The District of Columbia Bar; Maryland State and American Bar Associations; National Health Lawyers Association; American Association of Hospital Attorneys.

WARREN G. ELLIOTT, born Pueblo, Colorado, January 3, 1927; admitted to bar, 1952, Colorado; 1958, U.S. Supreme Court; 1976, Connecticut; 1978, District of Columbia. *Education:* University of Nebraska at Lincoln and University of Colorado at Boulder (A.B., 1952); University of Michigan (LL.B., 1952). General Counsel, Aetna Life & Casualty Co., 1968-1978. Associate General Counsel, Life Insurance Association of America, 1961-1968. Legislative Counsel, U.S. Senator Gordon Allott, Colorado, 1955-1961. Assistant City Manager and City Attorney, Pueblo, Colorado, 1952-1955. Director, Comprehensive Care, 1988—; RehabCare Corporation, 1987-1988. *Member,* Washington Area Tennis Patrons, 1985—. *Member:* Connecticut, Federal and American (Member, Tort and Insurance Practice; Chairman, Committee on Employee Benefits, 1986-1987) Bar Associations. (Also Of Counsel to Nossaman, Guthner, Knox & Elliott, Washington, D.C.) [With U.S. Army Air Corps, 1944-1946]

THOMAS M. FARAH, born Washington, D.C., November 24, 1953; admitted to bar, 1978, District of Columbia. *Education:* Georgetown University (A.B., magna cum laude, 1975; J.D., 1978). Phi Beta Kappa; Pi Sigma Alpha. *Member:* The District of Columbia Bar; American Bar Association. *Health Law.*

STUART M. GERSON, born New York, N.Y., January 16, 1944; admitted to bar, 1968, District of Columbia. *Education:* Pennsylvania State University (B.A., 1964); Georgetown University (J.D., 1967). Assistant U.S. Attorney, District of Columbia, 1972-1975. [Capt., U.S. Air Force, 1967-1971]

GILBERT J. GINSBURG, born Chicago, Illinois, August 26, 1936; admitted to bar, 1957, Illinois; 1962, U.S. Supreme Court; 1968, District of Columbia; 1979, U.S. Claims Court; 1982, U.S. Court of Appeals for the Federal Circuit. *Education:* University of Chicago (B.A., 1954; J.D., 1957). *Member,* Order of the Coif. Adjunct Professor of Law, George Washington University, 1981—. *Author:* *Cases and Materials on Equal Employment*, George Washington University, 4th ed., 1980, Supp., 1982; *Cases and Materials on Federal Labor Standards*, George Washington University, 2d ed. 1976, Supp., 1982; *Fair Labor Standards Handbook for States, Local Governments and Schools*, Thompson Publication, 1985. *Articles:* "Construction Briefing Paper, Profit on U.S. Construction Contracts," No. 86-11, Fed. Publications, Inc., 1986; "Construction Briefing Paper, Loss of Efficiency," No. 85-12, Fed. Publications, Inc., 1985; "Construction Briefing Paper, Joint Venture," No. 84-7, Fed. Publications, Inc., 1984. *Member:* The District of Columbia Bar; Federal and American (Member, Sections of: Public Contract Law; Labor Relations Law) Bar Associations. *Government Contracts, Construction Claims and Litigation, Wage and Hour Law.*

PETER S. GRAY, born Brooklyn, New York, November 13, 1951; admitted to bar, 1977, District of Columbia; 1987, Connecticut. *Education:* Clark University (A.B., 1973); St. Louis University; Catholic University of America (J.D., 1977). *Author:* "Affirmative Action as an Affirmative Defense to EEO Charges," EEO Today, Vol. 6, No. 2, Autumn, 1979; "Termination at Will—The Employer's Right to Fire," 6 Employee Relations Law Journal 25, Summer, 1980. Instructor, 1977-1979 and Lecturer, 1979-1981, Fair Employment, Basic Legal Techniques, Catholic University of America Law School. *Member:* The District of Columbia Bar (Member, Committee on Labor Relations, 1979—). (Also at Stamford, Connecticut Office). *Labor Law.*

DOUGLAS A. HASTINGS, born Oak Park, Illinois, July 28, 1949; admitted to bar, 1981, District of Columbia; 1982, U.S. District Court, District of Columbia and U.S. Court of Appeals, District of Columbia Circuit. *Education:* Duke University (A.B., magna cum laude, 1971); University of Virginia (J.D., 1981). Phi Beta

Kappa; Order of the Coif. Visiting Lecturer, Duke University, Department of Health Administration, 1985—. *Member:* The District of Columbia Bar; American Bar Association; National Health Lawyers Association; American Academy of Hospital Attorneys; Washington Council of Lawyers. *Health Law.*

WILLIAM G. KOPIT, born New York, N.Y., April 7, 1940; admitted to bar, 1965, New York; 1972, District of Columbia; 1977, U.S. Court of Appeals for the District of Columbia and U.S. Supreme Court. *Education:* Bucknell University (A.B., 1961); Columbia University (J.D., cum laude, 1964). Recipient, William Gritzinger Award, highest average in Economics, 1961. Harlan Fiske Stone Scholar. *Author:* "Antitrust Issues for Health Maintenance Organizations and Preferred Provider Arrangements," Clark Boardman 1990 Handbook; "Independent Physicians Organizations: Are They a Solution?" The Internist, Vol. 28, No. 6, July, 1987; "Commentary: Professional Peer Review and the Antitrust Laws," Case Western Reserve Law Review, Vol. 36, No. 4, 1986; "Disease and Cure: The Professional Liability Crisis," Physician Executive, Nov.-Dec., 1986; "Regulation of Preferred Provider Organizations: A Legal Guide for Hospital Executives Legal Memorandum No. 8," American Hospital Association, Sept., 1986; "Constitutionality of Medical Malpractice Reform Statutes, Medical Malpractice Task Force Report on Tort Reform," American Hospital Association, May, 1986; "Antitrust Implications," Hospital Management, Winning Strategies for the '80's, edited by Jesus J. Poena and Valerie Glesnes-Anderson, Aspen Publications, 1985; "Antitrust," The Hospital Law Manual, Attorney's Volume, editors Patricia A. Younger and Melanie J. Karsh, Aspen Systems Corp., Vol. 11, Dec., 1984; "An Overview of Regulatory Issues in PPO Contracting," Attorneys & Physicians Examine Preferred Provider Organizations, National Health Lawyers Association, 1984; "State Legal Initiatives Legal Developments Report No. 3, State Rate-Setting Legislation: Legal Issues in the Negotiation and Implementation of Statute," American Hospital Association, January, 1984; "Hospitals Must Consider Anti-Trust Implications of Multi-Institutional Arrangements," Hospitals, March, 1982; "Antitrust Implications of the Activities of HMO's," St. Louis University Law Journal, vol. 25, No. 2, April, 1982; "Summary of State Legislation Governing Quality Assurance Activities," Quality Assurance in Ambulatory Care, Aspen Systems, 1980; "Decertification of Hospital Facilities: Legitimate Regulations or a Taking of Private Property," Utah Law Review, July, 1978; "Legal Considerations in the Organization and Operation of Health Maintenance Organizations," The Wharton School, 1977; "Report of the Secretary's Task Force on Compensation for Injury to Human Research Subjects," 1975. Co-author: with Robert J. Moses and M. Kathleen Kenyon, "Through the Looking Glass and Back: Sherman Act Claims by Health Care Providers Demanding Higher Fees from Health Insuring Organizations," Perspectives in Healthcare Risk Management, summer, 1989; with Robert W. McCann, "Toward a Definitive Antitrust Standard for Nonprofit Hospital Mergers," Journal of Health Politics and Law, Duke University, Winter, 1989; with Judith M. Mattson, "Developing Independent Organizations," Medical Advocacy Services, Inc., No. 332, June, 1988; with Randall R. Bovbjerg, "Coverage and Care for the Medically Indigent: Public and Private Options," Indiana Law Review, Vol. 19, No. 4, 1986; with Clifford E. Barnes and Lisa Latorre, "A Practical Guide to Health Care Antitrust Issues," Trustee, May, 1986. *Member,* Advisory Board, The Johns Hopkins Center for Hospital Finance and Management, 1980-1986. *Member:* The District of Columbia Bar; New York State and American Bar Associations; National Health Lawyers Association (Member, Board of Directors, 1978-1986); American Academy of Hospital Attorneys. *Health Law.*

DAVID H. LARRY, born Pittsburgh, Pennsylvania, December 24, 1941; admitted to bar, 1976, Oregon; 1979, District of Columbia; 1982, U.S. Supreme Court. *Education:* Williams College (B.A., 1963); University of Oregon (J.D., 1976). *Litigation.*

DAVID C. MAIN, JR., born Des Moines, Iowa, February 29, 1948; admitted to bar, 1977, District of Columbia; 1980, U.S. District Court for the District of Columbia, U.S. Court of Appeals for the District of Columbia Circuit and U.S. Supreme Court. *Education:* DePauw University (B.A., 1970); Harvard University (M.T.S., 1973); Georgetown University (J.D., 1976). Phi Beta

(This Card Continued)



U.S. Department of Justice
Civil Rights Division

Deputy Assistant Attorney General

See —

As discussed.
Needless to say,
these briefs are
Roberts' own work.
They are a good
representation of
the quality and
style of his work,
as well as an
indication of the

[SEE ATTACHED FOR COPY PURPOSES]

kinds of ~~the~~ issues
he has dealt
with in his
practice. Let me
know if there is
anything else
you would find
helpful or
enlightening.

Barbara

[SEE ATTACHED FOR COPY Pu

D. C. W.

John G. Roberts, Jr.

Principal Deputy
Solicitor General
Department of Justice
Room 5141
Washington, D.C. 20530
(202) 514-2206

6111 Cromwell Drive
Bethesda, MD 20816
(301) 320-9120

Experience

1989-Present: Principal Deputy Solicitor General,
U.S. Department of Justice.

1988-1989: Partner, Hogan & Hartson.

1986-1987: Associate, Hogan & Hartson.

1982-1986: Associate Counsel to the President.

1981-1982: Special Assistant to the Attorney General,
William French Smith.

1980-1981: Law Clerk to Justice William H. Rehnquist,
United States Supreme Court.

1979-1980: Law Clerk to Judge Henry J. Friendly,
United States Court of Appeals
for the Second Circuit.

Bar membership: Supreme Court of the United States,
United States Court of Appeals for the
District of Columbia, Fifth, Ninth, and
Federal Circuits, United States District
Court for the District of Columbia,
United States Claims Court, District of
Columbia Court of Appeals.

Education

Legal: Harvard Law School, J.D., magna cum laude,
1979.

Editor, Harvard Law Review, volumes 91-92,
Managing Editor, volume 92.

College: Harvard College. Entered 1973 with Sophomore
standing. Graduated A.B. summa cum laude in
History, 1976. Honors thesis on British
domestic politics, 1900-1914.

College:
(cont'd)

Election to Phi Beta Kappa, 1976.

Bowdoin Essay Prize, 1976, for "the best dissertation submitted in the English language."

John Harvard Scholarship, 1974, 1975, 1976, "in recognition of academic achievement of the highest distinction."

Detur Prize, 1976, based on cumulative academic record.

William Scott Ferguson Prize, 1974, for "the outstanding essay submitted by a Sophomore concentrating in History."

Edwards Whitaker Scholarship, 1974, awarded to first-year students who "show the most outstanding scholastic ability and intellectual promise as indicated by distinction in studies and general achievement."

Preparatory:

LaLumiere School, LaPorte, Indiana. Graduated 1973 first in class. Varsity football (captain) and wrestling. National Council of Teachers of English Award, 1973. National Merit Scholarship, 1973.

Membership

American Law Institute (elected 1991)
Supreme Court Historical Society
American Judicature Society
Executive Committee, D.C. Lawyers for
Bush/Quayle, 1988
Republican National Lawyers Association

Oral Arguments

U.S. Supreme Court

1. United States v. Halper, 490 U.S. 435 (1989) (appointed by the Court to argue on behalf of Halper).
2. ARCO v. USA Petroleum, 110 S. Ct. 1884 (1990) (argued as amicus curiae).
3. Wilder v. Virginia Hospital Ass'n, 110 S. Ct. 2510 (1990) (argued as amicus curiae).
4. United States v. Kokinda, 110 S. Ct. 3115 (1990).
5. Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990).
6. Irwin v. Veterans Administration, 111 S. Ct. 453 (1990).
7. Grogan v. Garner, 111 S. Ct. 654 (1991) (argued as amicus curiae).
8. Cottage Savings Ass'n v. Commissioner of Internal Revenue, 111 S. Ct. 1503 (1991).
9. United States v. Centennial Savings Bank, 111 S. Ct. 1519 (1991).
10. Florida v. Jimeno, 111 S. Ct. 1801 (1991) (argued as amicus curiae).
11. Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631 (1991).

U.S. Court of Appeals for the District of Columbia Circuit

1. Horn & Hardart v. National Rail Passenger Corp., 843 F.2d 564 (D.C. Cir. 1988).
2. City of Rochester v. Environmental Protection Agency, No. 90-5011 (argued October 29, 1990) (pending).

U.S. District Court for the District of Columbia

1. CC Distributors, Inc. v. United States (September 1989, D.D.C., Lamberth, J.) (unreported)

Other legal:

- misc (substantial) trial proceedings @ Hogan
- 30 S.Ct. briefs authored @ Hogan
- 20-25 S Ct/app. briefs authored @ SG's off.



U.S. Department of Justice
Civil Rights Division

Deputy Assistant Attorney General

See —

As discussed.
Useless to say,
these briefs are
Roberts' own work.
They are a good
representation of
the quality and
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with in his
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helpful or
enlightening.
Ruthana

U.S. Ct. .
D.C. Circuit

GBG:LSL:cfp
CBGray
LSLiberman
Chron

THE WHITE HOUSE
WASHINGTON

November 19, 1991

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY
COUNSEL TO THE PRESIDENT

Original signed by CBG

SUBJECT: Response to Letter from John Stein

Attached for your review and approval please find a draft letter responding to John Stein's letter recommending Stuart Gerson for the U.S. Court of Appeals for the D.C. Circuit.

Dear John:

Thanks for your note recommending Stuart Gerson for the U.S. Court of Appeals for the D.C. Circuit. I know Stuart and think well of him. In fact, as you probably know, at the beginning of my Administration, I appointed him Assistant Attorney General in charge of the Civil Division at the Department of Justice. I have passed along your recommendation to Boyden Gray and Bill Barr, who advise me in these matters.

All my best to you and Abbe.

Sincerely,

GB

Mr. John Ellsworth Stein
Sunwater Farm
S.R. 4 Box 184D
Brightwood, VA 22715

THE WHITE HOUSE
WASHINGTON
11/5/91

TO: BOYDEN GRAY

FROM: PHILLIP D. BRADY
Assistant to the President and
Staff Secretary

Please prepare a response for the
President's signature at the earliest
time.

Thank you.

JOHN ELLSWORTH STEIN
SUNWATER FARM
S.R. 4, BOX 184D
BRIGHTWOOD, VIRGINIA 22715
(703) 948-4915

October 24, 1991

Dear George,

I recently noted that Stuart Gerson was mentioned by the Wall Street Journal as a possible replacement for Justice Clarence Thomas on the United States Court of Appeals for the District of Columbia Circuit. He would be a first-rate choice.

Stuart and I have been friends and colleagues for nearly 25 years. We first served together as Assistant United States Attorneys in Washington, D.C. for 3 years, later worked together on various legal matters in private practice, and Stu, Pam, Abbe and I are strong friends now. I know of no one with a higher sense of morality and decency than Stu. Coupled with his keen abilities as a lawyer, he would make a wonderful appellate judge. I'm confident he would bring to the bench that rare combination of scholarship, objectivity and fair play. He would be a credit to the bench.

Abbe and I haven't spoken to you or Barbara in a while and, sometimes we seem to be far from Washington D.C. out here on our farm. Please say hello to Barbara for us both and also to Marvin. I miss hitting tennis balls with him.

Sincerely,



THE WHITE HOUSE
WASHINGTON

Date: 9-16-91

TO: *Boyd Gray (Lee Liberman)*

FROM: ANDY CARD *Andy*

- ☐ Action
- ☒ Your Comment
- ☐ Let's Talk
- ☐ FYI

CADC



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

September 3, 1991

RECEIVED

SEP 4 1991

Honorable Andrew H. Card, Jr.
Assistant to the President
and Deputy Chief of Staff
The White House
Washington, DC 20500

Dear Andy:

It was good to talk with you today. Enclosed, as promised, are a bio and resume for Peter Rusthoven, who I strongly support for appointment to the U.S. Court of Appeals for the D.C. Circuit.

One significant fact not mentioned in Peter's bio is that in 1988 he was instrumental in shooting down questions in Indiana about the Vice President's military service. Also, he has played a major role in drafting the Indiana educational "choice" initiative and as recently as last week appeared before the American Legislative Exchange Council as an expert on the constitutionality of such plans.

I think Peter would be an outstanding judicial appointee and urge you to support his selection as the President's next nominee to the D.C. Circuit.

With warm regards,

Sincerely,

A handwritten signature in blue ink, which appears to read "Sherrie", is written over a horizontal line.

Sherrie P. Marshall
Commissioner

Enclosures

Biographical Sketch of PETER J. RUSTHOVEN

Peter J. Rusthoven is a partner in the Indianapolis office of Barnes & Thornburg, the largest law firm in Indiana with over 200 lawyers in Indianapolis, Fort Wayne, South Bend, Elkhart and Washington, D.C. His practice focuses on corporate law (including mergers and acquisitions and takeover defense) and on appellate litigation.

Mr. Rusthoven is an Indiana native who was graduated from Indianapolis Arlington High School in 1969, where he was the salutatorian, a National Merit Scholar and 1969 Indiana State High School Debate Champion. In 1973, he received his A.B. degree magna cum laude from Harvard College, where he was awarded several academic prizes and was one of 12 members of his class elected to Phi Beta Kappa as a junior. He then attended Harvard Law School, where he was an editor of the Harvard Law Review and earned his J.D. degree magna cum laude in 1976.

After practicing law for five years with the Indianapolis predecessor of Barnes & Thornburg, Mr. Rusthoven, who was active in the 1980 Reagan Presidential campaign, was appointed Associate Counsel to President Reagan, a position he held from 1981 to 1985. He then resumed private practice in Indiana, though he returned to Washington in 1986 to serve as Counsel to the Presidential Commission on the Space Shuttle Challenger Accident. In 1988 he was Special Consultant to the U.S. Attorney General's Advisory Board on Missing Children. He also provided legal assistance in Indiana to the 1988 Bush-Quayle campaign (which included representing a Republican Presidential Elector in defeating a third-party candidate's Federal lawsuit seeking to remove the Republican and Democratic Presidential and Vice Presidential nominees from the Indiana ballot).

In addition to publications in legal books and journals, Mr. Rusthoven was a monthly columnist from 1973 to 1979 for The American Spectator magazine, and has also published articles in National Review, The Saturday Evening Post and Indiana Policy Review. He is a former member of the Board of Directors of the Legal Services Organization of Indiana, and is currently an Adjunct Senior Fellow of Hudson Institute, a Senior Fellow of the Indiana Policy Review Foundation, and a member of the Legal Policy Advisory Board of the Washington Legal Foundation.

Mr. Rusthoven is a member of the Roman Catholic Church and the father of three children. He and his wife, the former Linda Catherine Bennett (who was Executive Assistant to President Reagan's Assistant for Legislative Affairs and is currently Director of Public Affairs for Hudson Institute), reside in Carmel, Indiana.

CAPC

BIO SKETCH OF HONORABLE RICARDO M. URBINA

Judge Urbina is a 1967 honors graduate of Georgetown University where he distinguished himself academically and as an all American and National Champion in track and field. He entered Georgetown University Law Center immediately thereafter and graduated in 1970 whereupon he started a two year period of employment as a staff attorney with the Public Defender Service of the District of Columbia.

In 1974, he accepted a position as Associate Professor of Law at Howard University School of Law and in 1975 he became Director of the University's Criminal Justice Program.

During his seven year tenure on the Howard faculty he received several distinctions and awards including Professor of the Year which was bestowed upon him by the Howard student body.

In 1980, shortly before President Carter ended his administration he nominated Judge Urbina for a position on the Superior Court bench. In 1981 the nomination was resurrected by President Reagan and it ripened into President Reagan's first judicial appointment. With that appointment, Judge Urbina became the first Hispanic appointed to the bench in the history of the District of Columbia.

During Judge Urbina's pre-judicial career, he served in a number of community organizations and earned distinctions for his work in community reform. Subsequent to his appointment he continued to serve the interests of the community as demonstrated by the several local and national awards recognizing his service. Included among these awards are:

Maclovio Barraza Leadership
Simon Bolivar Award for Community Service
Washington, D.C. Friends of the Family
Juarez Lincoln National Award for Outstanding Service
Exceptional Commitment to D.C. Youth Award

In 1988, Judge Urbina fostered a partnership between the Juvenile Probation Division of the Court and Georgetown University. The ASK Program (After School Kids) brings together motivated GU students and young offenders in a variety of rehabilitation oriented activities.

In December of 1986, the WASHINGTONIAN MAGAZINE dubbed Judge Urbina as one of its Washingtonians of the Year.

Judge Urbina served as the Presiding Judge (administrative head) of the Superior Court's Family Division from July 1985 to January 1988. After that he served in the Criminal Division and is currently assigned to the Civil Division of the Court.

The work he has performed with children, youth and families during his tenure on the bench has twice been hailed by the Federal Department of Health and Human Services: Outstanding Leadership in the Prevention of Child Abuse and Neglect (1988) and an award in recognition of the Creation of the District of Columbia's First Child Support Guidelines (1990).

Judge Urbina resides in Washington, D. C. with his wife, Coreen. They have two children, Adrienne and Ian.

CADL

JIMMY GURULE
Assistant Attorney General
Office of Justice Programs
U.S. Department of Justice

EDUCATION:

University of Utah College of Law, J.D., 1980;
University of Utah, B.A., English, 1974.

PRESENT POSITION:

Assistant Attorney General, Office of Justice Programs: Assistant Attorney General, Office of Justice Programs, Department of Justice, confirmed with the unanimous consent of the United States Senate and sworn into office on August 3, 1991. Responsible for setting policy, priorities and coordination of the five OJP Bureaus to identify and address emerging criminal justice issues; assist the victims of crime; develop and test promising approaches to address these issues; evaluate program results; and disseminate these findings and other information to State and local units of government. Oversees, directs and manages all OJP activities with a primary focus on forging partnerships with State and local governments, community leaders, and the private sector to control crime, gang violence and drug abuse. Responsible for management and administration of an office with a Fiscal Year 1991 budget of more than three-quarters of a billion dollars.

TRIAL LITIGATION EXPERIENCE:

Office of the United States Attorney: Criminal Division, Los Angeles, California, Assistant United States Attorney, Deputy Chief of the Major Narcotics Section, October 1985 to September 1989. Chief Federal prosecutor in the murder case of DEA Special Agent Enrique Camarena, and the narcotics prosecution of Colombian drug kingpin Juan Ramon Mata-Ballesteros. Argued cases before the United States Circuit Court of Appeals for the Ninth Circuit.

Salt Lake County Attorney's Office: Justice Division, Salt Lake City, Utah, Deputy County Attorney, December 1982 to October 1985; Section Chief of the Major Narcotics Prosecution Team and Special Counsel to the Major Narcotics Strike Force. Also assigned to the Child Abuse Prosecution Team.

United States Department of Justice: Criminal Division, Washington, D.C., trial attorney, October 1980 to December 1982; Narcotic and Dangerous Drug Section, and Special Assistant United States Attorney; emphasis - major narcotics prosecutions and argued cases before the United States Courts of Appeals for the District of Columbia, and the Tenth Circuit.

Office of the United States Attorney: Southern District of Florida, Miami, Florida, Special Assistant United States Attorney, July 1982 to December 1982, assigned to the President's Narcotics Task Force; emphasis - prosecution of major federal narcotics cases.

LEGAL ACADEMIC EXPERIENCE:

Notre Dame Law School - Associate Professor of Law, 1989 to 1990; taught courses in Criminal Law, Complex Criminal Litigation, and Criminal Trial Advocacy.

University of Utah College of Law - Adjunct Professor of Law, August 1983 to August 1985; taught courses in Legal Process and Legal Writing. Served as the Acting Director of Special Programs for Minority Students and as a member of the Law School Admissions Committee.

1985 Southwest Region Council on Legal Education Opportunities (CLEO) - Adjunct Professor of Law, University of Utah College of Law; taught course on the Fourth Amendment.

1984 Southwest Region Council on Legal Education Opportunities (CLEO) - Visiting Adjunct Professor of Law, Arizona State College of Law, Tempe, Arizona; taught course in Criminal Procedure.

CERTIFICATION

Utah State Bar (admitted by examination), 1980; the United States District Court for the Central District of California, 1985; United States Court of Appeals for the District of Columbia, 1982; United States Court of Appeals for the Ninth Circuit, 1981; United States Court of Appeals for the Tenth District, 1982; United States Court of Appeals for the District of Utah, 1980; and the Utah Supreme Court, 1980.

HONORS

Edmund J. Randolph - awarded by the Department of Justice for outstanding leadership (1991);

Attorney General's Distinguished Service Award - awarded for the successful prosecution of those responsible for the murder of DEA Special Agent Enrique Camarena (1989);

Drug Enforcement Administration Administrator's Award (highest award conferred by DEA) - for directing the DEA investigation into the kidnapping and murder of DEA Special Agent Enrique Camarena (1989);

Drug Enforcement Administration Award - for Outstanding Contributions in the Field of Drug Law Enforcement (July 1987);

Drug Enforcement Administration Award - for Outstanding Contributions in the Field of Drug Law Enforcement (April 1987);

Hispanic National Bar Association (Law Student Division) - Lifetime Achievement Award (April 1991);

SER - Jobs for Progress, Inc. - National Hispanic Leaders Award (1991);

Honor Law Graduate - United States Department of Justice, Criminal Division, 1980 (one of eleven honor law graduates chosen nationwide from over 1,000 applicants); and

Hispanic Business Magazine - selected as one of the "100 Most Influential Hispanics" (1987, 1989 and 1990).

BAR AND COMMUNITY ACTIVITIES:

Hispanic National Bar Association - National President (1989-90); Vice-President (1986); Secretary (1985), and Regional President (1983-1984);

American Bar Association - Member of the Standing Committee on Lawyer Competence (1989-91);

American Bar Association - Criminal Justice Section, Vice-Chairperson of the Ad Hoc Committee on Minorities (1989-90);

New Jersey State Bar Association - Conference on Economic Opportunities for Minorities In The Profession - Speaker (1990);

Notre Dame Law School - Member Ad Hoc Committee on Racial Harassment (1990);

John Marshall Law School - National Law Student Criminal Trial Advocacy Completion - Advisory Board (1990);

Rueben J. Clark College of Law (BYU) - Board of Visitors (1985-1987) and lecturer;

Reynaldo G. Garza School of Law - Graduation Commencement speaker (1989);

Council on Legal Education Opportunities (CLEO) - Board of Directors (1987);

Pueblo Latino Chamber of Commerce - Annual Convention Keynote Speaker (1990);

California State Bar Symposium on the Minority Bar Failure Rate - participant (1989); and

Institute of Human Resource Development (Esperanza Para Manana) Board of Directors (1985).

D.C. Gr.

MICHAEL BOUDIN

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Office: Antitrust Division
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LEGAL EXPERIENCE

1987-Present: Deputy Assistant Attorney General, Antitrust
Division, Department of Justice

1966-1987: Partner (1972-1987), Covington & Burling,
Washington, D.C.; associate (1966-1972)

1965-1966: Law clerk, Justice John M. Harlan, U.S.
Supreme Court

1964-1965 Law clerk, Judge Henry J. Friendly, U.S.
Court of Appeals for the Second Circuit

LAW TEACHING

1983-Present Henry J. Friendly Lecturer on Law, Harvard
Law School

1984-1985: Lecturer, University of Pennsylvania Law
School

1982-1983: Visiting Professor from Law Practice,
Harvard Law School

EDUCATION

Law School: Harvard Law School, LL.B., magna cum laude,
1964; President, Harvard Law Review

College: Harvard College, B.A., magna cum laude,
1961

BAR AFFILIATIONS: New York Bar, 1964; District of Columbia Bar, 1967; Council, American Law Institute; American Bar Association

LEGAL WRITINGS:

Articles: "Antitrust Doctrine and the Sway of Metaphor," 75 Geo. L.J. 395 (1987); "Common Sense in Law Practice," 34 Harvard Law School Bulletin 22 (Spring 1983)

Book Reviews: 77 Harv. L. Rev. 835 (1984); 35 Stan. L. Rev. 621 (1983); 49 U. Chi. L. Rev. 1098 (1982); 67 Va. L. Rev. 1251 (1981); 77 Mich. L. Rev. 503 (1979); 85 Yale L.J. 591 (1976)

PERSONAL:

Born, November 29, 1939; married, Martha A. Field, September 14, 1984; children: Maria, Gabriel, and Lucas Field

WIFE OF
HARVARD

15 - 13 - 8
RETAIR

Controlling the Woman to Protect the Fetus

Martha A. Field

The Problem in its Context

Even many women who view reproductive capabilities not as a detriment but as an important source of joy in their lives recognize that women's reproductive capabilities have long been used to oppress them. The ability to reproduce has been an important factor in women's loss of control over their own lives, contributing to their being controlled by chance, by government, and by other people—husbands, boyfriends, parents. In the past, to the extent that reproduction has not been left to chance, the woman herself has often not been the decision-maker. Husbands have often coerced women into producing and raising offspring when they did not want to, and societal attitudes have had the same effect of encouraging marriage, then motherhood. Historically, state governments have participated in coercing childbirth as well, some by prohibiting or restricting birth control and all states by prohibiting abortion.

Technological developments concerning contraception and abortion have now made it possible to exercise much greater control and even for the mother to have actual decision-making power over reproduction.¹ And during the past two decades women to a greater extent than ever before have in fact acquired a legal right to make the decision whether or not to have children. The Supreme Court has invalidated restrictions on access to birth control—for single persons and minors as well as married persons.² It also has invalidated state laws criminalizing abortion and has upheld the woman's right to choose whether or not to continue her pregnancy.³

The current movement which is the subject of this paper seeks to use pregnancy against women in a different way—to control the behavior of the woman while pregnant. The rationales behind such regulation could moreover support controlling behavior before preg-

nancy as well—amounting in effect to an argument for controlling women generally as future childbearers.

Of course, there are precedents for exercising control over pregnant women, or even women more broadly, including actual mothers and potential childbearers. Historically, both employers and the state have denied women jobs or limited them to short workdays to protect their roles as childbearer or mother.⁴ And even after it was recognized that a *capability* to reproduce was not adequate cause for different treatment in the workplace, *actual* pregnancy continued to be deemed a reason for eliminating women from work; women were often forced to take unpaid leave while pregnant, for example, based upon the false presumption that pregnant women are not fit to work.

Such rules were invalidated in the 1970s, however. The Supreme Court in *LaFleur v. Cleveland Board of Education* found a legal right in women to continue working during pregnancy,⁵ and Congress gave women a legal right to experience childbirth without having to lose their jobs.⁶ Moreover, it is recognized today that women have a right to nondiscrimination in the workplace despite their capability to reproduce,⁷ although even now some businesses earn exemptions on grounds that their work sites are particularly hazardous to fetuses.⁸

The current movement which I am discussing would not require overturning those positions, but would nonetheless impose controls that potentially reach far beyond the workplace on the theory that the behavior of the woman while she is pregnant may impact on the fetus and the child-to-be. Advocates have called for legislatures to prescribe the conduct of pregnant women, for district attorneys to prosecute women who "abuse their fetus," and for the state to remove the child at birth

because of such maternal conduct. In addition, some call for detaining the pregnant woman who shows a propensity for disobeying medical orders; they would force her to conform in order to protect the fetus.

A wide range of controls may be involved. Operations may be forced upon the pregnant woman; she may be made to undergo a cesarean section or to submit to a suture of her cervix. She may be forced to take medication, such as penicillin, deemed necessary for fetal health, or to submit to other therapy, such as bed rest. Such treatments may, of course, be highly beneficial. The issue, however, is whether those who advocate those interventions are required to persuade the pregnant woman of their merits or whether the treatments can be imposed upon the pregnant woman who objects.

Another way that control might be exercised over pregnant women in the interest of the newborn population is to require prenatal screening to detect fetal abnormalities. Such screening might be required only in individual cases, based upon a perception of particular need; or it might be required of pregnant women generally;⁹ or an in-between approach might be adopted, such as a requirement that all pregnant women over 35 undergo amniocentesis.¹⁰ The purpose of requiring early diagnoses might in some cases be to require therapeutic treatment during the pregnancy. Intra-uterine operations, like an operation to relieve hydrocephaly, are currently highly experimental, but as we gain experience with such operations, they might even be required of a woman who has undergone testing. Or the purpose of prenatal diagnosis might be simply to influence the abortion decision.¹¹

Moreover, broader screening—of all women of childbearing age—could be mandated for the purpose of discouraging some from becoming pregnant. Mandatory AIDS screening, for example, would be designed to lead women who test positive for the HIV virus to avoid pregnancy. Mandatory screening might even trigger a legal prohibition on pregnancy for certain women (though no such prohibitions yet exist). And screening could cover men as well as women and be designed also to influence the choice of a mate, if childbearing is desired—for example, screening for recessive genetic conditions like Tay Sachs or sickle cell anemia which pose a risk to offspring only when *both* mother and father are carriers of the relevant gene.

Some urge that pregnant women be required to submit to prenatal care and be under obligation to obey doctor's orders throughout pregnancy—orders covering such diverse subjects as putting on weight or limiting weight gain, eating particular foods, taking vitamins and other medications, not carrying heavy groceries,

making and keeping doctor's appointments. Thus the law would step in to govern pregnant women's daily lives.

It may be wrong to conceive of this type of regulation as coercing pregnant women generally. Some conceive of the child abuse and neglect laws as the appropriate models for regulation of "fetal abuse,"¹² and it is familiar that child abuse laws apply only in the most extreme of cases. One need not be a model parent to escape charges of abuse and neglect; the statutes come into play only when behavior is truly unacceptable. Thus it is arguably wrong to think in terms of orange juice and spinach regulations; we all know there will not be prosecutions, child removal, or detention and intervention because of a failure to consume the healthiest food.

A single use of drugs, however, or even a single act of sexual intercourse with one's husband if the doctor has warned against it and it precipitates a problem, is less clear. Moreover, the extreme cases which child abuse reaches include not only cases in which the parents' conduct is objectively outrageous but also those in which the child is particularly vulnerable. Not following a doctor's orders to feed orange juice to a child who is particularly sickly is viewed much more seriously than omitting it in the case of a healthy child, and well-meaning parents can find themselves guilty of abuse and neglect under this standard.¹³ If that same approach were carried over to "fetal abuse," the fetus which was especially vulnerable could impose many demands upon the pregnant woman—much more than the apparently healthy fetus would and more than every well-meaning woman would be able to meet. The child abuse model also reminds us that abuse and neglect standards with their elements of subjectivity fall almost exclusively upon the poor; often the extreme behavior that supports the charge results primarily from poverty and is not fully understood by the middle class personnel who impose the judgment.

Moreover, rules may take the form of governing pregnant women in general, and not just women operating under particularized doctor's orders. For example, a state might enact a statute making it criminal for a woman to consume alcohol in the state if she knows or reasonably believes that she is pregnant—and perhaps also making it criminal for any person to sell or give alcohol to a woman whom that person knows or reasonably suspects to be pregnant. Or pregnant women might be required simply to attend to prenatal care and obey the orders of their physicians.¹⁴ Similarly a state might attempt to prohibit home births in general;¹⁵ or it might simply prohibit home births when a doctor has found in a particular case that there is high risk.¹⁶

I believe that controlling women to protect their fetuses is using pregnancy to deprive women of the most basic civil rights. Women used to lose their legal rights when they married, but in the past two decades the Supreme Court has established an equality between husband and wife that exists at least in theory and in contemplation of the law¹⁷ even if it does not exist in practice in many households. But having won at least a theoretical equality in marriage, and having gained as well the ability and the legal right to decide whether to have children, women who choose to reproduce are now threatened with a loss of their civil rights upon becoming pregnant.¹⁸ The theory is that it is necessary for government—or women's husbands, physicians, or other individuals—to exercise control over women in order to protect the fetuses they are carrying.

Such a use of pregnancy to the detriment of women is at war with the recent recognition of women, pregnant or not, as competent persons with the ability to make decisions. Moreover, if it were acceptable to control otherwise legitimate behavior of a pregnant woman in order to protect her fetus, then why would it not be acceptable to control women of reproductive age generally? Many things a woman does *before* pregnancy could affect her future childbearing. The possibilities for intervention here are almost as great as with women who are pregnant.

Today's lawmakers have not gone nearly so far. Yet such measures have powerful advocates, and a number of cases, illustrating a range of human situations, have already arisen.

A Range of Examples

Ayesha Madyun's 1987 case is typical of many. A 19-year-old Washington, D.C. resident, she had been in labor for two days when she arrived at the hospital to give birth to her son. Eighteen hours later, when the birth was still not progressing, doctors decided they needed an emergency cesarean to save the unborn infant. Madyun, distrustful of surgery, refused to consent, but the doctors won a court order to force the surgery upon her, and the operation was successfully performed.¹⁹

The Madyun story does not stand alone. The cesarean rate in this country has reached what some physicians have called alarming proportions.²⁰ Doctors who believe a cesarean should be performed can usually obtain the consent of the woman on whom they would operate, but in those rare cases in which women persist in their objection, the doctor may go to court to obtain an order for surgery.²¹ In most cases that have been brought, doctors have prevailed rather easily.²²

In 1981, Mrs. Jessie Mae Jefferson from Butts

County, Georgia, who had diligently pursued prenatal care throughout her pregnancy, refused to submit to a cesarean, which the doctors said she needed; her refusal was based upon religious conviction that surgery was wrongful. The hospital where Mrs. Jefferson had been seen went to court to obtain permission to force surgery upon her, explaining that "defendant has a placenta previa; that the afterbirth is between the baby and the birth canal; that it is virtually impossible that this condition will correct itself prior to delivery; and that it is a 99 percent certainty that the child cannot survive natural childbirth (vaginal delivery). The chances of defendant surviving vaginal delivery are not better than 50 percent."²³ The doctors also pointed out that the child was fully viable; the defendant was in her 39th week of pregnancy.

While the hospital petitioned the Georgia courts for permission to force the operation in order to save the life of mother and child,²⁴ the Georgia Department of Human Resources filed a similar petition in juvenile court, and the two cases were consolidated. The Department of Human Resources won temporary custody on the ground that the fetus was not receiving proper parental care, and the court ordered Mrs. Jefferson to submit to an ultrasound and a cesarean section and related procedures considered necessary by the attending physician to sustain the life of the child.²⁵

It may not be surprising that many judges order cesareans faced with apparent emergencies like these. There is an atmosphere of rush and emergency in the hearings, especially in those cases where the testimony is that the child is rapidly declining. In some cases, the hearings are even held in the hospital room. In a case like Mrs. Jefferson's, a judge might understandably deem it wiser not to dwell upon her right to make her own decisions, when that right threatened her own life and the life of her fetus; rather than have those lives upon his conscience, a judge in an emergency situation might easily prefer to relieve Mrs. Jefferson of the consequences of her religious convictions.

And if Mrs. Jefferson had received the surgery and she and the baby were healthy, it might seem that the proper result had been achieved, even though it had required forcing surgery and trampling upon Mrs. Jefferson's own right to choose. It is hard to resist a reaction that in such a case the end justified the means and that the outcome was a happy one. But that reaction does presuppose that otherwise the result would have been as the doctors predicted. In fact, before the operation could be performed, Mrs. Jefferson's baby was born naturally, with mother and child emerging healthy, more battered by litigation than by childbirth.²⁶

Mrs. Jefferson's case is not unique. Doctors do make mistakes; they may be overcautious, or they may misjudge the situation. Another case²⁷ in which the doctors

predicted dire results without a cesarean—results which did not materialize—involved a 35-year old indigent woman in New York City who had had ten children already. The hospital said a cesarean was necessary because the umbilical cord was wrapped around the neck of the baby and it would strangle during the birth. But Civil Court Judge Margaret Taylor refused to order surgery, saying that pregnant women like other people have a right to decide whether to undergo surgery and cannot be forced to do so for the benefit of another person, even their own child. After the order was denied, the mother gave birth naturally and delivered a healthy child.²⁸

In June of 1987, many people first noticed the growing trend to force decisions upon pregnant women, as the District of Columbia courts imposed a cesarean upon a dying woman, contrary to her wishes and the wishes of her husband, parents, and doctors, and even knowing that the operation would hasten the mother's death. *In re A.C.*, as the case was called in court,²⁹ involves the story of 27-year-old Angela Carder. "Angie," as she was called, had been diagnosed as having bone cancer at age 13. She underwent extensive treatments and operations over the years, which included having her leg amputated. When, at age 27, she became pregnant, her cancer had been in remission for three years. Twenty-five weeks into the pregnancy, Angie went for a routine checkup, and the doctors told her she had a large tumor in her lung and might have only days to live. Because she was pregnant, Angie's own wishes as to how she might want to die, or to live her remaining days, were not respected.

Angie was admitted to George Washington University Hospital with a prognosis of "terminal." Five days later her condition had worsened, and the hospital decided to try to save the unborn child, over the objections of Angie, her family, and even her physicians. Even though the fetus was only 26 weeks developed, the hospital told the judge that there was a 50–60 percent chance the baby would survive and less than a 20 percent chance that it would be handicapped. The physicians also informed the court that the operation would hasten Angie's death. The hearing obtaining an order from the superior court, together with an appeal (which was decided by telephone consultation among three judges on the court of appeals), took a total of six hours, during which time Angie was being prepped for surgery.

When the court of appeals refused to stay the order for surgery, the operation was performed. The baby, a girl, died two hours later, and Angie died two days after that. Surgery was listed on her death certificate as a contributing factor.

It is important not to lose sight of the human dimension of these stories. Angie's mother has told the story

from her perspective: On the morning of June 16, five days after the sudden diagnosis and admission to the hospital, the family got a telephone call saying that Angie was not doing well. They called a priest and arranged for Angie to be given last rites, and attended the ceremony at the hospital.

Only a few minutes later the hospital staff told us we were needed at a short meeting. They did not tell us it was a court hearing. It took all day. Poor Angie, first she's told she's dying and the next thing everybody abandons her and leaves her alone in her room. . . . Then even before the hearing was over they started prepping her for surgery. She was already in so much pain. We told the judge she didn't want the surgery, that we didn't want her to suffer anymore, that we didn't think the baby would live. But they didn't listen. After the surgery and after they told her the baby was dead, I think Angie just gave up.³⁰

The opinion in *In re A.C.* was written by a panel of the District of Columbia Court of Appeals five months after the operation and deaths and sought to justify the court's decision. The judgment has since been vacated and the case has been set for rehearing *en banc*.³¹ Among other things, the parties are objecting to the absence of factual findings by the trial judge. Explaining the decision after the fact, the court understandably tried to depict the case as involving some ambiguity concerning Angie's wishes.³² The family and the American Civil Liberties Union, however, claim that in fact Angie's opposition to the procedure was made clear, and she expressly objected to surgery when she regained consciousness after the initial order but before the appeal.³³ Another factual issue that remains is whether Angie really was "terminal." Angie's doctors were pressing for chemotherapy. Together with the obstetricians, they opposed the hospital administration's forcing of surgery, and they had not given up on prolonging Angie's life.³⁴ Afterwards Angie's father commented: "For 14 years our daughter was considered terminally ill and what right did the court have to decide that her life was over?"³⁵

There was never any dispute that the operation could prove harmful to Angie, and in fact all predicted that it would shorten her life. Moreover, as her family reminds us, it caused her additional physical pain, as well as the emotional pain of experiencing her own baby's death in her last days of life. The hospital argued that it was not necessary to respect her decision-making rights because she was dying anyway, and the court minimized the problems with overruling her wishes: "The Caesarean section would not significantly affect A.C.'s condition because she had, at best, two days left of sedated life; the complications arising from the sur-

gery would not significantly alter that prognosis. The child, on the other hand, had a chance of surviving delivery"³⁶ The approach is startling not only for the cavalier attitude with which it treats the wishes of the dying, but also for the precedent it could set for removing organs before death from unwilling donors.

Even those who would oppose a rule that medical treatment should never be forced upon an unwilling mother-to-be might accept a rule that the treatment will not be imposed when it will cause the mother harm. It is most unusual to place the fetus's interests above the mother's in the way the courts did in *In re A.C.*; even prior to *Roe v. Wade* when states prohibited abortion, all states made an exception for pregnancies that endangered the life of the mother, and even the dissenters in *Roe v. Wade* believed that the mother's life was entitled to this protection as a matter of constitutional law.³⁷ Yet advocates of regulating the mother-to-be often seek to justify intervention on the ground that the doctor has two patients—the mother and the fetus—an approach that might suggest treating the two equally, and sometimes indeed they elevate the interests of the fetus above those of the mother.

Any rule that medical treatment cannot be forcibly imposed for the sake of the fetus if it will harm the mother would preclude the cesarean in Angie's case. The principle would, however, go very far toward eliminating forced cesareans generally, for physicians agree that cesareans carry "added risks of morbidity and mortality" for the mother³⁸ in comparison to natural childbirth. Even the typical case of Ayesha Madyun would therefore have to be reversed if harm to the mother precludes forcing surgery. Only in *Jefferson*, where the mother's life was allegedly at risk as well as the fetus's, could the surgery still be ordered.

True, in the typical forced cesarean case like *Madyun*, the amount of risk to the mother from undergoing the operation is (if the doctors are correct) much less than the risk to the fetus if the operation is omitted. Generally, however, individuals are not required by law to undergo any medical risk even in order to confer substantial benefit upon another. And this approach is followed even where the moral duty to help seems strong. The law does not permit a son to force a father to contribute bone marrow so that the son's life can be saved,³⁹ even if all agree that the father has a strong moral obligation to grant his son's request. To force the pregnant woman to have an operation without her consent is an unprecedented intrusion into the right to choose which is otherwise invariably granted to competent adults.

The case of Pamela Rae Stewart shows that the controls imposed upon a woman against her wishes can

include not only operations but also controls over the incidents of her pregnancy and her daily life. The control mechanism in Stewart's case was not coercion-before-birth, as in the cases considered so far, but instead punishment-after-the-fact—after the birth and death of her son. Pamela Rae Stewart was a 27-year-old mother of two who lived in California. She was warned by her doctor that hers was a problem pregnancy and was instructed to seek medical attention at the first signs of bleeding. She also was told to refrain from sex with her husband. But when her bleeding started, she disregarded the medical advice, stayed home with her husband, had sexual intercourse, took amphetamines, and waited twelve hours before going to the hospital. Her son was born with extreme brain damage and died six weeks later, and the prosecutor brought criminal charges against Ms. Stewart, claiming that her conduct violated a California statute prohibiting a parent "without lawful excuse" from wilfully omitting "to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child."⁴⁰

Ms. Stewart's prosecution was thrown out on the basis that even though the statute expressly provided that a "child conceived but not yet born is to be deemed an existing person insofar as this section is concerned," it was not intended to apply to a mother's refusal to obey doctors' orders.⁴¹ A prosecution under the state general child abuse provisions was not a possibility because the California Court of Appeals in an earlier case had held that fetuses were not within the intended scope of the California child abuse law.⁴² But the *Stewart* case was well-publicized, and that attempt to punish a mother for having disobeyed doctors' orders during pregnancy has stirred the imaginations of many to uses that could be made of their own state's abuse and neglect laws,⁴³ or to laws the state legislatures could design that would expressly punish "fetal abuse" by the pregnant woman. It has opened the debate about whether such control over the pregnant woman is good social policy, and also whether it is constitutionally permissible.

A vast range of controls might be placed upon the pregnant woman. A state statute might seek to prescribe the conduct of all pregnant women—such as a statute forbidding alcohol or cigarettes—or allow for enforcement only of particularized orders found necessary in the individual case. Some of the prohibitions might duplicate bans on illegal activities but most would not; women could be told not to use amphetamines or illegal drugs while pregnant, but also not to drink alcoholic beverages, use hot tubs, smoke cigarettes, eat junk food, or gain more than 20 pounds. While many of these decisions seem incidental, other possibilities are more personal: a woman may be told not to have sex because of

a risk to the fetus; a ban on lifting applies to carrying her older children as well as her groceries. And momentous decisions may be involved—for example, when a woman's doctor tells her that she needs to quit her job, or spend six months in bed, because of risks to her fetus.

These last examples seem to conflict with *LaFleur* and with the right to continue working during pregnancy that it and Title VII have established. But because the examples involve doctors' orders aimed at a particular case where a particular need is perceived rather than at pregnant women generally, a legal system could uphold coercion of the mother-to-be in these cases without running afoul of *LaFleur*. Moreover, the argument supporting the restriction on the woman's freedom is different concerning the restrictions that are now urged. In *LaFleur* the theory seemed to be that pregnant women in general were incompetent as workers, or that it was too titillating to a pregnant teacher's pupils and coworkers to have her around; the restriction was overturned because the first of these theories was unproven and the second was an illegitimate basis for firing her. In this context the theory instead is that the restriction is needed to protect the fetus. In a sense the woman is still considered incompetent, but incompetent in a different way—she is incompetent not as a worker but as a protector of the fetus, so doctors and government must impose rules of conduct upon her.

The complaint in the Stewart case did not specify which aspects of her conduct violated the law, charging only that "on or about November 23, 1985, [she] . . . did willfully omit, without lawful excuse to furnish necessary medical attendance or other remedial care for her child" in violation of the statute. But all of the activities that the prosecutor targeted took place on the day of the birth, at the very end of the pregnancy.⁴⁴

In this respect regulating Stewart's activities is comparable to cases imposing cesareans, or to rules which might be adopted forbidding home births: the fetus is only an operation away from birth and from becoming a child. It is that fact that adds strength to the case for overriding the wishes of the mother when a cesarean seems necessary. At the moment of birth, more than any other stage of pregnancy, it is understandable if the doctor regards the fetus as a person and patient, as well as so regarding the mother.

If the fetus also is fully developed, the argument for protecting the fetus gains in strength. As the chances of survival become more attenuated, however, the justification for intruding upon the mother's bodily integrity against her wishes also fades. If the fetus to be delivered in Angie's case had been near term, or even six to eight weeks more fully developed, should Angie have been forced to undergo the cesarean? While it is by no means

clear that a cesarean should be forced in that situation—or ever—the case would be closer than in the actual case, where the fetus was much less prepared for life outside the womb.

If regulation or prosecution for "fetal abuse" were accepted, however, it is hard to imagine it being limited to this stage at the very end of pregnancy. The harms that "fetal abuse" can cause often take place at the beginning of pregnancy. One behavior that we know is harmful is for pregnant women to drink excessive alcohol.⁴⁵ A child born with fetal alcohol syndrome because of his mother's intake of alcohol can suffer prenatal or postnatal growth retardation, craniofacial deformities, cardiac defects, limited joint mobility, central nervous system abnormalities (which can include behavioral and intellectual impairments), and microcephaly with mental retardation.⁴⁶ A state prepared to deal with this problem by passing preventive measures could not, however, be content to regulate the pregnant woman's intake of alcohol at the end of pregnancy; it is during the first days and months that it may be most important to avoid excessive liquor. Prevention of fetal harm requires halting consumption from the beginning of pregnancy. Similarly, if it were an offense for the pregnant woman not to obey doctors' orders or follow particular regimens essential to the health of the child-to-be—requiring her to report for prenatal appointments, control her weight, give up smoking, or spend six weeks in bed, for example—it is hard to imagine such an offense being restricted to the end of pregnancy, because the orders or regimens could be crucial earlier as well.⁴⁷ Even operations—blood transfusions for example—or the taking of medication may be called for long before the end of pregnancy.

The range of possible controls obviously intrudes substantially upon the autonomy of the pregnant woman. To force her to go to the doctor or have an operation without her consent—or to give up sex, drink, drugs, cigarettes, or spend six weeks in bed—would be an unprecedented intrusion into the right to choose granted all other competent adults. Partly for this reason, many of these controls have not yet been attempted broadly. Indeed, the Orwellian scenario of husband, doctor, government overseeing and dictating all aspects of the pregnant woman's life might never come to pass, even if voices were not raised in protest. Nonetheless, such laws already have vocal adherents. For example, many maternal-fetal specialists have advocated detaining women to make them follow doctors' orders so that their fetus's health will be saved.⁴⁸ And the prosecutions and child removals, forced operations and therapies, and even forced detentions of pregnant women, are becoming sufficiently frequent that it is not too early to prepare a defense against them.

Should Government Regulate Pregnancy?

I would propose a flat rule that women not be subject to governmental coercion because of pregnancy. The controls under discussion not only intrude greatly upon pregnant women. They also are neither necessary nor effective in achieving their professed aim of improving the health of the newborn population.

In one sense, the cesarean cases seem more defensible than the so-called "fetal abuse" prosecutions; at least they often accomplish their aim. The dominant pattern for "fetal abuse" is after-the-fact punishment or removal of the child, rather than before-the-fact prevention. The preventive approach is less available when it would require continuing control over the pregnant woman than when a single surgical procedure is imposed. Detention is the only apparent preventive device that might effectively handle drug or alcohol consumption—or even cigarette smoking.

Many courts do not think it proper to detain the mother-to-be through the ploy of taking custody of the unborn fetus,⁴⁹ but detention has occasionally been ordered. It was ordered on a short term basis in the *Jefferson* case, and it has also been ordered early in pregnancy, presumably for the long term.⁵⁰ Moreover such detention has strong support in the medical community.⁵¹

Even detention could not be utterly effective, of course. Fetal alcohol syndrome may result from the mother's alcohol intake even before she knows she is pregnant; it often would be caused before her pregnancy was noticed by those who would force detention upon her.

But the principal problem is that the only means that might work—forcing surgery or other medical therapy and detaining to enforce behavioral compliance—intrude enormously upon the woman's control of her own life and life decisions. Our government enforces few other intrusions of comparable magnitude—only prison and other forced institutionalization and perhaps the draft.

Nonetheless, the possibility that some coercive remedies would work to protect the health of some newborns raises the question whether any rule against controlling mothers-to-be should be absolute. Why not instead create a strong presumption against intervening contrary to the wishes of the mother-to-be but let the presumption be defeated in occasional cases—when, for example, the benefit to the newborn would *far* outweigh the detriment to the mother? Or perhaps the exception should be limited to the rare case like *Jefferson* in which it appeared that the operation (or other treatment) would cause *no* net harm to the mother. With that rule we could avoid having to decide *how much* benefit to

the fetus outweighs *how much* harm to the mother, a question that could prove extremely difficult. Such an exception might be applied to prevent drug or alcohol abuse as well as to support occasional forced cesareans. It could, for example, resolve the problem posed by social workers who ask whether they can intervene to detain a woman who has already had three pregnancies which resulted in fetal alcohol syndrome and when pregnant for a fourth time plans to carry to term.⁵² Only if it were also required that the fetus be very close to birth would the possibility of long-term incarceration under such an approach be eliminated.

There are undoubtedly some situations in which forced treatment seems appealing. If a balancing approach were adopted, intervention would be ordered on some occasions, and some of these would serve to protect the health of a newborn. Nonetheless, there is reason for maintaining a *per se* rule against court-ordered coercion and for allowing the doctor's wishes to prevail only when he or she is able to persuade the pregnant woman of their merits. If a balancing approach were sanctioned, there would doubtless be occasions on which the interests of the woman would not be given appropriate weight. *In re A.C.* is a powerful illustration that an authority to intervene designed for use only in the clearest cases will not be so limited in application.

Moreover, it is a misuse of judicial processes to buttress a doctor's judgment with a court order obtained in circumstances in which there is no opportunity for deliberation, for careful factfinding and analysis, because of the rush necessitated by emergency. And any right to appeal that is honored in that situation is likely to be perfunctory. One interesting study reports 21 instances since 1981 of doctors going to court to get a cesarean over the mother's refusal, all but three of which the doctors won; in 88 percent of the cases the order to operate was received within six hours, and in almost one-fifth it was received in less than an hour.⁵³

Finally, doctors do make mistakes. Not only is this evident from our experience with cesareans; doctors also have advised mistaken therapies. In the 1960s, for example, many prescribed DES (diethylstilbestrol) to prevent miscarriages; the drug turned out to be carcinogenic to unborn daughters. Similarly, they prescribed thalidomide as a sleeping medication, and it turned out to cause severe birth defects.

Courts lack the ability to know which of the doctors' judgments are dependable—a problem that is exacerbated in emergency hearings, but that exists even in relaxed ones. Although doctors themselves often do not know what will occur without the intervention, "when obtaining an order becomes an objective in itself, an incentive to overemphasize the consequences of nonintervention may exist."⁵⁴

Many physicians do not feel they need the authority

to coerce their patients; they are content to rely on their powers of persuasion over the pregnant woman and other patients, and when faced with a veto of their advice would not go to court to override that veto.⁵⁵ The American College of Obstetricians and Gynecologists has adopted a policy that doctors are "almost never" justified in going to court to compel treatment for the pregnant woman.⁵⁶ Knowing the limits of their own knowledge and respecting the right of the patient to make her own decisions, right or wrong, those doctors would accede to the wishes of the patient, with a feeling that they have done all that they appropriately can.

There are indications of a class dimension to the issue whether to coerce the woman. Doctors respect the decisions of patients who are most like themselves, and the rare cases in which they go to court are those in which they can least identify with the patient—because she is poor, or has an ethnic or cultural background very different from their own.⁵⁷ For the judicial system to enforce compliance with the doctors' wishes is to place the doctors' cultural values over their patients'. Of course, it is not surprising that the judiciary should take this side, since judges are likely to have more in common with the doctors than with the women in question; but the issue is whether it should take any side on the merits of the decision, rather than rest on a principle that the woman has total discretion and is subject to persuasion but not to force.

Doctors do not want an adversary relationship with their patients. They need to rely on the patient's sharing her concerns with the doctor, as the patient will not be willing to do if her confidences—such as disclosure of an alcohol or drug dependency problem—can be used against her in court. They recognize that it would be self-defeating for the state to exert control and that even those coercive measures that appear most effective would almost certainly do more harm than good—even from the sole perspective of preventing prenatal harm. If going to the doctor means the doctor will enforce his or her orders, many persons will avoid prenatal care. If the doctor is going to force a cesarean a woman believes it is sinful for her to have, she may simply not report to the hospital when her labor begins.⁵⁸

Alternatives to direct coercion—such as after-the-fact removal of the child or criminal punishment—also seem inappropriate, ineffective, and self-defeating. Removal would be proper if *child* neglect or abuse exists and the mother is *presently* unfit, but it is hard to see removal as the appropriate remedy when the mother's transgressions have been limited to the prenatal period. Nonetheless, some courts have held that conduct during pregnancy can constitute neglect that will result in removal of the child after birth.⁵⁹ Putting the weight of the criminal law behind the ob-gyn's orders likewise seems

inappropriate.⁶⁰ Criminalization may have a deterrent purpose, and it serves best when it in fact heightens public awareness of the pregnant woman's obligations to her fetus;⁶¹ but the threats of prosecution will also drive many to avoid prenatal care—a result hardly in keeping with promoting the health of fetuses and children.

It is not necessary to visit upon pregnant women the threat of criminal prosecution, removal of their child, detention or forced surgery in order to create incentives on their part to safeguard their fetus. It is not necessary to punish a mother like Pamela Rae Stewart, or to enforce any legal sanction against her. The events that have transpired are punishment to her as well as being harmful to the fetus/child and to the interests of the state. By and large the interests of the mother-to-be and the interests of the state are in harmony on the subject of the fetus's well-being. It is in the mother's interest also that the baby be born as healthy as possible.

This coincidence of interests between the mother-to-be and her fetus makes it possible to tailor a program that could produce widespread voluntary compliance, more so than any compulsory model. Educating women about prenatal care and the needs of their fetuses could yield results, without the negative effects of criminalization and detention. Providing free prenatal care to those who cannot afford to pay would make a vast difference. The leading factor associated with neonatal mortality is low birthweight, which studies show is significantly reduced by prenatal care, especially for high-risk women.⁶² It would accomplish much more to put women in contact with doctors, so that they could be told of the fetus's needs and persuaded of their importance, than to create a criminal sanction for women who err. But state and federal funding for prenatal care is hopelessly inadequate, and for many in this country prenatal care is simply not available today.⁶³ We have not made infants' health a national priority in this country; in 1985, our infant mortality rate was 19th in the world, behind countries with far fewer resources, like Singapore or Spain. Moreover, when only the black infant mortality rate is considered, the United States ranked 28th.⁶⁴

Education and persuasion are not, of course, effective tools in all situations. If the pregnant mother acts as she does out of religious conviction, it may not be possible to get her to change her mind. Similarly, education and persuasion are notably ineffective in cases of addiction (and the criminal law is ineffective here as well). A serious effort to cut down on harm to fetuses that will be born would have to include provision of good substance abuse programs, free of charge, to all pregnant women who wanted them, or even women desiring to become pregnant (or all people, for that matter).

Such programs are not available today. In San Di-

ego, for example, authorities report that the number of pregnancies complicated by maternal substance abuse is rising sharply. Nonetheless, no effort is made to reach out to high risk communities to offer treatment, and even pregnant addicts who seek help must wait up to six months—and even longer if they want or need their children to be with them in the program. Indeed many programs actually discriminate against pregnant women, refusing them treatment because of pregnancy and because of the programs' fears of liability.⁶⁵ The result is that even addicted mothers-to-be who desperately want to break their habits in order to protect their fetuses are denied the means to do so.

No funds are available to help alcohol or drug abusing pregnant women, even though that could do much more to prevent fetal harm than could any criminal law.⁶⁶ Such programs would, of course, be expensive. A principal utility of the compulsory model seems to be creating the impression of acting to prevent fetal harm, while actually refusing to dedicate the resources that would be needed to make a significant improvement.

The coercive measures that some propose in the war against fetal abuse may seem inexpensive by comparison, but they are ineffective at best, counterproductive at worst. That they are so inadequate raises suspicions that as well as protecting fetuses, control is the part of the point here. This new movement may represent a backlash against women and the rights to decision-making they have recently won in the area of reproduction, as much as any bona fide attempt to deal with problems of fetal abuse.

Men control women in most aspects of women's lives. Sometimes the control is exercised by an individual man—a husband or boss—and sometimes by institutions that are largely male, such as state legislatures. A notable exception has emerged during the past two decades, however, as women have begun to be accorded decision-making power in the area of reproductive rights.

The Supreme Court has not only held that the state cannot deny a woman the right to choose abortion; it also held in *Planned Parenthood of Missouri v. Danforth*⁶⁷ that the woman's right predominates over the rights of the father of the fetus. Even a husband cannot prevent his wife from having an abortion, nor can he choose abortion when she wants to proceed with the pregnancy. Even if he is willing to assume full responsibility for raising the child, he cannot decide in favor of childbirth. Even if he wants abortion, he is liable for child support if the mother chooses to have the child.

The result is that men have comparatively little control over whether or not they will become fathers, even though this is a subject that can be of great importance

to them, personally and financially. Instead, women have all the legal options after conception, although their choices, of course, will usually be influenced by the wishes of others. The Court in *Danforth* recognized the unfairness to men wanting to decide whether to be fathers but pointed out that there was no way to allow both men and women to have final authority over the choice.⁶⁸ It would be even more unfair to have the father control the choice than the woman, who will share responsibilities with the father after birth but also currently is undergoing the pregnancy and will have to undergo the abortion or the childbirth.

Other examples of women's increased and increasing ability to choose include increased access to sterilization as a method of birth control—a procedure that often was denied women in the past.⁶⁹ Moreover, women are usually entitled to exercise this right free of any requirement of spousal consent⁷⁰ (just as men are free to get vasectomies without their wives' permission). And the rights of single women to decide to become parents and to be free from discrimination are increasingly recognized.⁷¹

The decisions using pregnancy as a means of controlling women emerge as a rude contrast.⁷² Do they represent an attempt to make women "pay for" the gains they have made in the reproductive area by suffering attendant burdens? Do they represent an attempt to keep women under the control of men?

Regardless of the motive, the likely effects of a policy of control demonstrate that district attorneys should not attempt to prosecute for "fetal abuse"; state legislators should not pass laws explicitly controlling women because of pregnancy; and courts should not cooperate with doctors who seek to force unwanted medical treatments upon the mother-to-be. But when a legislature nonetheless passes a statute proscribing "fetal abuse" or subjecting the woman to the orders of her doctor, does such an enactment transgress constitutional limits? Or when a state court upholds a district attorney's or a social service agency's interpretation of state child abuse laws to extend to a pregnant woman's conduct toward her fetus, should the United States Supreme Court hold unconstitutional that interpretation of state law?

The argument that it is unconstitutional for government to regulate the woman to protect the fetus is more difficult to maintain than the argument that regulation is misguided. Many of the "right-to-choose" decisions—often called "right to privacy" decisions—have been decided under the due process clause of the Fourteenth Amendment. Courts will strike down governmental intrusions upon a person's fundamental interests (the woman's interest in deciding upon her own medical treatment, or in not being incarcerated, for example) unless those intrusions are necessitated by a "compelling

state interest." Similarly, the courts would strike down "burdens" upon a woman's "fundamental interest" in bearing a child, unless those burdens were necessary. In assessing the state interest, courts will exercise "strict scrutiny," and even where an important state interest exists, the means employed to achieve it must be those that least interfere with the woman's fundamental right. (Recently it has come to be recognized that the issues involved are ones of degree and that the strictness of scrutiny is variable.)

The weak point of state regulation of mothers-to-be from a constitutional point of view, just as from a policy point of view, is the unworkability of the proposed rules. How can intrusive controls be upheld when they do not even accomplish their objective, when indeed they cause more harm than they prevent because they drive from prenatal care the women who need it most? It is hard to justify the courts second-guessing legislatures on such pragmatic issues as whether a regulation will accomplish its goal, but if evidence is clear and consistent, that strengthens the case for judicial reliance upon it. The evidence concerning pregnancy control is clearer than in other contexts in which the Supreme Court has relied upon unworkability to strike down state enactments that impinge upon women. For example, in cases dealing with access to birth control—both by minors and by single persons—the Court has discounted a legislative purpose to discourage teenage sex and extramarital sex, saying that the absence of contraception will not have the effect of deterring sexual intercourse.⁷³ There is no compelling state interest that supports regulations that will not work. Nor can such coercive measures be seen as the least restrictive alternative for dealing with the problem.

The argument for a constitutional right to choose on the part of the mother-to-be is different from the argument for the constitutional right to choose abortion, and in some respects it is more difficult to support. In *Roe v. Wade* the Supreme Court protected the right to choose whether to have a child under the Due Process Clause, and it used the formula described above of balancing the woman's fundamental interests against the state's need for regulation. The variables in the balance differ considerably, however, when the pregnant woman chooses to deliver a child rather than to abort. Most important, the state's interest in preserving the health of the child who will be born is both clearer and more obviously legitimate than is its interest in preventing fetuses from being aborted.

In *Roe v. Wade* the Court balanced the various interests at stake to conclude the woman has a right to choose whether or not to terminate her pregnancy during the first two trimesters of pregnancy. In the last three months of pregnancy, however, the state can prohibit elective abortion, even though it must still allow thera-

peutic abortion—to protect the life or health of the mother. The Court found that the mother's interest in being able to decide whether to terminate a pregnancy is fundamental. Pregnancy may cause her medical and psychological harm. Unwanted offspring can result in "a distressful life and future" for the mother, a conflict with the mother's other commitments, and sometimes "the continuing stigma of unwed motherhood."⁷⁴ The state interests that the Court recognized were interests in the health of the mother and interests in fetal life.⁷⁵ When considered together with the mother's interests, the state's interest in maternal health, the Court held, allowed the state to regulate the abortion procedure where necessary (although not during the first trimester of pregnancy except to require a doctor). But the state's interest in fetal health, according to the Court, came into play only after the fetus was viable, in the sense that it could survive independent of the mother. The Court opined that fetal viability commenced at the beginning of the seventh month of pregnancy.

It may seem peculiar that the state has a greater interest in preventing the fetus from being harmed than from being killed, but such is the case. Certainly the state's interest in preventing harm to the child who will be born is different in kind from its interest in preventing abortion, which is a moral or religious interest. It depends primarily upon a view of when life begins—a question that reflects religious and philosophical, not scientific differences of opinion. On such issues, there is no legitimate and pragmatic governmental interest in depriving persons of the right to act in accordance with their own ethical views. In pragmatic terms, there is no state need for more children, and there is no tangible state interest in preventing abortion the way there would be if we were suffering from underpopulation.

But the state unquestionably has a tangible and substantial interest in safeguarding the health of the child who will be born. Nothing in *Roe v. Wade* contradicts the existence of a strong and legitimate state interest in the health of newborns. If, for example, a child is born with fetal alcohol syndrome—or suffers brain damage when born prematurely or when deprived of oxygen during the birthing process—the state becomes responsible for costs of special education. More likely than not, the state will continue to support that child—through welfare, sheltered workshops, community residences, for example—for the rest of that child's life. Nor is the state's interest solely financial. The state is properly *parens patriae* to and protector of the child, though not of the fetus as such before viability. If it is intended that the fetus develop to childhood, the state therefore has an important interest in regulating the pregnant woman to protect fetal health.

The different and stronger state interest that exists when the mother intends to carry to term also helps

explain why the trimester system that applies to abortion has no application to controls on the mother-to-be. Occasionally courts or commentators talk as though *Roe v. Wade* created a period—the first trimester of pregnancy—in which the mother was immune from state regulation. Indeed some go further and suggest that because before the third trimester the mother-to-be can abort, she must also logically be free to engage in activities that will damage the child without destroying it. According to this view, *Roe v. Wade* has already mandated that the state cannot impose any controls upon the mother that are designed to further the fetus's wellbeing before the 28th week of pregnancy, when she loses her constitutional right to choose abortion for nontherapeutic reasons.⁷⁶ I disagree with this view because the state interest in the treatment of the fetus is greater when a woman is planning to give birth to a child than when she proposes to abort. Moreover, the state interest in protecting the health of the infant-to-be exists at the outset of pregnancy as much as near the end of it.⁷⁷

A constitutional argument against controls over the woman who intends to deliver her child, therefore, cannot rely upon the absence of a legitimate interest in having women obey the regulations. Instead it must stress that the regulations are not necessary and effective. Moreover, those remedies that would work best intrude utterly upon the mother-to-be. It is when those factors are weighed in the balance that the case for controlling the behavior of mothers-to-be fails.

Many persons are not satisfied with the *Roe v. Wade* reasoning and would prefer a different explanation for women's right to choose abortion: Instead of adopting a balancing test—weighing women's interests against the state's need to regulate—the Court could have ruled that women have a right to control their own destiny, which necessitates control of reproduction among other things, and that lawmakers, especially male lawmakers, should not be permitted to view and treat women as containers for future offspring.⁷⁸ Instead women should be treated as individuals who are as autonomous and independent as men.

That type of reasoning could have been used in support of the access-to-contraception cases. It could also be used in support of the abortion right. Indeed one advantage such reasoning has over the approach in *Roe v. Wade* is that it could protect the right to choose abortion even if the timing of viability moved forward and the fetus were able to live independent of the mother very early in its development.⁷⁹

The same reasoning would also protect mothers-to-be from being controlled because of their pregnancy; they could not be viewed as containers for the fetus but would have to be treated as individuals in their own

right with all the rights and privileges that other individuals have.

The argument has particular force when lawmakers are overwhelmingly male and when in the most analogous situations that men face they are not required by law to give of themselves in the interest of their offspring. For example a father who has a kidney that his son desperately needs to survive is not required to give that kidney to his son even when any risk to the father is deemed insubstantial. This is true even though many fathers, when alerted to the situation, would readily choose to serve as donor—and even though that is, in some sense, the “medically correct” resolution.⁸⁰ Of course, the dependence between father and son in this example is not exactly like the dependence of the fetus upon the pregnant woman. But women should be entitled to make their own medical and lifestyle decisions, when men are permitted to do so in the most nearly analogous circumstances.

The failure to limit at all men's prerogatives to make medical decisions has led to the popular slogan, “If men became pregnant, abortion would be a sacrament.” Surely legislation is suspect when it is produced by male legislatures and places controls only upon women. In those circumstances, it is appropriate for courts at least to exercise added scrutiny in reviewing the legislation. So scrutinized, the fact that the legislation is of such questionable efficacy, with the effect if not the purpose of penalizing women for pregnancy, is enough to sustain an argument that, should such a statute be passed by a legislature today, it would be unconstitutional. In short, the Supreme Court should recognize as a constitutional matter that women have the same right to make medical decisions that men do.

Persuasive as this reasoning may seem, it has never commanded the support of the Supreme Court of the United States. In the meantime, the best available argument is that controlling the woman to protect the fetus is both unwise and unconstitutionally burdens women's right to reproduce; it intrudes substantially upon mothers-to-be and it will not work to protect the health of newborns.

Conclusion

As a matter of policy and even of constitutional law, a mother-to-be should be permitted the decision whether to accept medical treatment. Her own decision should invariably control.

Pregnancy is a personal event. Pregnancy should not become a legal event as well—an occasion for governmental intrusion. There is no need for the law to regulate pregnancy and no net benefit from its doing so. Mother and fetus ideally and normally are in a supportive relationship, not a competitive one, but attempts to

regulate the mother to protect the fetus or to punish the mother for misconduct toward the fetus tend to make them legal adversaries. They also put mother-to-be and her doctor in a potentially adversarial relationship and would tend to frighten many of the women most in need of prenatal care away from the health care system.

Instead of adopting legal rules and constraints to govern the pregnant mother, the law should leave her to decide in accordance with the rules that govern the decision-making of all other competent adults. Coercive governmental regulation has little to offer in the field of pregnancy. If the real goal is not control of women but protection of the child-to-be and creation of as healthy a newborn population as possible, then appropriate means are education and persuasion, free prenatal care, and good substance abuse rehabilitation programs, available free of charge to pregnant women. These remedies are more expensive in the short run than the coercive approaches and therefore more difficult to put in place, but unlike the coercive measures, they will help produce healthy infants.

References

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1. The same possibilities for *actual* decision-making power, as opposed to legal decision-making authority, do not exist for decision-makers other than the mother—for the state, for example, or for husbands—because the mother as child-bearer could avoid many restrictions even if an outsider were given legal decision-making power. If, for example, the legal rule were that a wife could not obtain an abortion without the consent of her husband but a pregnant married woman wanted an abortion, she might simply not inform her husband that she was pregnant and in seeking an abortion she might not inform the doctor that she was married.
2. See *Griswold v. State of Connecticut*, 381 U.S. 479 (1965) (married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (single persons); *Carey v. Population Services, International*, 431 U.S. 678 (1977) (minors age 16 and under).
3. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). See discussion *infra*.
4. See e.g., *Bradwell v. Illinois*, 82 U.S. 130, 142 (1873) (J. Bradley, concurring) (explaining that the "paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother" as part of the reason for upholding state court's denial of a license to practice law because the applicant was a woman); *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (maximum hours laws are constitutional for women although not for men because the physical structure of a woman and "the proper discharge of her maternal function—having in view not only her own health but the well being of the race—justifies legislation to protect her"). See Karen Koziara, "Women and Work," in Karen Koziara, Michael Moskow, and Lucretia Tanner, eds., *Working Women* (Washington, D.C.: BNA Books, 1987), 374–408; Barbara Babcock, Ann Freedman, Eleanor Holmes Norton, & Susan Ross, *Sex Discrimination and the Law: Causes and Remedies* (Boston:

Little, Brown, 1975), p. 261. Since 1971 the courts have held such "protective" labor laws for women inconsistent with Title VII of the Civil Rights Act of 1964, see, e.g., *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9 Cir. 1971).

5. 414 U.S. 632 (1974). As well as federal constitutional protection, many states also have laws which protect pregnant employees, e.g. Cal. Gov't Code §§ 12900–12948 (West 1980); Conn. Gen. Stat. Ann. §§ 46a–51 to 62 (West Supp. 1981); Iowa Code Ann. §§ 659.010–.030 (1979), and employers with federal government contracts in excess of \$10,000 fall under Executive Order 11246, 3 C.F.R. § 169 (1965), which prohibits discrimination. Despite these provisions, pregnant women can still be eliminated from some jobs during pregnancy on the ground that pregnancy renders them unfit. See e.g. *Burwell v. Eastern*, 633 F.2d 361 (4 Cir. 1980), cert. denied, 450 U.S. 965 (1981) (upholding removal of airline stewardesses after the 13th week of pregnancy to protect safety of passengers); *Levin v. Delta Airlines, Inc.*, 730 F.2d 994 (5 Cir. 1984) (upholding exclusion of all pregnant stewardesses from flight duty because of passenger safety concerns); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9 Cir. 1980) (upholding rule that pregnant stewardesses must take leave from the moment they become aware of pregnancy). Employers are required to provide reasonable alternative employment to displaced pregnant workers, but the job may pay less, and no job need be provided if none exists that involves the same skills. See, e.g., *Zuniga v. Kleger County Hospital*, 692 F.2d 986 (5 Cir. 1982); *Levin v. Delta Airlines, Inc.*, 730 F.2d 994 (5th Cir. 1984).

6. Pregnancy Discrimination Act of 1978 (Title VII, § 701(k), 42 USC § 2000e–(k)). Congress enacted this provision in response to Supreme Court decisions holding that women were not protected from discrimination against pregnancy either by the Constitution, *Geduldig v. Aiello*, 417 U.S. 484 (1974), or by Title VII of the Civil Rights Act of 1964, *General Electric v. Gilbert*, 429 U.S. 125 (1976).

7. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1982) (prohibiting employment discrimination by race, color, religion, sex and national origin by employers with 15 or more employees, labor unions, employment agencies and certain job training programs). Section 701(k) defines discrimination on the basis of pregnancy and related conditions as sex discrimination.

8. As of 1979, an estimated 100,000 jobs were closed to women, ostensibly to protect future offspring. See Wendy Williams, "Firing the Woman to Protect the Fetus," *Georgetown Law Review* 69 (1981): 641–704, at 647. Olin Corporation, for example, classified jobs on the basis of reproductive risks, and closed to females aged 5 to 63 jobs which involved contact with teratogens. Jobs which involved more limited exposure were closed only to pregnant women. *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). In *Ohio, Chemical and Atomic Workers International Union v. American Cyanamid*, 741 F.2d 444 (D.C. Cir. 1984), the court let stand a company policy that women aged 16 to 50 could take jobs involving exposure to lead only by establishing their sterility; five of seven workers had been sterilized and two others had instead been transferred to lower-paying jobs. See Wendy Cherner-Mareval, "Occupational Safety and Health," *Temple Law Quarterly* 58 (1985): 939–975. See also *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984). Similar policies are pursued by Allied Chemical, B.F. Goodrich, Sun Oil, Gulf Oil, Union Carbide, Monsanto and Du Pont. See Yvonne Sor, "Fertility or Unemployment," *Journal of Law and Health* 1 (1986): 141–228.

The usual explanations for fetal protection policies are the company's desires to avoid tort liability and to protect future generations. But regardless of the extent of risk, women are much more likely to be excluded from traditionally male jobs than female jobs, see Jeanne Stellman, *Women's Work, Women's Health: Myths and Reality* (N.Y.: Pantheon, 1977) at p. 160; J. Scott, "Keeping Women in Their Place," in W. Chavkin, ed., *Double Exposure* (N.Y.: Monthly Review Press, 1984) at 180-183.; Jeanne Stellman & M. Henifin, "No Fertile Women Need Apply," in Ruth Hubbard, M. Henifin, B. Fried, eds., *Biological Women—The Convenient Myth* (Cambridge: Schenkman, 1982) at p. 117. Moreover, men are typically not covered by fetal protection policies even though toxins are known to present reproductive risks to males and to render them even more vulnerable to certain hazards (because spermatogenesis is continuous and dividing cells are most vulnerable). See *Wright v. Olin Corp.*, 697 F.2d 1172 (4 Cir. 1982); Barry Levy & David Wegman, eds., *Occupational Health: Recognition and Prevention of Work Related Disease* (Boston: Little, Brown, 1983) at p. 308.; Jane Brody, "Sperm Found Especially Vulnerable to the Environment," *New York Times*, March 10, 1981, sec. C1. Women as a class therefore bear the entire cost of protecting future generations, sometimes without regard to the likelihood of pregnancy (since older women are often covered as well as younger ones) and despite lack of clear evidence of special risk. See generally Mary Becker, "From Muller v. Oregon to Fetal Vulnerability Policies," 53 *University of Chicago Law Review* 53 (1986): 1219-1273.

9. Pregnant women as a group could also be subjected to mandatory drug testing or mandatory AIDS testing. Alternatively, newborns can be tested for evidence of maternal drug use, or for AIDS seropositivity, and they are frequently so tested today. Maternal drug use might result in punishment of the mother or removal of her baby.

10. As well as the degree of necessity for the screening procedure, another factor that might influence which screening procedures to require is how intrusive the particular procedure is. Screening by urinalysis or blood test, for example, might be ordered more readily than screening by procedures like amniocentesis, which are not only more intrusive but also carry some risk to the healthy fetus.

11. In many states women would not have the option of abortion if they were more than six months pregnant when the tests results became known. But in the first two trimesters of pregnancy, the Constitution requires that women retain the option whether to abort. *Roe v. Wade*, 410 U.S. 113 (1973).

12. See John Myers, "Abuse and Neglect of the Unborn: Can the State Intervene?," *Duquesne Law Review* 23 (1984): 1-76, at pp. 26-34; Ethan Bronner, "Advances Elevate Status of Fetus," *The Boston Globe*, July 21, 1987, 1-1 (quoting Prof. John Robertson to say that actions for fetal abuse are "a logical extension of child abuse laws"); Tamar Lewin, "Courts Acting To Force Care of the Unborn," *New York Times*, Nov. 23, 1987, p. A-1 (quoting Prof. John Robertson to say, "If a woman refuses medical help, and her child is born damaged as a result, maybe she has fallen below acceptable standards and . . . should be turned over to the child abuse authorities, who could punish prenatal child abuse just as postnatal abuse.")

13. See, e.g., *People in Interest of D.K.*, 245 N.W. 2d 644 (So. Dak. 1976).

14. A statute might provide:

Necessary medical treatment. A woman who is pregnant and intends to give birth must submit to treatment that the medical profession as a whole would conclude both

poses no substantial risk to the mother and is necessary and effective for the health of the fetus. This section can be enforced only by a doctor's seeking in court an order to impose treatment upon a pregnant woman whose refusal of treatment the doctor regards as unreasonable. It is a question of fact, to be determined by the factfinder subject to the usual rules for judicial review, whether the medical community as a whole would regard a particular treatment or procedure as both posing no substantial risk to the mother and necessary for the fetus.

The remedy for violating a court order issued under the statute might be contempt of court—either civil contempt allowing the woman to be confined until she agreed to comply, or criminal contempt resulting in a fine or imprisonment for a specified term.

15. Obviously some births always will take place away from the hospital, accidentally as well as intentionally, but a legislature could attempt to prohibit deliberate home births by imposing fines on women for willfully failing to report for hospitalization when their labor commenced, or by punishing doctors, midwives and others for agreeing to assist at a home birth.

16. One writer would utilize a reporting system as part of the enforcement mechanism, and would intervene to prevent the home birth, as well as threatening criminal punishment and removal of the infant under child or fetal abuse laws. See Donald Bross, "Court-Ordered Intervention on Behalf of Unborn Children," *Children's Legal Rights Journal*, 7 (1986): 11-15, at pp. 13-14.

17. See e.g. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Orr v. Orr*, 440 U.S. 268 (1979); *Reed v. Reed*, 404 U.S. 71 (1971).

18. Indeed one efficacious way of structuring regulations, if they are to apply to all women planning to continue their pregnancy to term, would be to regulate every woman upon commencement of pregnancy. A prohibition of alcohol for pregnant women, for example, would not have to exempt women planning to abort or considering abortion; it could instead regulate all pregnant women and let some opt out of the regulation only when they exercised their right to abortion. One commentator suggests that women in the first trimester of pregnancy could not be regulated but that those who engage in behavior likely to harm the fetus during that stage could be required to abort. See Bross, *supra* note 16, at p. 15.

19. 114 *Daily Wash. L. Rptr.* 2233 (D.C. Super. Ct. July 26, 1986). The decision was affirmed on appeal to the Court of Appeals of the District of Columbia by unreported order.

20. In the past 16 years the percentage of cesareans in this country has quadrupled, so that today almost one birth out of four is a cesarean. The rate of cesarean section delivery in this country increased from 4.5 per 100 deliveries in 1965 to 22.7 per 100 deliveries in 1985. See Selma Taffer, Paul Placek, & Teri Liss, "Trends in the United States Cesarean Section Rate and Reasons for the 1980-85 Rise," *American Journal of Public Health*, 77 (Aug. 1987): 955-959, at 955.

21. Many women accept cesareans they at first resist, under pressure from the doctor or even under threat of court action. Even if a clear rule were adopted prohibiting court intervention and coercion, it is difficult to delineate the boundaries between persuasion and force, and doctors would continue to have substantial leverage. In view of the influence doctors can exercise over the mother's decision, it may be no accident that many of the reported cases involve persons who follow unwaivable church doctrine.

22. See Veronika Kolder, Janet Gallagher, and Michael Parsons, "Court Ordered Obstetrical Interventions," *New England Journal of Medicine* 316 (May 1987): 1192-1196.

23. *Jefferson v. Griffin Spalding Hosp. Authority*, 247 Ga. 86, 274 S.E. 2d 457, 459 (1981).

24. The hospital sought permission to force on Mrs. Jefferson both a cesarean section and any necessary blood transfusions.

25. *Jefferson v. Griffin Spalding Hospital Authority*, 247 Ga. 86, 274 S.E. 2d 457, 459 (1981).

26. The night before the operation was to be performed, the placenta moved—"a most unusual occurrence." 274 S.E. 2d 457, at 461 n. 1.

27. Tamar Lewin, *supra* note 12.

28. In still another case in which an order was obtained, doctors were surprised that the baby when finally delivered by cesarean was much healthier than the fetal monitoring had led them to expect. The doctors concluded, "That a more asphyxiated infant with poor neonatal outcome did not result after so long a duration of apparent fetal distress simply underscores the limitations of continuous fetal heart monitoring as a means of predicting neonatal outcome." Watson A. Bowes, Jr. and Brad Selgestad, "Fetal Versus Maternal Rights: Medical and Legal Perspectives," *Obstetrics and Gynecology*, 59 (1981): 209-214, at p. 211. Kolder, Gallagher, and Parsons, *supra* note 22, report six cases in which forced cesareans were sought where the prediction of harm to the fetus was found to be inaccurate.

29. 533 A.2d 611 (D.C.Ct. of App., 1987).

30. "Drama in the Womb: A Matter of Life and Death Winds Up in Court," *Los Angeles Times*, December 25, 1987, 5A-5.

31. *New York Times*, March 22, 1988, A-17.

32. See *In re A.C.*, 533 A.2d 611, 612-13 (D.C.Ct. of App., 1987).

33. "Drama in the Womb," *supra* note 30.

34. *Ibid.*

35. *Ibid.*

36. *In Re A.C.*, 533 A.2d 611, 617 (D.C.Ct. of App., 1987).

37. *Roe v. Wade*, 410 U.S. 113, 173, (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, (White, J., dissenting).

38. Bowes and Selgestad, *supra* note 28, at 214.

39. See *McFall v. Shimp*, 10 Pa. D.&C. 3d 90 (Allegheny Ct. Comm Pleas, 1978). The case involved cousins, but the court made clear that it was not the closeness or the distance of the relationship that was important but rather that no person would be forced to be a donor for another. The plaintiff suffered from a rare bone marrow disease and would not survive without a compatible donor, and it was stipulated that his cousin the defendant was the only suitable donor.

The court based its decision upon "[t]he common law [which] has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save that human being or to rescue. . . . For our law to compel the Defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. . . ." *Id.*, at p. 91. The risks to the bone marrow donor were small. See Robert Steinbrook, "Unrelated Volunteers as Bone Marrow Donors," *Hastings Center Report* 10 (February 1980): 11-14; Alan Meisel & Loren Roth, "Must A Man Be His Cousin's Keeper?" *Hastings Center Report* 8 (Oct. 1978): 5-6. See generally, Note, "Coerced Donation of Body Tissues: Can We Live with *McFall v. Shimp*?" *Ohio State Law Journal* 40 (1979): 409-440 (suggesting that

in some circumstances compelled donations should be required).

40. Cal. Penal Code § 270 (West 1970 and Supp. 1988).

41. The language concerning fetuses in the statute had been added in 1925, when the statute applied only to fathers, and it was intended to impose liability upon the father-to-be who refused to provide support to the woman he had impregnated. Later the statute was amended so that it applied to mothers as well as fathers. The effect, however, according to the court's ruling, was to make women as well as men financially responsible for the expenses of pregnancy, but not to impose upon women an obligation to obey doctors' orders. See generally, Note, "Maternal Rights and Fetal Wrongs: The Case Against Criminalization of 'Fetal Abuse,'" *Harvard Law Review* 101 (1988): 994-1112, note 1.

42. In *Reyes v. Superior Court*, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977), the California Court of Appeals held that because the statute does not expressly mention fetuses, the provisions of the general child abuse law do not apply to fetal abuse.

43. Some courts, unlike the California court in *Reyes*, have applied existing abuse and neglect laws to the unborn; one such case, involving a Colorado court and Colorado's abuse and neglect law, is reported in Bowes & Selgestad, *supra* note 28. See also note 12 *supra* for authorities supporting this application of child abuse laws.

44. The prosecutor might have found it difficult to prove that these activities were responsible for the condition of the baby when born, and not earlier events or conditions.

45. Some doctors say that any alcohol can be harmful to the fetus, and that fetal alcohol syndrome can result from relatively low intake. Others believe that limited use is not risky.

46. Eugene Braunwald, et. al., *Harrison's Principles of Internal Medicine*, 11th ed. (N.Y.: McGraw-Hill, 1987), at 2108.

47. The fetus is particularly vulnerable at the beginning of pregnancy. See Y. Brackbill, K. McManus and L. Woodward, *Medication in Maternity: Infant Exposure and Maternal Information* 5 (1985).

48. See Donald C. Bross, *supra* note 16, at 11-12. See also Kolder, Gallagher, and Parsons, *supra* note 22 (reporting that 46 percent of the heads of fellowship programs in maternal-fetal medicine thought that women who refused medical advice and thereby endangered the life of the fetus should be detained).

49. See, e.g., *In re Steven S.*, 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981); *In re Dittrick Infant*, 80 Mich. App. 219, 263 N.W.2d 37 (1977).

50. See, e.g., Kolder, Gallagher, & Parsons, *supra* note 22, at 1193 (reporting court-ordered hospital detentions in Illinois and Colorado of women with diabetes who were 31 to 33 weeks pregnant); Ethan Bronner, "Advances elevate status of fetus," *Boston Globe*, July 21, 1987, p. 1 (reporting a Wisconsin case in which a young woman was detained during her pregnancy because she "tended to be on the run" and to "lack motivation.") That case is also described in "Girl detained to protect fetus," *Wisc. State Journal*, August 16, 1985, sec. 3-2.

51. See note 16 *supra*.

52. See Bross, *supra* note 16, at 14.

53. Kolder, Gallagher, and Parsons, *supra* note 22, 1192-96.

54. *Id.*: 1195.

55. One doctor who objects to that practice says "If you have to have several attendants hold down a woman to anes-

thetize her in order to perform a Caesarean, that's treating her like an animal." Ethan Bronner, "Advances Elevate Status of Fetus," *The Boston Globe*, July 21, 1987, p. 1-1 (quoting Dr. Arnold Colodny, a surgeon at Children's Hospital in Boston). Usually this kind of physical restraint is unnecessary, however, and the operation is forced only in the sense that a court order is obtained allowing the doctors to perform the operation without the consent of the patient. In fact, the patient then often relaxes and accepts the inevitable, and it is not always clear that the operation would be performed if the patient continued to resist physically. Some doctors would not strap a woman down "like an animal" and forcibly sedate her, and there are cases where doctors do not believe they can safely sedate a resisting woman. See, e.g., Bowes & Selgestad, *supra* note 28, at p. 211 (discussing an obese woman and saying that it might have been neither safe nor possible to administer anesthesia if she had continued to resist after the court order was obtained).

56. American College of Obstetricians and Gynecologists policy statement, issued in August, 1987, reported in Lewin, *supra* note 12. See also Lawrence J. Nelson & Nancy Milliken, "Compelled Medical Treatment of Pregnant Women," *Journal of American Medical Association*, 259 (February, 1988): 1060-1066 (calling it counterproductive for doctors concerned for the health of the unborn to turn to courts).

57. Most forced cesareans have been performed on women who were poor and were members of racial minorities; many of the women did not speak English and had beliefs and attitudes about childbirth that their doctors did not share. See Kolder, Gallagher, and Parsons, *supra* note 22, at p. 1195.

58. Some maternal-fetal specialists would deal with these contingencies as well with coercion; they advocate state surveillance of women in the third trimester who have stayed outside the hospital system. See Kolder, Gallagher, and Parsons, *supra* note 22, at 1194 (reporting that 26 percent of the specialists surveyed approved of state surveillance).

59. See, e.g., *In re Vanessa F.*, 76 Misc. 2d 617, 351 N.Y.S.2d 337 (1974) (child removed after birth because of prenatal drug abuse); *In re Baby X*, 97 Mich. App. 111, 293 N.W.2d 736 (1980); *In re Smith*, 128 Misc. 2d 976, 492 N.Y.S.2d 331 (Fam. Ct. 1985); *In re Ruiz*, 27 Ohio Misc.2d 31, 500 N.E.2d 935 (1986).

60. Nonetheless, some doctors prefer criminalization to forced intervention, even in the context of cesarean births. In J.R. Lieberman, W.C. Mazor, & A. Cohen, "The Fetal Right to Live," *Obstetrics & Gynecology*, 53 (April, 1979): 515-517, at p. 517, the authors conclude that when a mother refuses to submit to a needed cesarean, doctors should not force the operation but should use all means of explanation and communication and if the patient persists in refusing, should inform her that she is committing a felony.

61. Jeffrey Parness, "Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life," *Harvard Journal on Legislation*, 22 (1985): 97-172, at p. 163, favors criminalization through fetal abuse statutes, largely on this theory. See also Note, "Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus," *Southern California Law Review*, 60 (1987): 1209-1238, at p. 1235.

62. Division of Health Promotion and Disease Prevention, Preventing Low Birthweight (1985): 8; American Academy of Pediatrics Task Force on Infant Mortality, "Statement on Infant Mortality," *Pediatrics* 78 (1986): 1155; A. Dott and A. Fort, "The Effect of Availability and Utilization of Prenatal Care and Hospital Services on Infant Mortality Rates," *Amer-*

ican Journal of Obstetrics and Gynecology 123 (1975): 854; National Health Law Program, "The Cost-Effectiveness of Prenatal Care," *Clearinghouse Review* 19 (1985): 259.

63. See, e.g., Greater New York March of Dimes, The Campaign for Healthier Babies: Fighting the Problem of Low Birthweight in New York City; Lori Leu, "Legislative Research Bureau Report: A Proposal to Strengthen State Measures for the Reduction of Infant Mortality," *Harvard Journal of Legislation* 23 (1986): 559-578, at pp. 561-63; United States Government Accounting Office, Prenatal Care: Medicaid Recipients and Uninsured Women Obtain Insufficient Care (1987): 3.

64. See A.T. Geronimus, "The Effects of Race, Residence, and Prenatal Care on the Relationship of Maternal Age to Neonatal Mortality," *Journal of American Public Health Assn.* 76 (1986): 1416; Children's Defense Fund, The Health of America's Children: Maternal and Child Health Data Book (1988).

65. See Jane Brody, "Widespread Abuse of Drugs By Pregnant Women Is Found," *New York Times*, August 30, 1988, p. 1-1 (quoting Dr. Janet Chandler).

66. See Jim Schachter, "Help is Hard to Find for Addict Mothers: Drug Use 'Epidemic' Overwhelms Services," *Los Angeles Times*, December 12, 1986, p. 11-1.

67. 428 U.S. 52 (1976).

68. The only way states could treat the mother and father equally would be for the state itself to adopt a preference for or against abortion: for example a rule that abortion was permissible only if both parents consented to it (a preference for childbirth) or alternatively a rule that childbirth was permissible only with the consent of both (a preference for abortion). Today such rule would be unconstitutional under *Danforth*, even though in other contexts the Supreme Court has permitted government to make "a value judgment favoring childbirth over abortion. . . ." *Maier v. Roe*, 432 U.S. 464, 474 (1977). See *Harris v. McRae*, 448 U.S. 297 (1980). And even if they were not unconstitutional, either rule would pose extreme problems of workability. See note 1 *supra*.

69. See, e.g., *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1 Cir. 1973); Comment, "A Constitutional Evaluation of Statutory and Administrative Impediments to Voluntary Sterilization," *Journal of Family Law*, 14 (1975): 67-84; Richard Sherlock & Robert Sherlock, "Voluntary Contraceptive Sterilization: The Case of Regulation," *Utah Law Review*, (1976): 115-141.

70. See *Ponter v. Ponter*, 135 N.J. Super. 50, 342 A.2d 574 (Ch. Div. 1975) (denying husband's right to veto his wife's decision to undergo sterilization).

71. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Cord v. Gibb*, 219 Va. 1019, 254 S.E.2d 711 (1979); *Andrews v. Drew Municipal Separate School Dist.*, 507 F.2d 611 (5 Cir. 1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976).

72. If the state can control the pregnant woman's behavior, why cannot the husband come to court to force on his wife behavior that best comports with the well-being of the fetus, as the husband tried to do in *Taft v. Taft*, 446 N.E.2d 395 (Mass. 1983)? Nothing in *Danforth* would prevent the state from allowing the husband to initiate decisions to control the wife's behavior over decisions that are within the state's regulatory power.

73. *Carey v. Population Services, International*, 431 U.S. 678 (1977) (availability of contraception for minors age 16

and under); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (availability of contraception for single persons).

74. 410 U.S., at 153.

75. *Id.*: 147-52.

76. Articles that maintain that the viability line established in *Roe v. Wade* is determinative concerning fetal abuse as well as abortion include A. Edward Doudera, "Fetal Rights? It Depends," *Trial* 18 (April, 1982): 38-44; Note, "Constitutional Limitations on State Intervention in Prenatal Care," *Virginia Law Review* 67 (1981): 1051-1067, at pp. 1066-67; John Myers, "Abuse and Neglect of the Unborn: Can the State Intervene?" *Duquesne Law Review* 23 (1984): 1-76, at pp. 65-68.

77. While *Roe v. Wade* and its trimester system are not directly applicable when the aim of a regulation is to prevent damage to the child who will be born, the trimester system is relevant when the aim of the regulation is solely to prevent miscarriage. One way doctors, and even the state, sometimes try to impose treatment is by forcing a woman to submit to an operation to have her cervix sutured. In *Taft v. Taft*, 446 N.E.2d 395 (Mass. 1983), the family court on the husband's petition ordered a woman to submit to such an operation in order "to hold her pregnancy," but the Supreme Court of Massachusetts reversed, saying the order violated the woman's constitutional rights including the right to free exercise of her religion, which forbade surgery. The court also said that the state had not proven the need for or safety of the operation. Even apart from these considerations, however, there should be no question that a woman does not have to take steps to avert miscarriage when she has a right to abort, and Mrs. Taft was only in her fourth month of pregnancy. That alone should have been sufficient to dispose of the *Taft* case.

Only in the last trimester can the state assert an interest in preventing fetal death. See *Roe v. Wade*, 410 U.S. 113, 162-65 (1972). Although *Roe v. Wade* would prohibit requiring that operation to save the life of the fetus during the first two trimesters, requiring a suture of the cervix of a woman in her seventh month of pregnancy would be analyzed in accordance with whatever rules are adopted for forcing operations generally upon the pregnant woman. *Roe v. Wade* does not prohibit the state from protecting the fetus as such during the last

trimester of pregnancy. There is a legitimate state interest during the last trimester in requiring the operation, cf. *Taft v. Taft*, 446 N.E. 2d 395, 397 (Mass. 1983), or other treatments and operations that will allow the woman to carry to term, even though the baby may live if born prematurely without it, because premature birth is a primary cause of handicap in newborns. See V.Y.H. Yu, A.A. Orgill, B. Bajunk & J. Astbury, "Survival and Two Year Outcomes of Extremely Preterm Infants," *British Journal of Obstetrics and Gynecology* 19 (1984): 640-646, at p. 643. See also "The Cost Effectiveness of Prenatal Care," National Health Law Program, *Clearinghouse Review* 19 (July 1985): 259-264.

Throughout the last trimester the state can assert an interest in fetal life as such (as well as the health of the child to be), even though the fetus is not fully developed. *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964), is an example of a case very much like *Jefferson*, except it involved a transfusion instead of a cesarean and it was performed prior to the end of pregnancy, although after viability. In *Raleigh Fitkin*, the court gave the hospital authority to perform a blood transfusion on a pregnant woman, although the woman objected for religious reasons, when the testimony was that both mother and fetus would die without the operation. The court said the operation could be performed, however, if it was necessary to save the life of either the woman or the unborn child.

78. Another instance of women being treated as fetal containers is evident from the traditional exceptions to prohibitions of abortion for cases of rape and incest. It is difficult to explain such exceptions from a right-to-life perspective, since the fetus's origins are not the fetus's fault. Nor is the explanation that the woman is invariably "faultless" in these situations and not in others, for she may have consented to incestuous acts. The only correlation is with the fault of the father, whom the exceptions punish by not permitting him to use the woman to perpetuate his genes.

79. Cf. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, (1983) at 452-461 (O'Connor, J., dissenting).

80. Cf. *Hart v. Brown*, 29 Conn. Sup. 368, 289 A.2d 386 (1972).

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AIDS and the criminal law. (AIDS: Law and Policy)

Field, Martha A.; Sullivan, Kathleen M.

Law, Medicine & Health Care 15 n1-2 46(15) Summ. 1987

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Sources of law: the scope of federal common law.

Field, Martha A.

Harvard Law Review 99 n5 983-984 March, 1986

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Garcia v. San Antonio Metropolitan Transit Authority: the demise of a misguided doctrine. (The Supreme Court, 1984 Term)

Field, Martha A.

Harvard Law Review 99 n1 84-118 Nov, 1985

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The uncertain nature of federal jurisdiction. (National Center for State Courts Marshall-Wythe School of Law Symposium on "State Courts and Federalism in the 1990's")

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AIDS and the Criminal Law

Martha A. Field and Kathleen M. Sullivan

AIDS is spread by acts, not by casual exposure. As AIDS spreads further, some are urging that those acts, including sexual acts, be treated as crimes.¹ Indeed, two AIDS carriers have already been charged with crimes for risking sexual transmission of AIDS to others. In one case, the United States Army has court-martialed an infected soldier, Pfc. Adrian Morris, Jr., charging that when he had sex with two other soldiers, he committed the crime of "aggravated assault." Aggravated assault requires use of a "dangerous weapon or other means of force likely to produce death or grievous bodily harm."² What was the "weapon" in his case? The sexually transmittable AIDS virus itself. In the other case, the Los Angeles district attorney has charged an AIDS carrier, Joseph Markowski, with attempted murder for selling his blood and for having sex with another man while infected.³

Should the transmission of AIDS be treated as a crime? If so, under what circumstances? In this paper we explore these issues. We first describe ways that traditional criminal laws and public health offenses might be found to cover AIDS transmission, and describe why those laws are ill suited to this context. We then describe what the most appropriate form of criminal proscription would be, if the criminal law were to intervene. But we conclude that the criminal law should not intervene. The social costs of criminalizing AIDS transmission would far outweigh the benefits of deterrence such a law might have. Serious and well-funded public education about AIDS prevention is a far preferable means of influencing behavior.

Applying Traditional Criminal Law to AIDS Transmission

The criminal law punishes a culpable act in order to incapacitate and reform the offender while deterring others from committing similar acts. The principal purpose of criminalizing AIDS transmission would be to deter persons with AIDS and AIDS carriers⁴ from infecting others.

The best argument for criminalizing AIDS transmission is, perhaps, that it would be far preferable to quaran-

tine, another form of regulation frequently advocated for preventing the spread of AIDS.⁵ The criminal law would focus on culpable acts of AIDS transmission; quarantine would punish persons with AIDS or AIDS carriers for the mere status or condition of being infected or ill. The criminal law would punish actual offenders; quarantine would sequester a far larger group of people on the basis that they might infect others. Quarantine of persons with AIDS and AIDS carriers would presume that they cannot control their own behavior; the criminal law would recognize that most people do act responsibly and would punish only those who do not.

For all these reasons, using the criminal law to regulate AIDS transmission would pose far less threat to civil rights and civil liberties than quarantine does, although we still believe that threat excessive, as discussed below.

What might count as a "crime" of AIDS transmission? The criminal law typically punishes an act, accompanied by a culpable state of mind, that causes or risks causing a serious harm. None of these requirements, however, is straightforward in the context of AIDS transmission. To be sure, AIDS transmission involves more of an "act" than does transmission of a disease that is communicable by breathing, coughing, sneezing, or other involuntary body functions. Indeed, it is that very fact that makes quarantine of persons with AIDS or AIDS carriers so inappropriate. But the acts most likely to transmit AIDS—the act of sexual intercourse, whether anal or vaginal, and the act of needle-sharing for intravenous injection of drugs⁶—will rarely be accompanied by a conscious choice or wish to transmit AIDS. Quite the contrary: in criminalizing AIDS transmission, we would typically be criminalizing not intentional harms but simply the taking of risks.

The traditional criminal law, to be sure, does sometimes punish risk-taking. For example, the American Law Institute's Model Penal Code, which has greatly influenced state criminal code reform over the past three decades,⁷ defines four states of mind, in descending order of culpability, that might be required to accompany a crime: purposeful, knowing, reckless, and negligent. *Purposeful* is

defined as wanting the prohibited result; *knowing* is defined as consciously aware that the result will occur, and proceeding anyway; *reckless* is defined as consciously aware of a substantial and unjustifiable risk that the result will occur, and proceeding anyway; *negligent* is defined as possessing knowledge that should cause a reasonable person to avoid such a risk, and proceeding anyway.⁸

The Model Penal Code requires for most crimes a culpability level of recklessness or higher. Since negligence can be the product of carelessness, inadvertence, or ignorance, it is generally considered an insufficiently culpable state of mind to support criminal sanctions, with the stigma and severe deprivation of liberty that they impose. In the rare instances when the Code does accept negligence as sufficient, it invariably reduces the severity of the offense. Moreover, for *both* recklessness and negligence, the Code requires more than mere carelessness; it requires a "gross deviation" from ordinary standards of care.⁹ Lesser deviation from such standards may create civil but not criminal liability.

Criminal liability may sometimes be imposed without any showing of a culpable state of mind—not even negligence.¹⁰ But such "strict" liability is a relative anomaly in the criminal law, and it has been confined mainly to areas of life that are highly regulated by government, such as food and drug manufacture and railway and highway safety.¹¹

What state of mind, if any, should be required if the transmission of AIDS is to be treated as a crime? We examine this problem first with respect to the traditional crimes most likely to be invoked to punish transmission of AIDS: homicide and assault. We argue that the established laws of homicide and assault fit AIDS transmission too poorly to be useful in any effort to treat AIDS transmission as a crime. We next consider whether traditional public health offenses fit AIDS transmission any better, and conclude that they too are inappropriate in this context.

Murder

If a person with AIDS or an AIDS carrier were found to have transmitted the disease to another with the effect of causing that person's death, he might be charged with murder or manslaughter.¹² Murder is distinguished from the lesser offense of manslaughter by the more culpable state of mind murder requires. The Model Penal Code, for example, defines murder as the killing of another human being either purposely, knowingly, or recklessly under circumstances manifesting "extreme indifference to the value of human life."¹³ Such a mental state is required with regard to every element of the offense.

To be guilty of *purposeful* murder, therefore, an AIDS transmitter would have to commit an AIDS-transmitting act with the *desire* to cause his partner to die of AIDS. An AIDS transmitter would have *knowingly* caused the death

of another only if he was consciously aware that he had AIDS or carried the HIV virus, and that his conduct *would* infect and kill another. And for an AIDS transmitter to commit *reckless* murder, he would have to be consciously aware that he carried or might well carry the AIDS virus and that his conduct might well transmit it to another person and cause that person to die. Moreover, he would have to manifest some unusual disregard for human life *in addition to* that recklessness in order to be guilty of reckless murder, as distinct from the lesser offense of reckless manslaughter. Deaths resulting from some violent felonies, including rape, may be treated as murders under this reckless-plus-extreme-indifference standard.¹⁴

Cases of purposeful or knowing murder by AIDS transmission are conceivable but likely to be extremely rare. The AIDS transmitter will rarely if ever be certain that an act of sex or needle-sharing will transmit AIDS, as knowing murder requires. Having sex or sharing needles, moreover, is a highly indirect *modus operandi* for the person whose *purpose* is to kill.

In the unusual situation where purpose or knowledge could be shown, however, the person who deliberately used AIDS to kill would seem just as culpable as a person who deliberately injected a victim with a lethal poison in the hope of causing death. Nor is culpability much in doubt in other instances that are likely to count as murder under the Code: for example, the prostitute who knows he or she is contagious and nonetheless plies his or her trade without precautions, indifferent to the number of persons thus fatally infected,¹⁵ or the person who, knowing he has AIDS, rapes another and so eventually causes his or her death.¹⁶

Manslaughter

Where criminal culpability becomes more doubtful—and the application of traditional murder rules more troubling—is in the realm of recklessness and negligence, the two mental states that are by far the likeliest to accompany AIDS transmission. Reckless killing can be either murder or manslaughter. When it does not reflect the "extreme indifference to the value of human life" that is the standard for reckless murder, the Model Penal Code treats it as the lesser offense of manslaughter.

Many instances of AIDS transmission might qualify as manslaughter under the Model Penal Code's definition. Recklessness means simply advertent to a known substantial and unjustifiable risk, and disregarding it anyway. For example, a lover carried away by passion who has intercourse with his friend or spouse without taking precautions against transmission could be guilty of manslaughter if he was aware that he might well be transmitting AIDS to his partner, who later dies.

What would count as awareness of a "substantial and unjustifiable risk" of AIDS transmission? Diagnosis of

AIDS-related complex (ARC) might be enough, even though people with ARC symptoms do not always contract full-blown AIDS. Knowledge that one had tested positive on an HIV-antibody test might be enough. Although the test does generate a significant number of false positives and not all true positives develop AIDS, the medical presumption is that all true positives are contagious. Indeed, persons just developing the infection, although they seem healthy, may be as contagious as persons who have developed the full disease.¹⁷ Knowledge that one had had high-risk sexual contacts in the past might be enough, even in the absence of any diagnosis or test. Thus, applying the manslaughter provisions to AIDS transmission might embrace many cases in which one knew of a risk but in which killing one's sexual partner was the last thing one *wanted* to do.

Negligent Homicide

The Model Penal Code treats grossly negligent killings as negligent homicide, a lesser offense than manslaughter, although many states continue to treat grossly negligent killings simply as manslaughter, as did the common law. Negligent homicide under the Model Penal Code does not require "conscious disregard" of risk, as the recklessness crimes do, but only that the actor disregard a risk of which he "should be aware"—even if he is not. As noted above, the Model Penal Code limits negligence for this crime, as for all negligence crimes, to "gross deviation from ordinary standards of conduct."¹⁸

It is possible that some prosecutors would treat many transmissions of AIDS as negligent homicide, even under this strict requirement. They might, for example, prosecute a person who did not actually know that he had AIDS, or that he carried the AIDS virus, or even that AIDS is deadly and transmittable by some sexual acts he engages in. And a jury could convict him so long as it believed that a "reasonable person" in his circumstances should have known those facts, even if the defendant genuinely did not. The crime of negligent homicide could thus cast a very wide net over AIDS transmitters, because the fears and prejudices of juries could greatly influence their judgments about what conduct is "reasonable."

Problems in Applying Homicide Law

There are many problems with using these traditional homicide provisions as a means of regulating the transmission of AIDS. To name two obvious ones, the victim may well have consented to expose himself or herself to the risk of contracting the disease from the defendant, and a long time usually elapses between exposure and death.

Under the law of both murder and manslaughter, consent of the victim is irrelevant to the crime—a homicide exists even if the victim has consented, or indeed request-

ed, to be killed.¹⁹ But the presence of "consent" to acts that can transmit AIDS may well affect the degree of culpability that should attach—at least in the context of sexual transmission. A person who transmitted AIDS after informing his sexual partner of everything he knew about his own condition and the contagious properties of AIDS seems far less blameworthy than someone who carefully hid from his sexual partner the fact that he was infected.

Under the law of murder and manslaughter, moreover, the transmitter cannot be convicted unless the victim has died, no matter how malicious the intent in exposing the victim to the disease. In the AIDS context, however, blameworthiness relates far more to factors like the defendant's knowledge and intent than to the timetable of the victim's life in relation to the defendant's. After all, the transmitter of AIDS will often die before the person to whom he has given the disease.

Even if the victim does pre-decease the defendant, proving that the defendant's act was the *cause* of the victim's death will be difficult. The victim may have had other relationships, prior or subsequent, that could have been the cause instead. Moreover, half of the states still follow the common-law rule that homicide can be charged only if death has occurred within a year and a day of the act.²⁰ In those states, given AIDS' long latency period, AIDS transmission will rarely be chargeable as murder or manslaughter.

Solutions to these problems might be reached along other avenues of traditional criminal law. Even when the victim does not die, so that homicide cannot be charged, an AIDS transmitter might be prosecuted for the crimes of attempted murder, or assault.²¹ Both offenses, as their penalties reflect, are considered substantially less serious than criminal homicide.²²

Attempted Murder

A finding of guilt of attempted murder would not require that the victim die; guilt for *attempt* turns principally upon the intent of the would-be perpetrator—the factor that seems most closely correlated with blameworthiness in the transmission of AIDS. Because attempt makes liability turn on intent while shifting the focus away from the timing of death, it may fit AIDS transmission better than the law of homicide. On the other hand, attempt may sometimes impose more liability than is desirable. It would potentially apply not only when the victim has not yet died from AIDS, but even when the victim does not become infected with the AIDS virus at all. As long as the would-be transmitter (1) had or carried AIDS or believed he did²³; (2) engaged in conduct that could transmit it (or even attempted to engage in that conduct); and (3) did so with the requisite state of mind, he could be guilty of attempt to kill.

As a practical matter, however, attempt law could reach

very few cases of AIDS transmission because it requires a purposeful or knowing state of mind. To be guilty of attempted murder for transmitting AIDS, a person would have to act "with the purpose of causing" his partner to be infected and die "or with the belief that it will cause such result."²⁴ While there may be the rare case in which a person with AIDS shared a needle or had sexual intercourse with a person out of a conscious desire that that person acquire AIDS and die, that certainly is not the paradigm case. Even if such a case could be proved, punishing it as attempted murder would have little effect on the overwhelming majority of AIDS transmissions, which are either reckless, negligent, or wholly accidental.

Assault

Assault may seem a more appropriate tool for reaching AIDS transmission than homicide or attempted murder. The victim need not die in order for the offense to be complete, and consent may be a defense in some circumstances. Under the Model Penal Code, a person can be guilty of assault if he "attempts to cause or purposely, knowingly or recklessly causes bodily injury to another."²⁵ Assault is a misdemeanor. A person can be guilty of aggravated assault—a second-degree felony—if he "attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life."²⁶

One reason assault may seem better suited than homicide or attempt to cases of AIDS transmission is that the consent of the victim may be relevant to guilt. An assault is an unwanted or offensive touching. Brain surgery is a touching but not an assault, because the patient consents; consensual sex is normally not an assault either. The common law regarded consent as a complete defense to otherwise offensive contact, as the consent vitiated the element of offensiveness. The Model Penal Code, by contrast, would treat consent as a defense in some cases but *not* in cases of serious bodily harm.²⁷

Both these approaches to consent would have to be refined in the context of AIDS transmission. Consent to sexual activity itself should not constitute consent to contracting AIDS—or any other serious sexually transmittable disease—if one did not know that one's partner was infected. Rather, only *informed* consent should suffice. That is, unless the victim agreed to have sexual intercourse with the transmitter knowing that the transmitter had AIDS or had tested positive for HIV exposure, an assault prosecution might proceed.

English common law offers some support for this approach. In one case, for example, a defendant was found guilty of assault and battery for transmitting venereal disease to a woman who was held to have consented to sexual intercourse but who was not aware that the defendant

had venereal disease. In *Regina v. Bennet*, Bennet had sex with his thirteen-year-old niece and infected her with gonorrhea. He was charged with indecent assault, the assault being the act of infecting the girl with gonorrhea. The court instructed the jury that it could find the defendant guilty if the girl did not know that her uncle had gonorrhea, even if she could be deemed to have consented to the act of sexual intercourse.²⁸

The Model Penal Code might be read to reach the same result today, for a different reason: because it generally precludes consent to serious bodily harm as a defense.²⁹ No consent defense would be allowed even in cases of consensual sex where AIDS is transmitted, since one is legally precluded from "consenting" to the receipt of a deadly disease that is the real assault here.

Although assault law might thus be stretched to fit the AIDS transmission context, it has been developed with circumstances very different from AIDS transmission in mind. Indeed, we are using fictions when we label as "assault" sexual activity that is generally consensual but where the consent was obtained by fraud.³⁰ Assault law purports to punish unconsented contact, but in this context would in fact punish consented contacts that happened to transmit AIDS. Moreover, assault is often concerned with rather minor offenses—not with offenses associated with causing death. Finally, the possible reach of assault law in this context would be extremely broad, because the victim may not even have to become infected with AIDS for assault to be charged. While assault could provide a framework for prosecuting some AIDS transmission cases, therefore, it is ill suited to the context.

Applying Traditional Public Health Offense Laws to AIDS Transmission

Many states have long had statutes making it a criminal offense for a person with a contagious disease willfully or knowingly to expose another person to that disease.³¹ Many states have specifically criminalized willfully or knowingly exposing another to sexually transmitted diseases, making having sex itself the crime so long as one is infectious.³² Most of these statutes treat such willful communication of disease only as a misdemeanor punishable by fines or by imprisonment for no more than a year.

While such statutes are little enforced today, they might be resurrected as an alternative to using traditional crimes such as homicide, attempt, and assault to regulate and punish intentional or knowing transmission of AIDS. At least one state with such a statute has explicitly amended it to embrace the intentional transmission of AIDS³³; others have bills pending to do so.³⁴ In other states, courts may treat AIDS as covered by the terms "infectious and contagious disease" or "venereal or sexually transmitted disease" even without explicit legislative amendment.

In one sense these statutes are well tailored to culpa-

bility in the AIDS context: most include within their purview only persons who know they have the disease and who willfully or knowingly expose another. But these enactments are not a proper vehicle for the prosecution of AIDS transmission. Unless the offenses are explicit in including AIDS within their purview, judges should not interpret them to do so. Nor should legislators expand these statutes to include the AIDS virus within their scope.

"Contagious" disease statutes are overinclusive with respect to AIDS because they appear to count as "exposure" casual contacts that pose no risk whatever of spreading the disease. And "venereal" disease statutes are underinclusive because AIDS can be spread by means other than sex—for example, by needle-sharing and blood transfusions. Neither sort of statute, of course, was originally conceived with AIDS in mind.

More important, these statutes do not take into account the fact that AIDS is incurable and fatal. On the one hand, these statutes thus may be too lenient: they impose only misdemeanor liability, in recognition of the fact that modern medicine can cure most if not all of the diseases they are meant to cover. They would not permit felony liability for the rare but highly culpable cases of purposeful, knowing, or reckless-and-indifferent AIDS transmission discussed above. On the other hand, it is the very deadliness of AIDS that make these statutes too harsh here. For most sexually transmittable diseases, these statutes impose merely temporary abstinence until one is cured by antibiotics³⁵; for persons with AIDS and AIDS carriers, however, they would require abstinence for life.

We believe it would be better for any legislature that is contemplating making intentional AIDS transmission a crime to give more precise attention to the factors that make AIDS unique. If it is to criminalize AIDS transmission at all, it should enact an AIDS-specific statute. The next section describes what such a statute might look like. The section after that, however, argues that even though such a statute would be clearly preferable to using existing criminal laws to regulate AIDS transmission, it would still be undesirable to use the criminal law in the fight to control AIDS.

Creating a New, AIDS-Specific Offense

If the criminal law were to operate in this area at all, a statute specific to AIDS would be a better means of regulation than the use of general criminal prohibitions enacted with very different situations in mind. A statute specific to AIDS transmission would convey maximum warning and have maximum deterrent value. After all, deterrence, not punishment, is the chief purpose of applying the criminal law to AIDS transmission.³⁶

A specific statute would be preferable primarily because it could be tailored to what we decide we really want

to prevent. Use of traditional criminal law leaves many central issues unanswered. If a victim had full knowledge that he or she risked infection with AIDS, does that constitute a defense? If a transmitter thinks he *might* be an AIDS carrier but does not know and has not been tested, can he be guilty of crime? Can someone be guilty if he consciously risks infecting another even though the victim in fact never becomes infected with the AIDS virus? An AIDS-specific statute could explicitly resolve these and other important issues. In taking a position on these issues and embodying it in the criminal law, such legislation would announce a societal judgment about appropriate standards of behavior. The educative and normative functions of that announcement are likely to be more important than the actual prosecution rate.

The most basic point about an AIDS-specific criminal statute is that a great deal of what it would criminalize is intimate sexual activity³⁷—activity that should normally not be regulated by government, and that if regulated at all should be regulated to the least extent possible. Although some activities that may transmit AIDS, such as needle-sharing or donation of infected blood, involve no similar privacy interest, the implications of regulating people's sex lives must be taken into account in any law that would regulate AIDS transmission.³⁸

It is a familiar principle that government should use far greater restraint in policing our bedrooms than in policing our streets. Rights associated with intimate sexual conduct have in many contexts been given constitutional protection against state interference. While the right to make one's own decisions concerning intimate sexual relationships is not mentioned in the language of the United States Constitution, the United States Supreme Court has interpreted the Constitution to contain a right to privacy allowing individuals to make decisions about contraception, abortion, and family matters for themselves.³⁹ Protecting these decisions as private might be explained either on the ground that sexual activity is central to personality,⁴⁰ or on the ground that government has no business regulating matters that involve none of the tangible harms government was constituted to prevent.⁴¹

We do not claim it would be unconstitutional under these precedents for the state to regulate the sexual conduct of AIDS carriers or others, in an effort to contain the AIDS virus. It might not be unconstitutional even to order persons with AIDS or AIDS carriers not to engage in sex. The transmission of AIDS obviously implicates serious and tangible harm, both to the immediate victims and to the public at large. Thus even though regulating AIDS transmission entails intrusion by government into the bedroom, some intrusion may be necessary to protect the public health against an epidemic.⁴²

The principle at the core of the right-to-privacy cases counsels, however, that even if a law criminalizing AIDS

transmission would be constitutional, it should be carefully tailored so that it does not reach too far into the private sexual realm.⁴³ The following sections detail how an AIDS-specific criminal law might be so tailored.

What Behavior Should an AIDS-Specific Law Encourage or Discourage?

In deciding what to criminalize, it is important to consider how we would want a person with AIDS or an AIDS carrier to act. The answer to this question involves a balancing of sometimes conflicting interests. At one extreme, some might argue that persons with AIDS and AIDS carriers should abstain altogether from behavior with any risk of transmitting the virus to others. Under such a view, having sexual intercourse while knowing one was an AIDS carrier would be a crime no matter how much one disclosed about one's condition and no matter how many precautions one tried to take. Advocates of such a view would emphasize that condoms may break and that no one should be allowed to consent to engage in a risk that endangers the public. Under this "total-abstinence" view, the social interest in stopping the spread of AIDS would flatly outweigh any individual interest in continuing to engage in sex.⁴⁴

At the opposite extreme, some might argue that decisions about what risks to undertake should be an entirely private matter. Such an approach would value the individual interest in pursuing intimate sexual relationships over the public interest in preventing transmission of AIDS. Under such a view, consent and precautions would be matters for individuals and not the state to regulate. The only AIDS transmission such a view might regard as criminal is that involving an unwitting victim—one to whom a knowing AIDS carrier did not disclose his condition. And even then, a "total-permissiveness" approach might regard such a victim as having assumed the risk by having engaged in sex.

We believe that both these extreme views are too simplistic, and we conclude that the most appropriate policy would fall somewhere in between. The "total-abstinence" view both overestimates the effectiveness of the criminal law and undervalues the individual interest in continuing intimate sexual relationships. But the "total-permissiveness" approach wrongly minimizes the public interest in stopping the spread of an escalating epidemic.

A "total-abstinence" policy would be unrealistic. Such a policy would in effect require persons with AIDS and AIDS carriers to give up sexual intercourse for what will amount to the rest of their lives. Because AIDS is lifelong—because it is not currently curable—a prohibition on sexual intercourse is of a different order than prohibitions that last during the period that a person is afflicted with curable venereal diseases like gonorrhea or syphilis.

After all, many people who find out they have AIDS will be involved in long-term romantic relationships, homosexual or heterosexual. Love for the AIDS victim may make a partner unwilling either to discontinue the relationship or to alter it drastically by avoiding intercourse altogether. Moreover, if such a partner would consent to sex with someone he knows to be an AIDS carrier despite the plain risks it poses to his life and health, he would most likely ignore a criminal prohibition too. Thus if a law criminalized all sexual intercourse by persons with AIDS or AIDS carriers, some of these people and their partners would follow it, but more would not.⁴⁵

Indeed, a "total-abstinence" policy might well be self-defeating. The goal of such a policy would be to stop the spread of the disease. But if sexual relationships are likely to continue despite such a ban—as sexual relationships long have in defiance of other laws that have tried to regulate them—the best way of preventing the spread of the disease is to create incentives for sexual partners both to disclose their condition and to use precautions. A flat ban on all sex by AIDS carriers, however, would create just the opposite incentive: if the sex is criminal no matter what one does to inform or protect one's partner, why bother with information or protection?

A flat ban on sex for AIDS carriers seems not only unrealistic but also inhumane. It adds to the already considerable burdens of persons who find out they are AIDS carriers to require them to sever what may be long-term relationships, or to brand them as criminals unless they give up sexual intercourse for life. As well as being self-defeating, it seems wrong to so burden them for having sex with adults who know of their condition and who want nonetheless to continue a sexual relationship.

On the other hand, a "total-permissiveness" approach is likewise inadequate. First, it is not clear that people should always be permitted to endanger themselves as they see fit. Our general prohibition of euthanasia and suicide reflects the value of intervention to prevent even harms one would inflict upon oneself. Of course, consenting to sex with an AIDS-infected person is not the product of suicidal impulse; it is typically the product of love or sexual desire to which some risk is attached. But not all will assess the situation intelligently; some may not understand the risks, and love or desire may lead others to play them down. Accordingly, this may be an especially strong case for paternalistic intervention. Moreover, even apart from protecting the victim from him or herself, there is a strong public interest in containing the virus—in protecting the victim's potential future partners. Unlike suicide, contracting AIDS is a harm to the self that may tangibly harm others as well. In this way, the case for intervention here is stronger than it is with respect to suicide.

An appropriate regulation would give weight to *both* the individual's interest in sexual intimacy *and* the public

interest in protecting the uninfected and stopping the spread of AIDS. Such a middle course would permit sex but encourage disclosure and safety. It would tell persons with AIDS and AIDS carriers that their sexual contacts are punishable only if they do not use precautions or if they do not disclose their condition to their sexual partners. Such an approach would have far more chance of actually influencing the behavior of both AIDS victims and their sexual partners than would the "total-abstinence" approach. But at the same time, unlike the "total-permissiveness" approach, it would contribute to community awareness of a societal judgment that AIDS carriers should both inform their partners and take precautions against transmission. If the criminal law were to increase disclosure and the use of precautions, it would have made as great a contribution as it can here.

How Might an AIDS-Specific Law Be Structured?

There are two basic approaches that might be taken to criminalizing AIDS transmission. One would be to legislate a general prohibition against purposely, knowingly, recklessly, or perhaps even negligently transmitting AIDS to another person, and would leave it to courts and juries to give meaning to those terms over time in particular cases. The other would be to legislate more particularly in order to impose specific affirmative duties on knowing AIDS carriers to disclose and to use precautions. This section discusses these two approaches and concludes that the second is plainly preferable, because it is the only one that gives clear and consistent guidance about what behavior is and is not desirable for persons with AIDS or AIDS carriers.

THE CLASSICAL CULPABILITY APPROACH

The first is the more classical criminal law approach. It would criminalize the act of AIDS transmission by any means, sexual or non-sexual, so long as it was accompanied by the requisite state of mind. The advantage of such an approach is that it focuses on acts, not persons; it would thus apply to all rather than singling out the group of persons with AIDS and AIDS carriers as such. The difficulty with this approach, however, is in defining a state of mind requirement that is both practical and fair.

As discussed above in connection with homicide and attempt, criminalizing only purposeful or knowing acts of AIDS transmission—that is, acts that a person intends or knows will transmit AIDS—would be quite fair but highly ineffectual, because such acts are likely to be very rare. If reckless or negligent AIDS transmission is criminalized, the law becomes more effective, but other problems arise.

AIDS transmission could be "reckless" if one was consciously aware of a substantial risk one might have or carry AIDS, and if one was consciously aware of a substantial

risk that one's conduct might transmit it. AIDS transmission could be "negligent" if one took such a risk even if one was wholly unaware that one was infectious or that one's conduct might transmit the virus—as long as a jury finds one *should* have been aware of these risks.

Using either of these standards here would give far too much power to juries. In many contexts, criminal liability for recklessness and perhaps even negligence may be desirable.⁴⁶ But in this context, popular anxiety, irrationality, and even hysteria about AIDS are far too likely to cause vindictive or discriminatory verdicts, especially while AIDS is disproportionately concentrated in already unpopular groups such as gay men and intravenous drug abusers. Moreover, even the most rational jury may be confused by ever-evolving scientific understanding about the nature of the disease and its transmission. Where science is uncertain, some juries may wish to impose very strict norms of conduct.

For example, juries would be free under either a recklessness or a negligence standard to convict even those who did not know when they committed the charged act that they had AIDS or were AIDS carriers—so long as the jury deems them to have disregarded clues of which they were aware (recklessness) or should have been aware (negligence). But what would count as such a clue? Should it be enough that one is a member of a "high-risk" group such as gay men or intravenous drug abusers? That one had never been tested for HIV antibodies, and had never therefore obtained a negative result? If the former is enough, a recklessness or negligence standard would be a license to juries to discriminate against unpopular groups. If the latter is enough, it would be a license to juries to enforce mandatory AIDS testing even where the legislature has not, if and when they wish to do so.

If testing is to be required, it would be far fairer for such a decision to be made by the legislature, subject to usual processes of judicial review, rather than imposed selectively and in an ad hoc fashion by juries. We do not think, however, that even legislative enactment of mandatory testing is warranted at this time. One reason is that the tests now available are not sufficiently accurate bases for the enormous consequences that can attach to them. The antibody tests currently in use still generate a significant number of false positives and accordingly give uncertain guidance about one's ability to transmit the disease to others. Moreover, under current social conditions a person who tests positive risks severe hardship if that result becomes public: one may lose one's job, home, or insurance benefits, with little if any protection from current anti-discrimination law.⁴⁷ It would be far better for legislatures to do what they can to encourage voluntary testing by funding it, by guaranteeing the confidentiality of results,⁴⁸ and by passing anti-discrimination laws that would protect positive testers from becoming social pariahs overnight.⁴⁹

Criminalizing the reckless or the negligent transmission of AIDS not only threatens to punish those who did not know they had it; it also threatens to punish those who did not know they were transmitting it. The reckless AIDS transmitter—because he was aware there was substantial risk—may seem sufficiently culpable for punishment to be appropriate, but negligence liability would be troubling. Negligence liability would punish any act a jury believes “unreasonably” risked transmission, regardless of the defendant’s own knowledge or actual state of mind. It thus would risk branding an individual a criminal because of his ignorance or stupidity rather than because of any malice.

While negligence liability seems inappropriately strict, there is one respect in which requiring recklessness might treat the AIDS transmitter too leniently: if an AIDS carrier used precautions, such as wearing a condom during sexual intercourse, that might negate “conscious disregard” of risk.⁵⁰ While it is appropriate for the law to encourage precautions, we believe it would not be appropriate for a law to make precautions alone negate the offense. Rather, the AIDS carrier should also be obligated to disclose his condition to his partner before intercourse.⁵¹

Such disclosure is highly desirable. An AIDS carrier has no right to defraud others into taking deadly sexual risks by being silent about his condition. His sexual partner deserves to know the facts before consenting to sexual contact.⁵² Even if the AIDS carrier believes he can shield his partner from risk by silently taking precautions, he should nonetheless disclose the truth and allow his partner to make the choice. If many people believe that safe sex with an AIDS carrier is possible, then a person who has tested positive will not have a problem finding sexual partners despite his disclosure of that fact. If the uninfected shun him, he may be able to find willing sexual partners among others who have tested positive.⁵³

Full disclosure or informed consent might, therefore, constitute an affirmative defense to any crime of AIDS transmission. The difficulty with viewing full disclosure as a complete defense on its own, however, is that it would tend to undermine the incentive to use precautions. However imperfectly, criminalizing reckless or negligent transmission will tend to encourage the use of precautions. But if *either* precautions *or* disclosure could help negate liability, people who mold their behavior according to the criminal law would be less likely to do both. There is a strong case to be made for requiring both, and thus for not allowing informed consent to be a complete defense in the absence of precautions. For one thing, mistakes about consent here may have lethal consequences. For another, even if the sexual partner is genuinely informed and is willing to forego precautions, there may be an important public interest in denying him or her that choice in order to contain the spread of the disease. Finally, requiring available precautions to be used notwithstanding a sexual partner’s

consent might also serve as useful insurance for situations in which the sexual partner may not wholly understand the situation to which he or she consents.

THE AFFIRMATIVE DUTY APPROACH

Many of the problems with the first, more traditional approach might be avoided by enacting instead a criminal law geared less to punishing culpable acts than to imposing affirmative duties of disclosure and precaution on persons with AIDS and AIDS carriers. Such a law might specify those duties, leaving less discretion to juries to import them as they pleased through determinations about state of mind. Such a law might punish AIDS transmission, for example, only when the defendant (1) actually knew from testing or diagnosis that he had AIDS or was an AIDS carrier; and (2) failed to disclose his condition to his partner or failed to use appropriate precautions. In other words, only the combination of disclosure and precautions could suffice as a defense.

Why require actual knowledge of one’s infection with AIDS? The advantage of such a requirement over the more traditional recklessness or negligence liability discussed above is that it avoids imposing punishment for ignorance, while preventing the backdoor imposition of mandatory testing. True, it has some disadvantages. First, the knowledge requirement appears to single out a particular group; it thus makes the offense resemble quarantine more than a traditional criminal law applying equally to all. But singling out only knowing AIDS carriers is fairer than subjecting even unwitting ones to criminal sanctions, and the burden upon them is not unreasonable because even those singled out are still permitted to have sex. While perhaps it would be fairer and more logical to require *every* sexually active person—not just persons with AIDS and AIDS carriers—to disclose their health status and to use condoms so long as AIDS remains uncured, it would be quite harsh as well as politically impossible to do so through the criminal law.⁵⁴

Second, an actual knowledge requirement may discourage voluntary testing. After all, as long as one does not “know” for sure that one is infected, can’t one go on having sex with impunity? But this deterrent to voluntary testing should not be exaggerated. Many incentives exist to get tested, without adding the threat of criminal punishment to the list. One may wish to gain peace of mind from a negative result, or to learn that one is positive so that one can begin to treat oneself and to protect one’s loved ones. Moreover, in cases where a person has clear enough reason to suspect he is infected, “conscious avoidance” of an AIDS test may not necessarily negate knowledge. In some other criminal contexts, knowledge of a key fact has been found despite similar attempts at “willful blindness.”⁵⁵

Why require that no culpable mental state accompany the act of transmission itself? The proposed law here would require knowledge that one carried AIDS, but nothing

more except an act of transmission without disclosure or precautions. In this sense, it imposes a kind of strict liability. Like strict-liability crimes that help to enforce the affirmative duties of those who drive dangerous cargoes or ship dangerous drugs, the purpose here is to mold behavior, to induce people to take care with a dangerous disease when they alone are in a position to do so.

But strict in this context does not mean unfair. It seems that AIDS carriers would be more fairly treated by the proposed offense than by the classical criminal law approach. There are definite advantages to having legislatures rather than juries set the rules in this area. A law specifying that one will not be criminally liable if one discloses and uses appropriate precautions not only would clearly preserve AIDS carriers' right to engage in sexual intercourse but would also give them much clearer notice of what their obligations are than would the recklessness or negligence liability discussed above. Moreover, such a law would pose far less danger of jury arbitrariness and selectivity. And finally, there is little danger that the law in practice would unfairly sweep in many who transmit AIDS through complete ignorance of how it is transmitted. Because the law covers only those who have tested positive or been diagnosed as having AIDS, most will be informed at the time of the positive diagnosis of how an infected person might transmit the disease and what precautions he should take.⁵⁶

Of course, the warning can only be as clear as the legislature is specific. If the legislature deems "appropriate precautions" a partial defense, considerable ambiguity about what is "appropriate" would be left for juries to resolve, with many of the attendant dangers discussed above. But if the legislature becomes too specific, it may intrude too far into private sexual decision-making. The specter of a legislative debate over which precautions are appropriate, or which particular techniques should be used for "safer sex," is extremely disturbing. Could certain sexual practices themselves be banned under this rubric?

We would oppose any attempt to codify precautions by legislatively blacklisting specified sexual practices or contacts between specified body parts. In order to minimize legislative intrusion into intimate sexual activity, a precaution provision should be limited to a requirement that condoms or an equally safe substitute be used.⁵⁷ Of course, it can be problematic to be this specific; regular condoms may be widely thought adequate today, but perhaps only state-of-the-art germicidal condoms will seem appropriate tomorrow.⁵⁸ But such a specific provision would have the key virtue of leaving less to juries' imagination and prejudice than the classical culpability approach.

In sum, the second approach appears preferable to the first. It more clearly imposes on persons with AIDS and AIDS carriers an affirmative duty, as a condition of engaging in sexual intercourse, of fully disclosing their condi-

tion to their sexual partners and obtaining their partners' knowing consent, and also an affirmative duty of using precautions like condoms. Such a statute has a realistic chance of influencing behavior, because it permits a person to pursue a sexual relationship if he complies with these affirmative duties. And perhaps most important so long as an epidemic of prejudice accompanies the epidemic of AIDS, such a statute would minimize the risk that jury verdicts will be determined by fear and discrimination. Indeed, such a statute is probably the best the criminal law could do to stem the tide of AIDS while respecting conflicting interests. In the next section we argue, however, that even such a model criminal statute should be rejected.

Assessing the Desirability of Criminalizing AIDS Transmission

Even if an AIDS-specific criminal statute could be closely tailored to the harms we wish to prevent, is criminalization a desirable means of fighting the spread of AIDS? We conclude that it is not.

The Benefits and Costs of Criminalization

Criminalizing forms of transmission other than sexual contact is not likely to provide major deterrent force but does impose little social cost. For example, it might increase existing incentives for intravenous drug abusers with AIDS not to share needles. Although the criminal law evidently does not deter intravenous drug abusers from using drugs, it might be marginally more successful in discouraging them from spreading the disease by sharing needles.⁵⁹ At the same time, there is no particular social value in the sharing of intravenous needles—whatever one might think of the morality of drug use generally. Accordingly, there is something to gain and little to lose by prohibiting persons who know they have AIDS or have tested positive from passing the needle.

With respect to the sexual transmission of AIDS, however, the balance is somewhat different. Criminalization of such transmission might well have a significant deterrent effect—at least if drawn along the lines suggested in the preceding section—by increasing both the amount of disclosure and the use of precautions against infection. The issue is whether these gains would be great enough to outweigh the costs of criminalization.

We conclude that the criminal law is not a desirable means of regulating sexual transmission of AIDS. The deterrent effect such an approach would have would not be great enough to be worth its costs: first, the threat of massive government intrusion into sexual privacy and second, the predictable danger of selective prosecution and misuse of the criminal law to harass particularly unpopular groups, especially gay men.

SEXUAL PRIVACY

The enactment of even a narrowly defined criminal law would create grave risks to sexual privacy throughout the population, heterosexual as well as homosexual. Enforcement of such a law would implicate not only the purposeful, knowing, and reckless AIDS transmitters who are the law's ultimate target but also a vast number of others who are or have been sexually involved with them. To be sure, if all it took to trigger such a law was a complaining witness' allegation against a named defendant—as is the case, for example, in date-rape cases—then it might seem that only the witness' and the named party's sexual privacy would be breached, the witness' voluntarily and the suspect's justifiably. But suppose that the complaining witness had recently had sex with more than one partner. Would the criminal law stop with the initial complaint? Or would the complainant's other sexual partners now be subject to investigation or surveillance? How else could potential sources other than the suspect be ruled out? And what about the defendant's other sexual partners, if any? Should the authorities seek them out if they have not come forward?

Nor can we assume that investigation and prosecution would be limited to cases where a complaining witness has come forward. Law enforcement authorities might well seek on their own to trace the sexual history of those persons they know to be infected with AIDS. In that event, would the victim's medical records and private papers be opened to police scrutiny as possible sources of leads? And would all the past sexual partners whom such sources might identify be subject to criminal investigation as well?

The possibilities are manifold. Wholesale sexual surveillance through the apparatus of the criminal law could clearly sweep in a great deal of sexual activity that involves no harm to others, in pursuit of the few instances of sexual activity that do. However laudable the end of preventing the intentional or reckless transmission of AIDS, using criminal enforcement as the means threatens to sweep too broadly.

SELECTIVE PROSECUTION AND HARASSMENT

Until AIDS spreads more deeply through the heterosexual population, gay men and intravenous drug abusers are the likeliest target for enforcement of an AIDS-specific criminal law, because they are the largest groups systematically and visibly at risk from AIDS. A parallel may be drawn with the criminal sodomy laws, which have been enforced against homosexuals more than heterosexuals even where they apply on their face to both groups.⁶⁰ An AIDS-specific offense could become a tool of official persecution—an outlet for irrational fear and hostility toward gay men or drug abusers independent of, though perhaps reinforced by, fear of AIDS.

A criminal law could provide a tool for harassment in

the sexual context even if a defense of disclosure plus precautions were available. Victims angry with a person who may be the source of their infection could tip off the police, causing the suspect to be picked up and detained even if he would ultimately be able to establish his innocence. The criminal process can substantially restrict liberty and impose stigma long before any prosecution has begun, much less conviction been entered.⁶¹ There is a risk in this context that gay men will be punished for their sexual orientation, apart from their guilt of any crime.⁶²

The danger that a criminal law against AIDS transmission will furnish a new tool for harassment is greater for gay men than for intravenous drug abusers. Narcotics use is already criminal, and laws against it are enforced, however ineffectively. By contrast, being gay is not illegal, and in most states, the oral and anal sex acts in which many gay men engage have been decriminalized.⁶³ Moreover, sodomy is plainly not taken as seriously as a crime as drug abuse even in jurisdictions where it is still denominated criminal.⁶⁴ Thus an AIDS-specific statute would cast the shadow of the criminal law upon gay male sex even in those jurisdictions that have repealed or overturned their sodomy laws. And in those few places where sodomy is sometimes enforced as a criminal offense, harassment under the new AIDS-specific enactment might be easier, partly because the offense would be viewed as a more serious one.

To empower the state to investigate gay sexual contacts is to empower the state to harass and intimidate a group that is popularly disliked at best, and despised at worst. There is every reason to fear that popular irrationality and hysteria about AIDS would reinforce efforts to use an AIDS-specific law not just to track down "killers" but also to intimidate the entire gay male community, in places where the police were inclined to do so.

If used to intimidate, an AIDS-specific criminal law would be precisely counterproductive to the aim of fighting the spread of AIDS. Public health authorities have argued that even criminal laws against sodomy impede medical efforts to control the spread of AIDS. Some who suspect they may have AIDS will be deterred from seeking medical advice by a fear that doing so would result in criminal investigation.⁶⁵ If such fears seem speculative against the backdrop of the largely unenforced sodomy laws, they could become all too real if new AIDS crimes were placed on the books.

Alternatives to the Criminal Law

Civil remedies in tort for transmission of AIDS⁶⁶ may pose less of a threat than the criminal law to sexual privacy generally and to the gay community in particular. Civil remedies, unlike criminal ones, do not invoke the specter of state surveillance of a wide range of sexual partners and

acts. Moreover, only a sexual partner or other transmission victim, not the state, could initiate suit, which may limit the range of cases actually brought. On the other hand, however, the intrusion into privacy entailed by civil discovery may be great in particular cases, and may touch many wholly innocent persons simply because of their past sexual contacts. Moreover, while the threat of monetary damages might provide some measure of deterrence, it would be limited to persons who have funds, unlike criminal law deterrence. Finally, enough stigma may be attached to such suits that both living victims and their estates will be discouraged from bringing them. And even if they do, a victory may not send out a clear message that spreading AIDS to unwitting victims is wrong—only that it is costly.

Notwithstanding these shortcomings, tort suits are preferable to criminal prosecutions as a means for influencing behavior in this context because they minimize the risk of state intrusion into a sensitive area of private life. The greatest advantage of civil over criminal enforcement is not that it would provide more deterrence but, rather, that it would impose less social cost.

Nor are tort suits the sole alternative to criminal remedies here. The point is less that civil remedies are superior to criminal than that all legal remedies for past wrongs have limited capacity to control the mounting AIDS epidemic. If we care as a society about containing the disease and protecting potential victims, we should pour funds into medical research about AIDS transmission and cure, and into public education and counseling about prevention until a medical solution can be found.

The surgeon general of the United States, for example, has recommended a vigorous expansion of public education efforts on AIDS prevention, beginning even in childhood.⁶⁷ Such a program would acknowledge that it is ignorance and not malice that puts people most at risk of contracting AIDS. Social services might also aid containment: providing shelter and welfare to infected prostitutes might do a better job of stopping them from transmitting AIDS to their clientele than would repeated arrests⁶⁸; making the HIV-antibody test anonymous and free might drastically increase its use and accordingly change behavior; and providing free needles and high-quality, free condoms at public expense, controversial as that would be, might do more to stop the spread of AIDS than criminal or civil sanctions. If legal sanctions are to be used at all, they must only supplement, not substitute for, education and social services. It would be a huge misuse of effort and resources to criminalize transmission of AIDS while at the same time underfunding AIDS-related research, education, and social services.

In sum, we believe that criminal law, like civil law, can have some deterrent effect on AIDS transmission. If criminalization imposed no social cost, we would view it

as a useful backstop to education and the dictates of individual conscience, and would urge adoption of AIDS-specific statutes. But there are real costs involved in regulating this area by criminal enactment—costs that threaten the sexual privacy of us all and that risk official harassment of gay men. The marginal deterrence that such an enactment might add to incentives that already exist is not worth the costs that criminal regulation would entail.

References

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1. The call for criminalization is becoming more fashionable daily, across the political spectrum. See, e.g., Grady, A haunting issue for '88, *Boston Globe*, June 3, 1987: 19, col. 5 (noting that potential presidential candidate Mario Cuomo, the governor of New York, "would make it a crime to knowingly transmit AIDS"); Safire, Failing the tests, *New York Times*, June 4, 1987: A27, col. 5 ("Should states make it a crime to knowingly transmit [AIDS] with malice aforethought? You bet"); Tax change advocate suffering from AIDS, *New York Times*, June 10, 1987: A29, col. 4 (quoting California tax revolt leader Paul Gann, infected with AIDS through a blood transfusion, as saying that people who knowingly transmit AIDS "should be tried for murder, because if you give it to someone, it's a death sentence").

2. See Turner, The military battles a new biological weapon: AIDS, *National Law Journal*, May 11, 1987: 6; AIDS-infected soldier faces trial for having sex, *Boston Globe*, June 4, 1987: 14, col. 3. In announcing the court-martial, Army officials called it the first such case in military or civilian courts. Civilian criminal codes likewise typically define aggravated assault as assault "with a deadly weapon." See, e.g., Model Penal Code §211.1(2)(b).

3. See Cummings, Charges filed against blood donor in AIDS case, *New York Times*, June 30, 1987: A18, col. 1.

4. In this paper we use the term "person with AIDS" as defined by the Centers for Disease Control: someone who has one of eight sorts of diseases that indicate the suppression of the immune system where there is no other explanation for that suppression. See Masur and Macher, Acquired immune deficiency syndrome (AIDS), in Mandell, Douglas, and Bennett, eds., *Principles and practice of infectious diseases*, 1985: 1670. We use the term "AIDS carrier" or "HIV carrier" to describe someone who is infected with the human immunodeficiency virus that is believed to be the cause of AIDS but who has not yet contracted any of the diseases. Some AIDS carriers exhibit symptoms of "AIDS-related complex." Others do not exhibit such symptoms, although they would test positive on the HIV-antibody test. See id.: 622; Weber et al., Three-year prospective study of HTLV-III/LAV infection in homosexual men, *Lancet*, May 24, 1986: 1179. Other infected individuals would not even be detected by the test, which yields false negatives as well as a substantial number of false positives. See Counsel on Scientific Affairs, Status report on the acquired immunodeficiency syndrome: HTLV-III testing, *Journal of the American Medical Association* 1985, 245(10): 342-45.

5. For example, calls for quarantine led in November 1986 to a California ballot measure that would have subjected those testing positive for HIV to reporting and isolation. The measure was defeated by a large margin. Proposition 65 on the California Ballot (November 4, 1986). But calls for quarantine persist

today. See, e.g., Roberts, AIDS alert: Politicians awoken to the threat of a global epidemic, *New York Times*, June 7, 1987: sec. 4, p. 1 (noting that evangelist and presidential candidate Rev. Pat Robertson has advocated quarantine). When "quarantine" is mentioned in connection with AIDS, it might imply any of a range of possibilities, from public incarceration to confinement to one's home, from total isolation from others to prohibition only of sexual contacts, to name but a few possibilities. We regard all of these methods as grossly overbroad and possibly unconstitutional. The issue of quarantine is more fully discussed in Curran WJ, Clark ME, Gostin L, AIDS: Legal and policy implications of the application of traditional disease control measures, *Law, Medicine & Health Care* 1987, 15(1-2): 27-35.

6. Sexual acts of transmission apparently account for the overwhelming majority of AIDS cases today. Curran JW et al., The epidemiology of AIDS: Current status and future prospects, *Science* 1985, 229: 1352-57. Blood-to-blood contact through the sharing of needles for intravenous injection and blood transfusions have been the major other vehicles of transmission. Some unusual cases of blood-to-blood contact have also been documented, including one where a boy transmitted the AIDS virus to his brother by biting him, and others where hospital workers became infected when AIDS-infected blood splashed onto their broken skin or mucous membranes. Boy apparently gave AIDS to sibling, *Boston Globe*, Sept. 28, 1986: 28; 3 Health workers found infected by blood of patients with AIDS, *New York Times*, May 20, 1987: 1, col. 3. But such cases are exceedingly rare. Finally, transmission of AIDS from mothers to children during pregnancy or childbirth accounts for some cases.

This paper will focus on sexual acts of transmission, both because they are the most prevalent and because they raise especially grave questions about the limits of government power to regulate privacy. Regulating transmission by pregnancy would of course raise similar questions. To the extent that this paper touches on non-sexual acts of transmission, it will chiefly address needle-sharing, as transmission of AIDS through blood transfusions has by now been virtually eliminated by screening of the country's blood supply.

We do not discuss at any length non-sexual acts or threats of transmission that are just like conventional assaults or threats of assault. Such cases occasionally catch press attention. For example, police have charged a number of suspected AIDS carriers with such crimes as assault, reckless endangerment, and even attempted murder for trying to bite officers while in custody for other offenses. See, Boorstin, Criminal and civil litigation on spread of AIDS appears, *New York Times*, June 19, 1987: 1, col. 3. It would be a great error, however, to use such cases as a guide to criminalizing AIDS transmission. They are exceedingly rare, and may in any event be treated as analogous to conventional assaults without raising the special problems that are our focus here.

7. See Model Penal Code part 1, vol. 1, p. 233 n.4.

8. See Model Penal Code §2.02(2). The degree of criminal intent required for a particular crime is central in determining whether criminal liability exists and, if so, how harshly it will be punished.

9. See Model Penal Code §2.02(2)(c)-(d).

10. The Model Penal Code acknowledges that legislatures may choose to impose such liability. Model Penal Code §2.05.

11. See, gen., *Morissette v. United States*, 342 U.S. 246 (1952). As Justice Jackson wrote in *Morissette*, strict liability crimes "do not fit neatly into . . . common-law offenses [for they] are not in the nature of positive aggressions or invasions . . . but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations re-

sult in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize." *Id.*: 255-56.

12. We generally use the pronoun "he" to refer to AIDS transmitters in this paper. We do so because male-to-male and male-to-female sexual transmission has been to date more prevalent than female-to-male. Female-to-female sexual transmission is virtually unknown though not impossible. Of course, non-sexual transmission is more symmetrical across gender lines. Where appropriate, our use of the pronoun "he" is intended to be generic.

13. Model Penal Code §210.2(1)(b).

14. The common law punished deaths caused in the course of such independent felonies as "felony murder." The Model Penal Code abandons the strict liability aspects of the felony murder rule but still gives some weight to the fact that the homicide was accompanied by a violent felony. It substitutes for the felony murder rule a presumption that the recklessness and the extreme-indifference-to-the-value-of-human-life requisite to murder exist when a homicide is committed during the course of certain enumerated felonies, one of which is rape. See Model Penal Code §210.2(1)(b). Recklessness and extreme indifference are presumed if the defendant "is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape." *Id.*

15. By endangering many people for profit, the prostitute might well satisfy the standard of extreme indifference to the value of human life that separates reckless murder from reckless manslaughter.

16. Such a rapist might well be guilty of felony murder as well as rape under the common law, or of reckless-plus-extreme-indifference murder under the Model Penal Code approach.

17. See Barnes DM, Grim projections for AIDS epidemic, *Science* 1986, 232: 1589-90.

18. Model Penal Code §210.4, comment #3, at p. 86. The defendant's failure to perceive a risk that he will cause death must involve a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Model Penal Code §2.02(2)(d).

19. The Model Penal Code explicitly makes it an offense purposely to help another to commit suicide. See Model Penal Code §210.5(2).

20. See, e.g., *State v. Minster*, 486 A.2d 1197, 1200 & n. 5 (Md. Ct. App. 1985) (listing states).

21. The Model Penal Code also makes it a crime recklessly to endanger another person. See Model Penal Code §211.2. This crime is classified as less serious than negligent homicide. The reckless transmitter of AIDS might be liable under this provision, as well as for attempted murder or assault, without regard to whether the victim died.

22. Homicide is always punished as a felony, with sentences ranging from one year to life in prison, or the death penalty in those states that retain it. Most states punish attempted murder less severely than they would punish the equivalent acts if the victim had died, and they never utilize the death penalty for attempt. Assault is normally a misdemeanor punishable by no more than one year in prison. If assault is "aggravated" by conduct manifesting extreme indifference to the value of human life (for example, by use of a deadly weapon), it may be punished for a longer term as a felony.

23. The common-law doctrine of "factual impossibility" might provide a defense if one's belief that one was an AIDS carrier proved in fact to be mistaken, so that one's "attempt" proved

futile. Many jurisdictions, however, have abandoned that defense because it makes liability of equally culpable persons turn on a fortuity. For example, the Model Penal Code provides for attempt liability where one "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be." §5.01(1)(a).

24. Model Penal Code §5.01(1)(b).

25. Model Penal Code §211.1(1)(a). The common law labeled such crimes of physical injury "battery" and treated attempted battery as "assault." We here take the Model Penal Code's approach of labeling as "assault" what the common law would have called "battery."

26. Model Penal Code §211.1(2)(a). Use of a deadly weapon is the typical conduct manifesting the required indifference. Aggravated assault was one of the crimes charged in the military court-martial case described at the beginning of this paper, on the theory that the AIDS virus itself is a deadly weapon.

27. See Model Penal Code §2.11(2)(b) (permitting consent as a defense to serious bodily injury *only* where such injury is a "reasonably foreseeable hazard" of participation in sports or athletic contests).

28. 176 Eng. Rep. 925 (W. Cir. Ct. 1866). The Army court-martial described at the beginning of this paper provides a modern analogue. In that case, the Army dropped the aggravated assault charge with respect to the defendant's sex acts with a soldier who was aware that the defendant had tested positive for AIDS. The Army pursued only the charges involving the defendant's sex acts with two other soldiers who had not known that fact. Army will try AIDS carrier, *National Law Journal*, June 15, 1987: 7, col. 1.

29. See Model Penal Code §2.11(2)(b)(2).

30. Indeed, if lack of information about a sexual partner's disease vitiates consent, the same analysis would turn consensual sexual intercourse into rape where disease is transmitted in the process—a metamorphosis that shows that the point goes too far.

31. See, e.g., *Texas Rev. Civ. Stat. Ann.* §4419b-1, 6.01-6.07 (making it a third-degree felony for a person to knowingly conceal or attempt to conceal the fact that he or she has been exposed to or is a carrier of a communicable disease that constitutes a threat to the public health, and a misdemeanor for a person with such a disease to attend or attempt to attend a public or private place or gathering).

32. See, e.g., *Cal. Health & Safety Stat.* §3198 (making it a misdemeanor for any person afflicted with a venereal disease to willfully expose himself to others, and for any person so to willfully expose another person afflicted with such disease); *N.Y. State Sanitary Code*, §§2307, 2309 (making it a misdemeanor for anyone who knows she/he has an infectious venereal disease to have sexual intercourse with another); *Fla. Stat. Ann.* §§384.01, 384.02 (making it a second-degree misdemeanor for any person infected with venereal disease to have sex with a person of the opposite sex or to expose another to infection); *Colo. Rev. Stat.* §25-4-401 (making it unlawful for any person who has knowledge or reasonable grounds to suspect that he is infected with a venereal disease to willfully expose or infect another, or to knowingly perform an act that exposes or infects another person with venereal disease).

33. See *Idaho Code* §39-601 (classifying AIDS, ARC, or HIV as venereal diseases and prohibiting persons with these diseases from knowingly or willfully exposing another to the infection).

34. See, e.g., *Fla. House Bill* 484 (would designate AIDS as a venereal disease and prohibit infected individuals from transmitting it to others); *Fla. Senate Bill* 576 (would make it a misdemeanor for anyone with a sexually transmitted disease to have

sexual intercourse); *Pa. House Bill* 1787 (would make it a misdemeanor for a person who knows that he has AIDS to transmit the disease to another person through sexual contact; second or subsequent offenses would constitute a felony); *Ga. House Bill* 1187 (would define AIDS as a venereal disease).

35. Under some of the definitions of the offenses, using precautions might constitute a defense; under others, even using precautions and obtaining the informed consent of one's partner could not exculpate one from the crime of having sex while infected.

36. It would be difficult to make a priority of punishing persons already dying from AIDS. Some carriers, however, are symptomless.

37. We define "intimate sexual activity" broadly to include all consensual sexual contacts. It does not include rape. How to treat prostitution is unclear. At first glance, the public interest appears unambiguous and the private interest minimal in the case of the prostitute who continues to ply his or her trade after a diagnosis of AIDS. Prostitution involves multiple sex partners by definition, and is premised on money, not love. On the other hand, people other than prostitutes also have sex with multiple partners, and prostitutes may be more likely than others to institutionalize the use of precautions against AIDS transmission as a business practice.

38. The important interest in avoiding governmental regulation of intimate sexual activity of course applies no matter how the AIDS virus was acquired. The person who acquired it through intravenous drug abuse or through a blood transfusion has the same interest in a future intimate sex life as the person who acquired it initially through sexual intercourse.

39. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state criminal law barring even married couples from using contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending to unmarried persons the right of access to contraceptives); *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977) (same); *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating state criminal law barring woman's choice of abortion). Laws burdening the right to privacy are subject to strict scrutiny and can be upheld only upon demonstration that the law is necessary to serve a compelling state interest.

To be sure, the Supreme Court has never held in such cases that the constitutional right to privacy protects consensual adult sex acts themselves, as opposed to access to contraception and abortion that may facilitate those sex acts. Indeed, the Court recently held that a law criminalizing oral and anal sexual contacts between consenting adults in private need not serve any compelling interest, but may be upheld simply because it expresses majority morality. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986); see *id.* at 2844 (asserting that the right to engage in oral or anal sex bears no "resemblance" to the right to use contraception). But we believe that any attempt to sever the contraception decisions from sexual activity is absurd; anti-contraception laws were no burden, after all, for the sexually celibate or abstinent.

40. Justice Blackmun articulated such a theory in his dissent in *Bowers v. Hardwick*, joined by three other Justices. *Id.* at 2851. Choice concerning sexual activity might also be protected under the First Amendment as expression. The Court's decision in *Stanley v. Georgia*, 394 U.S. 557 (1969), lends indirect support to both these theories. *Stanley* held that it violated a person's right to privacy to convict him for possessing pornography in his own home. *Stanley* expressly linked the value of privacy to the liberty of conscience and self-expression protected by the First Amendment.

41. Such a theory seems to underlie the Supreme Court's general efforts to locate the right to privacy in either the liberty

clause of the Fourteenth Amendment or in the Ninth Amendment, which protects fundamental rights not explicitly enumerated in the Bill of Rights. The premise of either approach is that our society cannot be truly free if government interferes in such matters as whether and when we breed, see, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down law providing for mandatory sterilization of recidivist felon), or how we choose to arrange our family household, see, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down conviction of grandmother for living with two non-sibling grandchildren, in violation of local zoning ordinance). Under a Fourteenth Amendment approach such interference would be incompatible with "ordered liberty"; under a Ninth Amendment approach, it would transgress the boundaries of a sphere we never ceded to government, such as the sphere of family and reproduction.

42. Accordingly, even if such regulation did implicate a constitutionally protected right to privacy, it might still be upheld as closely serving a compelling state interest. The only time in the nation's history that the Supreme Court has upheld a severe deprivation of liberty on such a ground was in its decisions upholding the internment of Japanese-Americans during World War II. See *Korematsu v. United States*, 323 U.S. 214 (1944). There the compelling factor was war, and even so many have since considered the Supreme Court deeply wrong in its judgment that herding Japanese-Americans into camps was necessary to avert the danger of wartime espionage. See, e.g., Irons P, *Justice at war*, 1983; Grodzins M, *Americans betrayed*, 1974; Rostow, *The Japanese-American cases—A disaster*, *Yale Law Journal* 1945, 54: 489. But epidemics, like war, may be held to create compelling circumstances.

43. In other words, the key question in assessing whether laws regulating AIDS transmission violate constitutionally protected liberty or privacy will concern means more than ends. It will ask not whether fighting AIDS is important but, rather, whether each law is closely tailored to the fight. See, gen., Note, *The constitutional rights of AIDS carriers*, *Harvard Law Review* 1986, 99: 1274, 1279-92.

44. Those who hold such a view would presumably advocate also abstinence from drug use, at least illegal drug use. The problem is that such a prohibition would be without effect, given that the law already forbids such drug use.

45. Such a law would be even more unrealistic and unjustifiable if it criminalized sexual acts other than vaginal and anal intercourse. AIDS is not transmittable by hand-to-genital contact. To date, there is likewise no evidence that AIDS is easily transmittable by kissing, even though experts have not excluded the possibility of such transmission. See, e.g., Altman, *Health experts find no evidence to link AIDS to kissing*, *New York Times*, June 8, 1987: B6, col. 2. Doubt similarly exists about the transmissibility of AIDS through oral sex. Curran et al., *supra* note 6. Fear of AIDS transmission may of course induce people to shift their sexual practices away from sexual intercourse and toward these other modes. Indeed, evidence of sharply reduced rectal gonorrhea rates among gay men suggests that many in that community have done just that. Centers for Disease Control, *Self-reported behavior change among gay and bisexual men—San Francisco, Morbidity and Mortality Weekly Report* 1985, 34(40): 613-15; Schecter MT et al., *Changes in sexual behavior and fear of AIDS*, *Lancet* 1984, 1: 1293; Centers for Disease Control, *Declining rates of rectal and pharyngeal gonorrhea among males—NYC, Morbidity and Mortality Weekly Report* 1984, 33: 295-97. But we believe the state should not seek to rule out sexual intercourse altogether for AIDS carriers for life.

46. Some believe that criminal stigma should be reserved only for conscious wrongdoers, because those who fail to take care out

of ignorance or carelessness cannot be deterred by the criminal law. See, e.g., Williams G, *Criminal law*, 1953: 120-25. The more plausible position, however, would seem to be that imposing criminal liability for negligence *can* deter by providing an additional motive to "take care before acting." Model Penal Code §2.02, comment at 126-27; see also Hart HLA, *Punishment and responsibility*, 1968: 152-54.

47. The fact that these social consequences now attach to a positive AIDS test is the principal reason that mandatory AIDS testing is controversial. Public health officials widely fear that if mandatory testing is imposed, fear of these consequences will drive many of the infected "underground." See, e.g., Boffey, *Health officials fear "sideshow" efforts will hurt AIDS fight*, *New York Times*, June 8, 1987: B6, col. 2. If these consequences could be eliminated, much opposition to testing would disappear. It is not the invasion of bodily privacy itself that is objectionable; just as the Supreme Court long ago held that mandatory smallpox vaccination did not unconstitutionally invade liberty or privacy, so a blood test involves minimal intrusion. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). What is feared is, rather, that the test will be a vehicle for discrimination, whether against currently unpopular groups at high risk, such as gay men and intravenous drug abusers, or against a new social underclass of AIDS carriers of all descriptions.

48. Indeed, the most widely used voluntary test might be one that is entirely anonymous—for example, one that could be used at home, like a home pregnancy test. The problem with such an innovation might be, however, that it would be administered without the opportunity for immediate counseling about its meaning and about how a positive tester should now behave.

49. Senator Ted Kennedy recently introduced such an anti-discrimination measure as part of a proposed Senate bill dealing with AIDS. 100th Cong. S. 1220.

50. By contrast, a jury might convict an AIDS carrier of negligent AIDS transmission even if he used a condom during sex. The statistics on pregnancy despite use of condoms as a contraceptive suggest that condoms break between 2 and 20 percent of the time. Fischl MA et al. *Evaluation of heterosexual partners, children and household contacts of adults with AIDS*, *Journal of the American Medical Association* 1987, 257: 640-44. A jury might deem the risk of sex even with a condom unreasonable.

51. A requirement of disclosure seems more realistic as applied to sexual transmission in intimate relationships than to cases of transmission by needle-sharing, where the parties may be strangers. Needle-sharing is not an intimate act in the sense that sexual relations are. Accordingly, use of precautions alone might appropriately negate the offense of transmission by needle-sharing.

52. It is often suggested that failure to inform one's sexual partners of an AIDS risk is not blameworthy because they assume the risk by having sex at all. We do not think that approach is appropriate. Because only one party has access to the relevant information, it does not unduly burden him to have to disclose it. Having sex should no more mean one is assuming the risk of disease than going to a singles bar and having a drink should mean one is assuming the risk of date rape. See generally Estrich S, *Real rape*, Cambridge: Harvard University Press, 1987.

53. The problem is that the chance of actually contracting AIDS after exposure to the virus increases with increased exposure. American College Health Association, *AIDS—What everyone should know*, Health Information Series, 1985: 2.

54. A statute that required the use of condoms would in a sense be the inverse of state statutes forbidding contraceptive use, such as the one struck down in *Griswold v. Connecticut*, *supra* note 39. Surely an exception to a condom requirement would have

to be made for persons trying to become pregnant. The precise scope of any such exception would no doubt be the subject of heated debate.

55. See, e.g., *United States v. Cincotta*, 689 F.2d 238, 243 & n. 2 (1st Cir. 1982); *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976); see also Model Penal Code §2.02(7) ("knowledge [of a fact] is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.") Of course, the "willful blindness" theory will tend to collapse knowledge into recklessness unless the defendant is shown to have known other facts suggesting a very high probability of the "fact" he was trying to avoid.

56. To the extent this is not the case, the solution is not to broaden the category of persons covered by the criminal law here but, rather, to provide for adequate counseling in conjunction with voluntary tests.

57. The best precaution for needle-users would be not reusing needles. But that is a requirement that only the wealthy addict may be able to meet. Unless free new needles were widely available at public expense, therefore, a reasonable attempt to sterilize a needle before reuse should be enough.

58. If so, it would be better for the government to remove from the market the condoms that are thought inadequate, rather than to broaden the criminal law.

59. The law elsewhere as well imposes separate penalties on those who cause harm to others while doing something that is already criminal—for example, one who kills while committing the crime of drunk driving may also be convicted of manslaughter.

60. The Supreme Court's recent decision in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), may be interpreted by police as legitimating such discrimination. In that case, the Supreme Court held that a statute criminalizing anal and oral sex violated no constitutional right to privacy when applied to same-sex contacts, while leaving open whether it would do so when people of opposite sexes commit precisely the same sex acts.

61. Indeed, the Supreme Court this term upheld as constitutional a federal statute providing for the pre-trial detention of persons deemed likely to be dangerous to the community if freed on bail. *United States v. Salerno*, 107 S. Ct. 2095 (1987). The Court's tolerance of such a measure as permissibly "regulatory" rather than impermissibly "punitive" may arguably signal a willingness

to tolerate the preventive incarceration of suspected AIDS carriers even in the absence of any conviction of guilt.

62. Of course, the danger of such selectivity will diminish as AIDS spreads further through the heterosexual population. Moreover, such selectivity might be unconstitutional if it is sufficiently systematic. While it is doubtful that anti-gay discrimination in the application of the law would be strictly scrutinized, as would racially selective prosecution—see, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down the selective prosecution of Chinese-owned laundries under a facially neutral ordinance purporting to regulate all wooden laundries)—it might be struck down even under minimal scrutiny as arbitrary and irrational, provided the selection could be shown to be motivated by "mere negative attitudes [toward], or fear [of]" gay men. See *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3259 (1985) (invalidating the exclusion of a group home for the mentally retarded from a residential neighborhood where no reason beyond irrational fear and hatred of the mentally retarded had been demonstrated).

63. See *Bowers v. Hardwick*, 106 S. Ct. at 2848 n. 2 (Blackmun, J., dissenting) (listing states).

64. While the plaintiff in *Hardwick* was arrested and jailed overnight, he was not ultimately prosecuted, convicted, and sentenced. See *id.* at 2848 (Powell, J., concurring). The very absence of convictions under the sodomy laws made it difficult for civil liberties lawyers to find any better test case than *Hardwick* with which to challenge the validity of those laws.

65. See, e.g., Brief of Amici Curiae American Psychological Association and American Public Health Association at 19-27, *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (arguing that sodomy laws disserve the public health by interfering with AIDS treatment, research, and education).

66. See Hermann DHJ, Liability related to diagnosis and transmission of AIDS, *Law, Medicine & Health Care* 1987, 15(1-2): 36-45.

67. See Top health official urges frank talks to young on AIDS, *New York Times*, Oct. 23, 1986: 1, col. 6.

68. For example, Markowski, allegedly a prostitute, charged with attempted murder for selling his blood even though he knew he was infected with AIDS, said he did so because "when you have to survive you'll do anything." Cummings, *supra* note 3.

Saudi AWACS Sale Wins Narrow Senate Victory

\$8.5 Billion Arms Package Approved. The Senate Oct. 28 voted, 52-48, to permit the sale of an \$8.5 billion air defense package to Saudi Arabia, including five sophisticated Airborne Warning and Control System (AWACS) surveillance planes.

Republicans voted, 41-12, to permit the sale, while Democrats opposed it, 36-11.

Approval of the sale represented a personal and foreign policy victory for President Reagan, whose administration had appeared to be facing its first major foreign policy defeat as late as two days before the final vote. [See pp. 768F1, 742C3]

The turnaround was achieved through a combination of personal appeals, flattery, arm-twisting and promises—in short, every piece of ammunition in the formidable presidential arsenal—according to a variety of press accounts. Victory was sealed only when four senators on record as opposing the sale switched their votes at the last minute. (By law, only the concurrent opposition of both houses of Congress could block the sale. The House had voted overwhelmingly against it Oct. 14.)

The arms package that won confirmation included, in addition to the AWACS, equipment to extend the range and firepower of 62 F-15 fighter aircraft already on order by Saudi Arabia and a complex of electronic ground stations to support the Saudis' air defense and surveillance activities. [See p. 609A1]

Momentum Shifts in Final Day—The bloc of uncommitted senators became smaller one or two at a time until the day before the vote, when intense personal lobbying by the President produced a swing of eight "uncommitteds" to his side and opened the way for the defections that put the administration over the top.

Senate Majority Leader Howard Baker (R, Tenn.) Oct. 22 estimated the pro-AWACS forces were "still behind" but insisted there were enough undecided votes for ultimate victory. Sen. Alan Cranston (D, Calif.), who led the opposition, predicted victory by a "substantial" margin.

On Oct. 22, Sen. Ernest F. Hollings (D, S.C.) announced his opposition, and Sen. Warren B. Rudman (R, N.H.) committed his support. Although the President had persuaded three of the 50 signers of a September Senate resolution of disapproval to switch sides, because of subsequent announcements Hollings' declaration brought the tally of known opponents back to 50. [See p. 705C1]

The next day, Sens. Mark Hatfield (R, Ore.) and Dale Bumpers (D, Ark.) joined the opposition. Bumpers in spite of a personal call from Reagan in Cancun, Mexico.

At this point, Baker said he would sound out the President on possible withdrawal of the proposal if defeat seemed certain. (The administration retained the option of declaring the sale to be "vital" to the "national security interests" of the U.S., in which case Senate or House approval would not be necessary.)

At Cancun Oct. 23, Reagan met with Saudi Crown Prince Fahd, but both sides insisted that AWACS was not mentioned. In the words of a White House aide, the issue had already been discussed "to the limits of tolerance." [See p. 787C2]

Upon his return, Reagan began a heavy schedule of meetings with key senators, conferring with many of them individually. The crucial breakthrough came Oct. 27, the day before the vote, when eight "uncommitteds"—four Republicans and four Democrats—endorsed the sale.

The Republicans were Bob Dole (Kan.), Charles Grassley (Iowa), Frank Murkowski (Alaska) and Harrison Schmitt (N.M.). The Democrats were David Boren (Okla.), James Exon (Neb.), Walter Huddleston (Ky.), and John Melcher (Mont.).

More importantly, Sen. Roger Jepsen (R, Iowa), one of the most outspoken opponents of the sale and a strong supporter of Israel, Oct. 27 said he would now vote to support the President. He said he had received "highly classified" information from the White House that "lessened the concerns" he felt for Israel's security.

Cranston Oct. 27 said, "The odds have shifted. The advantage lies with the President."

Switch of Votes Is Decisive—In the Oct. 28 vote, which came at the end of a full day of debate, the margin of victory was provided by four senators who had been among the sponsors of the September resolution of disapproval: Edward Zorinsky (D, Neb.) and three Republicans, William Cohen (Maine), Mark Andrews (N.D.), and Slade Gorton (Wash.). (Another early opponent, Sen. Larry Pressler [R, S.D.] had already switched his stand.)

Zorinsky met with Reagan at the White House for 40 minutes while the debate was on. He emerged saying, "He makes persuasive arguments based on the fact that we have only one president of the United States at a time." Andrews had said Oct. 27 that the President had argued strongly for the need to preserve his "firm image." Gorton insisted his decision had been "entirely separate" from an Oct. 20 White House pledge to support a \$26 million hospital renovation in Seattle.

But the most dramatic turnaround was that of Cohen, one of the Senate's strongest supporters of Israel. In a speech in which he "at times appeared to be near anguish" (in one account), he said he was switching largely to avoid having Israel made "a scapegoat." Cohen claimed that the Saudi government was "about as moderate as Yasir Arafat," the leader of the Palestine Liberation Organization, and that Reagan's policies had "left the Israelis confused and frightened." Nevertheless, he said, "I have concluded that Israel is in a classic no-win situation."

The morning of the vote, Sen. Baker also circulated a letter from Reagan that a number of supporters said permitted them to endorse the sale. It elaborated the "specific arrangements" with the Saudis already contained in an earlier draft, and



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which was responsible for supervising the stockpiling of strategic materials, was allowed to sell 46.5 million ounces in the 1982 fiscal year that began Oct. 1. The GSA said that it planned to sell up to 1,250,000 ounces weekly, depending on the bids it received. [See p. 547F2]

Out of 98 bids, the government agency awarded silver to only the two highest bidders, Republic National Bank of New York and Mocatta Metals Corp. The companies, both well-known metals traders, were granted a total of 160,000 ounces at a weighted average price of \$9.39 an ounce.

Proceeds from the silver sales were to be used to pay for purchases of other strategic materials.

Idaho Officials Protest—Critics of the stockpile sale had charged that the result would be a glut on the silver market. Silver prices had declined steadily in the past year since their high of \$19.66 an ounce in November 1980.

In a last-minute attempt to halt the government's plans, Idaho officials had written a letter of protest to the head of the Government Services Administration, it was reported Oct. 14.

Idaho produced about 45% of the 40 million ounces of silver manufactured in the U.S.

The letter, signed by Rep. Larry Craig (R), Sen. James McClure (R), Gov. John Evans, and Attorney General David Leroy, warned that the sale could violate federal law and have a "disastrous effect" on several mining companies in northern Idaho and the rest of the U.S.

The officials were particularly concerned that the sale would hinder efforts to find a buyer for Bunker Hill Co., a Kellogg silver, zinc and lead concern. Bunker Hill, owned by Gulf Resources & Chemical Corp., was scheduled to shut down Nov. 15. The closing would put 2,100 people out of work and cost the state millions of dollars in revenue.

Citing the current, depressed price of silver, the letter requested that the GSA postpone the silver sales until prices were higher. □

Automobiles

GM Posts 3d Quarter Loss. General Motors Corp. Oct. 22 reported a third quarter net loss of \$468 million. The loss was considerably larger than had been expected. [See p. 533E1]

Sales in the third quarter increased 12% to \$13.4 billion from \$12.03 billion. Sales in terms of dollars rose in the third quarter primarily because of increased car prices in 1981.

Weak car sales (in terms of the number of vehicles sold), high interest rates and the costly conversion to new models were among the factors cited in GM's sizable quarterly loss.

"Until interest rates decline to more reasonable levels, we can't look forward to a significant improvement in car and truck sales in the United States," Roger B. Smith, chairman of GM, said.

Kansas Plant Canceled—GM announced Oct. 23 that it was canceling plans to build

a \$500 million assembly plant in Kansas City, Kansas. That plant had been intended to replace an existing facility there.

GM also said that day that it would lay off indefinitely about 2,600 workers at an Oklahoma City assembly plant in order to cut production there by half. □

Ford Announces 3d Quarter Loss. Ford Motor Co. Oct. 28 reported a \$334.5 million loss for the third quarter of 1981. [See p. 517A1]

Ford's third-quarter loss compared with a year-earlier deficit of \$595 million. Worldwide sales rose 8.1% in the third quarter to \$8.66 billion from \$8.01 billion in 1980's third quarter.

"Ford achieved substantial reductions in costs and increased its car market shares in all major regions, but the company continued to be affected adversely by weak economic conditions worldwide," said Philip Caldwell, Ford's chairman, and Donald E. Petersen, president, in a statement. □

Chrysler Reports 3d Quarter Loss. Chrysler Corp. reported Oct. 29 a third-quarter loss of \$149.3 million. [See p. 516C3]

In the year-earlier period, Chrysler had a deficit of \$489.7 million. The improvement in the current third-quarter results was mostly a consequence of strict cost-cutting measures. However, the loss was much greater than the \$38 million deficit that Chrysler had earlier forecast to the federal government.

Chrysler also reported that sales for the third quarter increased 28% to \$2.56 billion from \$2 billion.

Although Chrysler's share of the U.S. car market rose between the 1980 and 1981 third quarters, the overall car market shrank, dampening Chrysler's progress. □

Political Radicals Arrested in Nanuet N.Y. Brink's Holdup

Guard, 2 Officers Slain in Shoot-Out. Three members of the Weather Underground, a radical group linked to terrorist bombings during the Vietnam War, were among four suspects arrested Oct. 20 near Nyack, N.Y. after a bungled armored truck robbery and shoot-out that left two police officers and one Brink's guard dead.

In the \$1.6 million robbery, three men armed with shotguns and automatic weapons opened fire on a Brink's truck as three guards were making a pickup at a bank at the Nanuet Mall in Nanuet, N.Y., a suburban community about 25 miles northwest of New York City. In the gunfire, one guard was killed, one wounded in the head and a third shot in the shoulder.

According to police, the robbers then fled with their accomplices, driving off in two vehicles. One of the vehicles, a rented truck, was later stopped at a police roadblock several miles away. There, two police officers were slain in an exchange of gunfire. Witnesses said that when police stopped the vehicle and pulled two suspects from the front, they were surprised by three others who burst from the rear of the truck and opened fire. The suspects,

believed to number between four and eight, then commandeered passing cars, throwing out passengers at gunpoint, and escaped. A

In the arrests, the robbery suspects were identified as Kathy Boudin, a radical activist and Weather Underground leader who had been sought by authorities for more than 11 years in connection with a 1970 bomb explosion in New York that accidentally killed three persons. [See 1970, p. 554C1]

Also arrested were Judith A. Clark, and David Joseph Gilbert, both members of the radical group. The fourth suspect was identified as Samuel Brown, who reportedly had a 23-year record of arrests and convictions for offenses including larceny and gun possession. B

On Oct. 23 at an arraignment hearing, the four suspects were remanded without bail and ordered held for "action by the grand jury." The hearing itself was technically held to determine whether the defendants should be held pending grand jury action on the robbery. At the hearing, Nyack Village Judge Robert P. Lewis, ordering the suspects held, said that he had found "reasonable cause" that they had "committed murder." C

The three-hour hearing, which took place in a courtroom in the Nyack Village Hall, was held amid unusually heavy security precautions. More than 200 police officers, armed with shotguns, rifles and automatic weapons, ringed the village hall, positioned at street corners and atop adjacent buildings. Authorities said that the heavy security arrangements were made after plans of the courthouse were discovered in one of the apartments raided by the police. D

Fugitive's Background Detailed—On Oct. 22 details began to emerge on the recent activities and background of Kathy Boudin, who was the most politically prominent of the three radical activists arrested. Press accounts disclosed that Boudin, the daughter of a prominent civil rights attorney, Leonard Boudin, had been living in a New York apartment under a false name with a one-year-old baby and was receiving welfare benefits of \$177.75 every two weeks. Furthermore, it was reported that the radical fugitive had been sharing the apartment with an investigative reporter for the Stamford (Conn.) Advocate for the previous several years. However, the reporter, Rita Jensen, maintained that she never knew Boudin's real identity until she saw her photograph in a newspaper story after her arrest. E

Arrests Spur Widening Terrorist Probe—Meanwhile, the arrests in the Brink's robbery spurred a rapid succession of anti-terrorist raids by police starting on Oct. 21 as licenses used by the gang's getaway cars were traced to a number of suspected hideouts. In raids carried out in East Orange, N.J. and later in New York City boroughs of the Bronx and Brooklyn, and in Mount Vernon, N.Y. police said they found automatic weapons, shotguns, bomb manuals, walkie-talkies, bloody clothing and literature on radical causes, as well as detailed floor plans of six New York City police stations and the Queens County, N.Y. criminal courts building. F

A In what was becoming an ever-widening probe into radical groups and terrorist organizations, investigators in New York, New Jersey, Connecticut and Washington, D.C. continued Oct. 24 to sift through evidence in the case, seeking new leads and connections. According to Kenneth Walton, director of the newly created joint federal-city Terrorism Task Force, a key target of the investigation was possible links between the Weather Underground and other terrorist groups such as the Black Liberation Army, the FALN, the Black Panther Party and a clandestine Communist group known as the May 19 Coalition.

B Some investigators were said to believe that the last remnants of the Weather Underground had merged with the Black Liberation Army, a terrorist group that had claimed responsibility for several police slayings in the New York City area in recent months, to form a resurgent radical organization. The new organization, called the May 19 coalition, took its name from the birth dates of Ho Chi Minh and Malcolm X. This new alliance was said to have set up a network of "safe houses" and bomb factories and also to have staged a number of robberies in recent months to finance its activities.

C As the probe proceeded, police were attempting to draw together many diverse threads in the case, ranging from the gang's possible involvement in a series of recent armored car robberies and other crimes to the escape of Joanne Chesimard, a leader of the Black Liberation Army, from prison in New Jersey in 1979. [See 1979, p. 953C2] □

Politics

Young Elected in Atlanta. Andrew Young, former chief U.S. delegate to the United Nations, was elected mayor of Atlanta Oct. 27. [See p. 748G1]

E Young, 49, a former congressman, received 65,798 votes (55.1%) to 53,549 votes (44.8%) for Sidney Marcus, a state legislator.

Young had been endorsed by Fulton County Commissioner A. Reginald Eaves, who ran third and took 16% of the total vote in preliminary voting Oct. 6. Young led the seven-way field at that time, but only by two percentage points over Marcus.

F Both elections, which were nonpartisan, were split along racial lines. Young and Eaves, who were black, received about 90% of the black vote in the first election. Marcus, a white, had strong backing in predominantly white neighborhoods. His candidacy had been strongly promoted by the white business establishment.

G Young also was supported by outgoing Mayor Maynard Jackson, the first black mayor of Atlanta, who early on set the tone of the runoff campaign by characterizing blacks supporting Marcus as "grinning and shuffling Negroes." Jackson was ineligible by law to run for a third consecutive term.

Blacks comprised about 66% of the city's population and 56% of its electorate.

After the results were in, Young said

Oct. 28 he hoped that "most of the polarization and the hostility was in the press" only.

The campaign had put a "strain" on racial harmony, but it was over and there were "no broken relationships," he said, "and there will be none in the future." □

Knowles Wins in Anchorage. Tony Knowles (22,408 votes) won a nonpartisan election Oct. 27 for mayor of Anchorage, Alaska over Joe Hayes, Republican speaker of the state House of Representatives (19,843 votes).

Knowles, a Democrat and restaurant owner, withstood a campaign attack by a group aligned with the conservative organization Moral Majority, which objected in particular to his support for an ordinance against discrimination based on sexual preference. □

Education

College Test Score Decline Halted. High school seniors' 1981 Scholastic Aptitude Test scores remained at the level of those for 1980, the College Board announced Sept. 28. The results marked a leveling off after 18 years of declining scores on the tests, used by college admissions boards to evaluate prospective students' capabilities and high school performance. [See 1980, p. 786C2]

The long and highly publicized decline in scores had alarmed both educators and parents, who interpreted it to mean that the nation's school system was deteriorating in quality. Robert G. Cameron, executive director of research and development for the board, warned that those fears may still be valid: "It is still too early to predict whether this signals the end of the score decline or simply an interruption in the 18-year trend," he said.

The SAT average for the combined math and verbal tests, each scored on a scale of 200 to 800, had dropped a total of 90 points since 1963, the board said. The 1981 average scores remaining steady, matched those for 1980: 424 in verbal skills and 466 in mathematics. After similar leveling off in 1968, however, the temporarily suspended slide in scores had continued.

Board Urges Upgraded Standards—The College Board, spurred by concern over the long decline in SAT scores, Sept. 24 announced a proposed program to standardize and upgrade high school college-preparatory programs.

The board said its move was intended to raise college admissions standards, establish a national definition of "academic competency," and make higher education more accessible to minorities by improving the quality of secondary education.

Called Project Equality, the plan listed 50 skills suggested by the board as minimum requirements for college admission, among them the ability to write "coherent paragraphs" and to use a calculator and computer. The suggested "basic academic curriculum" would include English, mathematics, history or social studies, natural sciences, a second language, and visual and performing arts.

Board President George H. Hanford, saying the board's specialty was "the tran-

sition from school to college," cited the declining SAT scores as a symptom of "a lowering of standards" in the nation's schools. He emphasized that the plan, while it could not be imposed by the board, was an attempt to redefine and raise those standards. □

Colleges Raise Tuitions by 15%-20%. Many of the nation's most expensive colleges had raised their 1981-82 tuitions by 15%-20% in order to cope with rising costs, it was reported Sept. 24. That increase represented approximately twice the rate of inflation.

The charge for tuition and fees alone at these colleges was currently over \$7,000 a year, with Harvard reporting a 15% increase over 1980, to \$7,490, and the Massachusetts Institute of Technology a 19% increase, to \$7,400.

College administrators cited higher energy bills, book and periodical prices, faculty salaries and financial aid expenses as factors in the tuition jump. The latter was a self-perpetuating expense, they explained, since more students became eligible for financial aid as tuition costs rose.

In addition, they said, the universities had not raised fees sufficiently during the past decade to compensate for growing inflation rates.

Two other factors, both a result of the technology boom, were higher salaries paid to researchers, who were increasingly wooed by private industry, and the building and updating of research laboratories.

Total Expenses Top \$11,000 a Year—The College Scholarship Board predicted a record rise in college expenses in 1981, according to a survey released Aug. 31. The annual College Board report stated that resident student costs at private colleges would rise an average of 13%, those at public colleges, 14%. The sudden jump in costs, the report said, followed a decade of relatively modest increases. [See 1978, p. 264A2]

The survey report also listed more than a dozen northeastern colleges whose total expenses—including tuition, fees, room, board, books, transportation and personal needs—were in excess of \$11,000 for 1981-82. Bennington College in Vermont reported the highest total costs, at \$12,030. □

La. Desegregation Plan Accepted. The first higher education discrimination case filed by the U.S. government came to an end Sept. 8 when a three-judge federal panel accepted a proposed settlement to desegregate Louisiana's colleges and universities. The case had been pending since 1974. [See 1973, p. 1057G1]

Under a six-year plan, proposed in August by the Reagan administration, Louisiana would spend \$18 million to \$50 million to upgrade its black schools and increase cross enrollment, but would be subject to no penalties should the enrollment goals not be met.

As in the case of a previously accepted Reagan administration proposal, for North Carolina, the requirement of the Carter administration that Louisiana eliminate duplicated programs and merge certain

D. C. Cr.

Resume

A. RAYMOND RANDOLPH

POSITIONS:

1987 - Present	Partner - PEPPER, HAMILTON & SCHEETZ Washington, D.C.
1989 - Present	Advisory Panel, Federal Courts Study Committee
1986 - Present	Special Assistant Attorney General State of Utah
1985 - Present	Special Assistant Attorney General State of New Mexico
1983 - Present	Special Assistant Attorney General State of Montana (Honorary)
1979 - 1980	Special Counsel Committee on Standards of Official Conduct (Ethics Committee) U.S. House of Representatives
1975 - 1977	Deputy Solicitor General Department of Justice Washington, D.C.
1974 - 1978	Adjunct Professor of Law (Injunctions and Civil Procedure) Georgetown Law Center Washington, D.C.
1970 - 1973	Assistant to the Solicitor General Department of Justice Washington, D.C.
1969 - 1970	Law Clerk to Judge Henry J. Friendly United States Court of Appeals Second Circuit New York, New York

EDUCATION

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
PHILADELPHIA, PENNSYLVANIA

Degree: J.D. (1969)
Honors: Summa cum laude
Class Standings: 1st
Awards: David W. Amram Prize
(best paper in civil procedure)
Barenkopf Award (1968-1969)
(highest grades 1st and 2d year)
Oscar M. Davis Prize
(highest grades 3d year)
Peter McCall Prize
(highest cumulative average)
John H. Maurer Prize
(highest grade criminal law)

Activities: Managing Editor - Law Review

DREXEL UNIVERSITY,
PHILADELPHIA, PENNSYLVANIA

Degree: B.S. Commerce & Engineering
(1966)
Major: Economics & Basic Engineering
Class Standing: Upper 10%
(Dean's List - 5 years)
Awards: First Speaker - Columbia
University International
Debate Tournament (1966)
Activities: Debate Society (President)
Student Senate (Vice President)
Varsity Wrestling

MISCELLANEOUS

American Law Institute
Who' Who in America
Who's Who in American Law
American Bar Association
American Trial Lawyers Association
Supreme Court Historical Society
National Press Club
Naifeh & Smith, Best Lawyers In America
(Corporate Litigation and Criminal Law)

BAR MEMBERSHIPS

Supreme Court of the United States (1973)
Supreme Court of California (1970)
United States Court of Appeals, for the First, Fourth,
Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and
District of Columbia Circuits
Tax Court of the United States (1974)
District of Columbia Court of Appeals (1973)
United States District Court for the
District of Columbia (1974)

A. RAYMOND RANDOLPH --ORAL ARGUMENTS IN U.S. SUPREME COURT

American Trucking Ass'ns, Inc. v. Smith, argued March 1989,
reargued December 6, 1989

Murray v. United States, ___ U.S. ___

Ruckleshaus v. Monsanto Co., ___ U.S. ___

Zipes v. Trans World Airlines, 455 U.S. 385

United States v. Chadwick, 433 U.S. 1

EPA v. Brown, 431 U.S. 99

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73

New York v. Kleppe, 429 U.S. 1307

Andresen v. Maryland, 427 U.S. 463

Kleppe v. Sierra Club, 427 U.S. 390

Kleppe v. New Mexico, 426 U.S. 529

Cappaert v. United States, 426 U.S. 128

Train v. Colorado PIRG, 426 U.S. 1

Kleppe v. Delta Mining, Inc., 423 U.S. 403

National Independent Coal Operators Ass'n v. Kleppe, 423 U.S. 388

Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289

United States v. Alaska, 422 U.S. 185

Department of Agriculture v. Moreno, 413 U.S. 528

NAACP v. New York, 413 U.S. 345

Mourning v. Family Publications Service, 411 U.S. 356

Tidewater Oil Co. v. United States, 409 U.S. 151

Affiliated Ute Citizens v. United States, 406 U.S. 128

Iowa Beef Packers v. Thompson, 405 U.S. 228

A. RAYMOND RANDOLPH -- ORAL ARGUMENTS U. S. COURTS OF APPEALS

Weisman v. Alleco Inc. and Weisman v. Smith, Barney (4th Cir., Feb. 8, 1990)

Alleco Inc. v. IBJ Schroder Bank & Trust Co. (8th Cir., Jan. 16, 1990)

The Siegel Trading Co., Inc. v. Yopp, No. 86-6073 (9th Cir. 1987) (unreported)

New Mexico ex rel. Energy and Minerals Dep't v. Department of the Interior, 820 F.2d 441 (D.C. Cir. 1987)

United States v. Carter, 803 F.2d 20 (1st Cir. 1986)

United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985)

Yopp v. The Siegel Trading Co., Inc., No. 83-6250 (9th Cir. 1985) (unreported)

State of Montana v. Clark, 749 F.2d 740 (D.C. Cir. 1984)

Hobson v. Wilson, 737 F.2d 1984 (D.C. Cir. 1984)

Denberg v. United States Railroad Retirement Board, 696 F.2d 1193 (7th Cir. 1983)

International Systems & Controls Securities Litigation, 693 F.2d 1235 (5th Cir. 1982)

United States v. Winograd, 656 F.2d 279 (7th Cir. 1981)

United States v. Randell, 630 F.2d 1023 (4th Cir. 1980)

United States v. Marshall, 609 F.2d 152 (5th Cir. 1980)

Cohen v. United States, 593 F.2d 766 (6th Cir. 1979)

United States v. Kearns, 595 F.2d 729 (D.C. Cir. 1978)

Carter v. Panama Canal Co., 463 F.2d 1289 (D.C. Cir. 1972)

Peterson v. Richardson (6th Cir. 1972) (unreported)

A. RAYMOND RANDOLPH -- CASES IN TRIAL COURTS

Texaco et al. v. State of Utah et al. (Utah State Court -- ongoing) (civil)

New Mexico ex rel. Energy and Minerals Dep't v. Department of the Interior, (D.D.C. 1985) (civil)

Alleco Inc. v. Weisman (D. Md. 1989) (civil)

Gould v. Alleco Inc. (D. Md. 1988) (civil)

In re Alleco Securities Litigation (Md. State Court 1988)

Yopp v. Siegel Trading Company (C.D. Cal. 1986) (civil)

Hobson v. Brennan (D.D.C. 1986) (civil)

United States v. Toombs (E.D. Va. 1983) (criminal)

United States v. Perticone (D.N.J. 1983) (criminal)

State of Rhode Island v. Porter (R.I. State Court 1982) (criminal)

United States v. Randell (E.D. Va. 1980) (criminal)

Rothblatt v. Nixon (D.D.C. 1975) (civil)

Alaska Native Ass'n v. Morton, 417 F.Supp. 459 (D.D.C. 1974) (civil)

United States v. Nimmo (S.D. Ill. 1974) (criminal)

21ST STORY of Level 1 printed in FULL format.

The Associated Press

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October 23, 1981, Friday, PM cycle

SECTION: Domestic News

LENGTH: 390 words

HEADLINE: Former Radical Recalls Boudin In Boston

DATELINE: BOSTON

KEYWORD: Boudin Life-Boston

BODY:

A former radical who lived underground for several years says Weather Underground member Katherine Boudin spent part of her 11 years of hiding in Boston.

Ms. Boudin, who is charged with murder in the ambush of a Brink's truck in Nanuet, N.Y., lived in a third-floor walk-up in a "seedy section" of Boston in the early 1970s, according to Jane Alpert.

Ms. Alpert's memoir of life in the radical movements of the late 1960s and early 1970s, "Growing Up Underground," is being published by William Morrow and Co. and is scheduled for release in mid-November.

Ms. Alpert surrendered in 1974 to face charges in connection with the 1969 bombings of several corporate and government buildings in New York. She was convicted and served 20 months in prison.

Reached at her New York home, Ms. Alpert told The Boston Globe she was shocked to hear that Ms. Boudin was charged with murder in the ambush of armored car in Nanuet, N.Y., this week.

"Your spine snaps and your eyeballs open when you hear that someone you know was supposedly involved," she said in an interview published today.

Of Ms. Boudin's involvement in the incident, Ms. Alpert said, "I think Kathy Boudin is a very sharp, very astute political thinker. She conceived of almost everything in political terms and I would expect her to be politically active and have a political articulation for whatever she was doing."

In her book, Ms. Alpert writes that she met Ms. Boudin once in her father's Greenwich Village town house and again in Boston in 1972 when Ms. Alpert was in town to argue feminist politics with members of a small collective.

"I could never have recognized her. She had changed her appearance from stolid to elfin and looked 10 years younger than her age, which was 30."

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The Associated Press, October 23, 1981

Ms. Alpert described her as "a small woman with a heart-shaped face" and "an ironic smile."

Ms. Alpert recalled the debate concerned whether it was possible for women to achieve autonomy without separating from men, that it was "particularly tiring." She said that unlike other female members of the Weather Underground, Ms. Boudin was forthright about discussing her personal life and a love affair with a woman.

Ms. Boudin dropped from sight after fleeing naked from a Weather Underground bomb factory that blew up in 1969.

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13TH STORY of Level 1 printed in FULL format.

The Associated Press

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September 18, 1983, Sunday, BC cycle

ADVANCED-DATE: September 16, 1983, Friday, BC cycle

SECTION: Domestic News

LENGTH: 843 words

HEADLINE: Lawyers, Not Rhetoric, for Brink's Defendant Kathy Boudin

BYLINE: By EILEEN PUTMAN, Associated Press Writer

DATELINE: NEW YORK

KEYWORD: Brink's

BODY:

Three radicals convicted last week in the \$1.6 million Brink's armored car robbery and murders called their trial a charade, acted as their own counsel and offered a defense they conceded no jury would buy.

It will be a far different story when Kathy Boudin _ the 40-year-old Weather Underground figure and daughter of a prominent civil liberties lawyer _ goes on trial on the same charges Oct. 12.

She will be represented by top trial lawyers seeking her acquittal by vigorously challenging the state's evidence from the Oct. 20, 1981, holdup in which a Brink's guard and two Nyack police officers were killed.

The three convicted last week _ Judith Clark, 33, David Gilbert, 38, and Kuwasi Balagoon, 36 _ rejected a conventional legal defense and even disputed the state's right to try them.

Like Ms. Boudin, the three are political radicals from the '60s.

Ms. Clark was a Weatherman arrested in the 1969 Chicago "Days of Rage" demonstration. Gilbert is also a former Weatherman, and Balagoon is a former Black Panther who spent years behind bars for robbery and assault.

In a two-month trial, their sole defense witness was Sekou Odinga, an avowed Black Liberation Army soldier who told the mostly middle-aged, all-white jury that murder and mayhem was "justified" in the war for black liberation.

Balagoon acknowledged after the verdict that the defendants did not expect the jury to see their side.

"I really would have been shocked if we had won," he said in a telephone interview from jail. "We were working on the political side of it ... and the main thing is that we wanted to use the case to politicize, mobilize people."

Bush Library Photocopy Preservation

The Associated Press, September 18, 1983

But these are not the '60s, and political rhetoric won't work in 1983 as a defense to crime, says Kenneth Gribetz, the Rockland County district attorney who prosecuted the case.

"Pure hogwash," Gribetz said of the defense. "It's an insult to the jury and to society."

Ms. Boudin does not plan that kind of "insult." Yet her radical credentials are as firmly established as those of her codefendants.

She, too, was in the Weatherman organization and spent more than a decade underground after fleeing the 1970 explosion of a Greenwich Village townhouse police said had been used by the radicals as a bomb factory.

Her father is Leonard Boudin, a prominent New York City lawyer who has Leonard Weinglass and Martin Garbus defending his daughter. Both are meticulous attorneys with a liberal bent.

Garbus, a former official of the American Civil Liberties Union, has taught at Yale and Columbia law schools. Weinglass was a defense attorney in the Chicago 7 conspiracy trial who has represented many political activists.

Ms. Boudin has one advantage _ although there are incriminating circumstances that link her to the robbery-murders, there is no direct evidence. No one saw her actually commit a crime.

Witnesses have testified that she was riding in a truck used as a getaway vehicle after the robbery, and that when stopped by police she got officers to put away their guns moments before gunmen burst out the back and opened fire.

Her lawyers plan to challenge the felony murder statute that makes a defendant criminally responsible for death that occurs during a felony committed by others who are intentionally aided by the defendant.

They also will challenge the legality of hypnotically induced evidence and the reliability of scientific evidence related to fingerprints, ballistics, glass and hair samples.

Their challenge of rental forms for vehicles used in the holdup and other evidence seized in Ms. Boudin's Manhattan apartment resulted in a judge's ruling that the evidence cannot be used against her.

They also hope to have the trial moved from rural Orange County to the metropolitan New York area.

An urban jury worked well for several other people accused as conspirators in the Brink's robbery. They were acquitted earlier this month by a Manhattan federal court jury. That panel seemed skeptical of the prosecution's case, which included testimony by some unsavory informants _ including one who admitted he had killed a Bronx armored car guard and had skinned a woman alive while serving in Vietnam.

Although Ms. Boudin's lawyers are making the most of a judicial system her codefendants disdain, she has not publicly broken with them. Less than three hours after his conviction, Ms. Boudin married Gilbert, with whom she has a

The Associated Press, September 18, 1983

3-year-old son.

Still, Ms. Boudin's lawyers appear to be avoiding anything that might prompt potential jurors to link Ms. Boudin with the convicted co-defendants.

They have avoided commenting on this week's verdict and are seeking to have her trial severed from that of Samuel Brown, identified by witnesses as a principal gunman in the holdup.

During pretrial proceedings when all Brink's defendants were in court together, Weinglass said he was under instructions from Ms. Boudin to respect her codefendants' position "absolutely."

But, he added, "Everything we're doing, every move we're making, is a move we'd make to defend Kathy Boudin. "

8TH STORY of Level 1 printed in FULL format.

The Associated Press

The materials in the AP file were compiled by The Associated Press. These materials may not be republished without the express written consent of The Associated Press.

February 14, 1984, Tuesday, AM cycle

SECTION: Domestic News

LENGTH: 553 words

HEADLINE: Former Weather Underground Fugitive On Trial in Brink's Murders

BYLINE: By EILEEN PUTMAN, Associated Press Writer

DATELINE: WHITE PLAINS, N.Y.

KEYWORD: Brink's

BODY:

Kathy Boudin, who spent more than a decade as a Weather Underground fugitive, went on trial Tuesday with her codefendant Samuel Brown for the \$1.6 million Brink's armored car robbery and murders.

Miss Boudin, 40, studied paper valentines brought by her father, civil liberties lawyer Leonard Boudin, as panels of 100 prospective jurors underwent preliminary screening.

Miss Boudin and Brown, 43, are charged with robbery and murder in the Oct. 20, 1981, armored car holdup in Rockland County in which a guard and two police officers were killed.

Three people, including Miss Boudin's husband, David Gilbert, were convicted last year and sentenced to 75 years to life for the crimes, which authorities said were staged by a gang of terrorists who wanted to set up a separate black nation in the South.

Jury selection began after Judge David Ritter said the defense claim that blacks were systematically excluded in the pool of prospective jurors was "not warranted."

Prospective panelists trooped into court past metal detectors that were only one example of the heavy security surrounding the trial. A total of 195 people were screened, and 27 of them said they were willing to serve on the case. They were told to return at a later date for intensive questioning.

But 144 others were excused after they said that the length of the trial, about six months, would prove a financial or medical hardship. Twenty-four others were excused because they already had an opinion in the case.

Miss Boudin, who until her capture in the Brink's heist had last been seen fleeing the 1970 explosion of a Greenwich Village townhouse police said was used as a radical bomb factory, has eschewed the revolutionary rhetoric used by previous defendants.

The Associated Press, February 14, 1984

Her lawyers have mounted a conventional legal defense, which included a challenge to the Westchester County pool of prospective jurors as having too few blacks.

Ritter's decision not to try the defendants separately was denounced outside of court by Leonard Weinglass, Miss Boudin's lawyer, who said it could lead to a mistrial "down the road."

Brown once turned government informer in a parallel federal investigation of the Brink's heist, and spoke of his own involvement in the case but did not mention Miss Boudin's alleged involvement, according to court documents.

Weinglass wants to call Brown as a defense witness to exculpate Miss Boudin, although Brown would apparently implicate himself by testifying, something that he is protected against under the law. Both defendants had consequently sought separate trials.

Ritter rejected the severance motions Tuesday, although he did not elaborate in court on his reasons. The judge also rejected "dual juries," a highly unusual procedure that had been considered, in which two panels would have sat in the same courtroom, each hearing evidence against one defendant.

He said the dual trial would harm his chances of putting on a full defense by getting Brown's complete testimony.

"Mr. Brown was there (at the Brink's robbery and shootout) and Mr. Brown acknowledges he was there. Miss Boudin was not there," Weinglass said.

The trial was moved to Westchester County due to publicity surrounding the previous trial in Orange County, which had been held there because of pretrial publicity in Rockland County.

3RD STORY of Level 1 printed in FULL format.

The Associated Press

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May 3, 1984, Thursday, PM cycle

SECTION: Domestic News

LENGTH: 434 words

BYLINE: By EILEEN PUTMAN, Associated Press Writer

DATELINE: WHITE PLAINS, N.Y.

KEYWORD: Brink's

BODY:

Former Weather Underground fugitive Kathy Boudin, saying her revolutionary ideals gave her strength to face a long prison term, was sentenced today to 20 years to life for the Brink's robbery and murders.

Miss Boudin, 40, who pleaded guilty to murder and robbery charges last week, stood and faced survivors of the three people who died in the bungled robbery and said she regretted their deaths.

"Nothing can take away the loss," she said as her mother, Jean, cried softly into a tissue across the room. "I feel your pain."

She was sentenced for her role in a \$1.6 million holdup in Rockland County in which a guard and two officers were killed Oct. 20, 1981.

She has already served 30 months since her arrest, and will become eligible for parole in the year 2,001. Miss Boudin will serve her time at Bedford Hills, the state's only prison for women.

She addressed the courtroom in a strong, firm voice and said her life had been devoted to the black liberation movement, and that all of her actions had stemmed from that cause.

"The meaning of my life has come from being part of a worldwide tradition of fighting for a more just and humane world," she said. "My ideals give me strength today, as well as yesterday and tomorrow."

Her trial with codefendant Samuel Brown, 43, was in the final stages of jury selection last week when she decided to plead guilty in exchange for the dismissal of 11 other charges, including two counts of murder.

Diane O'Grady, widow of Nyack police Sgt. Edward O'Grady, one of the three victims, looked stonily at the defendant. Later, she told reporters she felt only contempt for Miss Boudin.

"Regardless of her claimed remorse, in my heart I believe Kathy Boudin knowingly and willingly took part in all aspects of this horrible crime that

The Associated Press, May 3, 1984

took the lives of three innocent men, including my husband Ed," she said.

Brown's trial is continuing. Three other defendants in the case, including Miss Boudin's husband David Gilbert, were convicted last September and are now serving sentences of 75 years to life.

Miss Boudin spent more than a decade as a fugitive after she was seen running naked from a March 6, 1970, explosion at a Greenwich Village townhouse that police said was being used by radicals as a bomb factory.

She was not seen again until her arrest at the scene of a shootout between police and the Brink's robbers at a roadblock in Nyack, a few miles from the robbery at a shopping mall.

Authorities said the holdup was staged by a band of black and white radicals from the 1960s. At least one other suspect in the crime remains at large.

1ST STORY of Level 2 printed in FULL format.

Proprietary to the United Press International 1981

December 22, 1981, Tuesday, PM cycle

SECTION: Domestic News

LENGTH: 301 words

DATELINE: NEW YORK

KEYWORD: Wilkerson

BODY:

Former Weather underground bomb factory fugitive Cathlyn Wilkerson was freed from jail today by the state judge who originally sentenced her to a minimum term of up to three years in jail on a dynamite charge.

Miss Wilkerson, 36, remained impassive when Supreme Court Justice Harold Rothwax freed her. She had served 11 months of the jail term of up to three years.

Miss Wilkerson began serving the sentence on a possession of dynamite charge last January.

The charge stemmed from a March 6, 1970 explosion in a Greenwich Village townhouse that resulted in the death of three of Miss Wilkerson's comrades in the radical Weather underground. Police said the radicals were using the townhouse as a bomb factory.

The blast destroyed the building and police said they found enough explosives in the rubble to level a city block.

Miss Wilkerson and Weather underground leader Kathy Boudin were seen leaving the building shortly after the blast. Miss Boudin has been charged with three counts of murder in the bungled \$1.6 million robbery of a Brink's armored car in Rockland County in which two police officers and a Brink's guard were shot to death Oct. 20.

Judge Rothwax freed Miss Wilkerson despite vigorous objections by Assistant District Attorney John Reick.

'Her conduct in jail has been exemplary,' Rothwax said.

The judge said he had only intended Miss Wilkerson to spend a year in jail when he sentenced her to a maximum of three years in prison in October 1980.

Rothwax resentenced her to five years probation after noting she had already served 11 months in jail.

Miss Wilkerson remained an underground fugitive for 10 years following the townhouse explosion. She surrendered March 8, 1980 and pleaded guilty to the possession of dynamite charge -- a felony offense -- 10 days later.

THE WHITE HOUSE

WASHINGTON

November 29, 1989

Dear Charlie:

Thank you for your letter recommending Marshall Breger for appointment to the United States Court of Appeals for the District of Columbia Circuit. Recommendations by individuals who are familiar with a candidate's personal and professional qualifications are an important factor in the deliberations of the President's Federal Judicial Selections Committee. Thus, I can assure you that your suggestions will be given thoughtful consideration during the selection process.

Sincerely,

14 CBG

C. Boyden Gray
Counsel to the President

Mr. Charles Alan Wright
School of Law
The University of Texas at Austin
727 East 26th Street
Austin, Texas 78705

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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Charles Alan Wright

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Subject: recommendation of Marshall Dregie
for appointment to the District of Columbia
Circuit

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ACTION

DISPOSITION

Office/Agency	(Staff Name)
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89, 11, 16

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Referral Note:

Referral Note:**ACTION CODES:**

- A - Appropriate Action**
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D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

- I - Info Copy Only/No Action Necessary
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S - For Signature
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October 30, 1989

The Honorable Boyden Gray
Counsel to the President
The White House
Washington, DC 20500

Dear Boyden:

A newspaper article I have seen says that among those being considered for appointment to the District of Columbia Circuit is my sometime colleague Marshall Breger. Of those whose names I have seen mentioned as possible appointees to that court, he seems to me clearly the best and that is why I am writing you.

I have to say that my acquaintance with him and his work was almost entirely during the middle 70s when he taught on our faculty. I have kept up occasionally with him since that time, yet it has been quite hit and miss. When he was here, however, I thought he was an extremely bright young man. I think he has the type of temperament that would be good on the court. So far as I could tell from my acquaintance with him, his philosophy is the sort that we would hope for from a judge appointed by the Bush administration, and his expertness in administrative law is a particularly important qualification for a court that has a docket so heavily slanted in that direction as does the District of Columbia Circuit. I commend Mr. Breger to your careful consideration.

It was a pleasure sitting with you and Dick Thornburgh at dinner at the White House last January. I hope our paths cross again.

Sincerely,

A handwritten signature in cursive script that reads "Charlie".

Charles Alan Wright

CA-DC

Calfee, Halter & Griswold

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1800 Society Building
East Ninth & Superior
Cleveland, Ohio 44114-2688
(216) 622-8200

Cleveland
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Writer's Direct Dial
No. (216) 622-8334

January 29, 1992

VIA FEDERAL EXPRESS

PERSONAL AND CONFIDENTIAL

Ms. Lee S. Lieberman
Associate Counsel to the President
The White House
OEOP Room 115
Washington, D.C. 20500

Re: James M. Porter - Candidate for Nomination
to the United States District Court for the
Northern District of Ohio

Dear Lee:

Although it has been almost eight years now, you may recall when our paths crossed as law clerks at the D.C. Circuit. Since that time, I have read of your continued government service, particularly in the area of judicial selection, and thought it appropriate to address these comments to you.

I have known Jim Porter for over twenty years, having first met him when his son Tom and I were freshman classmates in high school. I learned quickly then, and have witnessed often since, that Jim is a person of strong conviction who balances a prudent suspicion of government with an abiding belief in the rule of law. I suspect that, for his candidacy to have advanced as far as it has, the White House and Justice Department have had an opportunity to confirm his integrity, honesty, intelligence, common sense and good judgment. I can attest that he possesses each of these attributes.

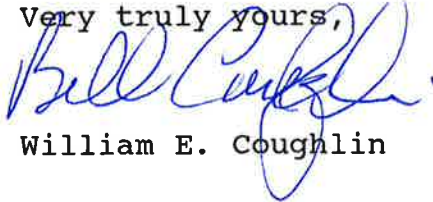
I have been a commercial and corporate litigator in Cleveland since 1984, and during that time I have had the opportunity to observe (and to hear other members of the bar and bench comment favorably on) Jim's formidable skills as a trial lawyer and as leader of the litigation practice group at a national law firm. Although I would support Jim's appointment to the District Court if I were not a litigator, I admit to heightened enthusiasm at the prospect of seeing on the bench a lawyer with such substantial depth in business litigation.

Calfee, Halter & Griswold

Ms. Lee S. Lieberman
January 29, 1992
Page 2

You and I had the privilege to observe some first-class judges in action on the D.C. Circuit. I believe that Jim Porter would make that kind of a judge here, and urge his nomination by President Bush.

Very truly yours,



William E. Coughlin

WEC/jag
47\00706CAA.593

P.S. I have enclosed a copy of his resume for your review, and understand that Jim is scheduled to meet with representatives of the Attorney General in Washington on Tuesday, February 4.

December 6, 1990

JAMES M. PORTER
PERSONAL, FAMILY, EDUCATIONAL
AND PROFESSIONAL BACKGROUND

Name: James M. Porter (age 59); born September 14, 1931,
Cleveland, Ohio

Address: 29475 Edgedale Road, Pepper Pike, Ohio 44124
(Home Phone No. 216-464-2260)

Present Position: Trial Partner at Squire, Sanders & Dempsey,
1800 Huntington Building, Cleveland, Ohio 44115
(216-687-8555); Litigation Department Practice Area Coordina-
tor since 1984 with general supervisory responsibility for
120 trial lawyers and 40 paralegals in five offices of
Squire, Sanders & Dempsey.

FAMILY

Immediate Family: Spouse of 38 years, Helen (nee Adams) (59);
four sons: James E. (36), Ph.D., Professor, English Depart-
ment (Director of Business Writing), Purdue University, West
Lafayette, Indiana; Thomas W. (33), trial partner, Dykema &
Gossett, Detroit, Michigan; William M. (25), high school
English teacher and coach, Gilmour Academy, Gates Mills,
Ohio; and Daniel J. (16), junior, Gilmour Academy.

Family History: Mr. Porter is the third of five sons of
Emmett T. and Mary Connell Porter. He was born, raised, and
has lived his entire life in Cleveland, Ohio, except for
military service and law school. His late father was a
Cleveland fireman, who rose through the ranks to become
Captain of a fire fighting company and later Chief of the
Cleveland Fire Prevention Bureau in the 1950's. His late
mother was a Cleveland elementary school teacher. His four
brothers are all living: Thomas E. (63), Ph.D., English
Professor, Dean of the College of Arts and Sciences, Univer-
sity of Texas at Arlington; John L. (62), M.D., Radiologist,
St. Vincent's Charity Hospital, Cleveland, Ohio; Robert J.
(56), M.D., Director of Radiology, St. Vincent's Charity
Hospital, Cleveland, Ohio; Gerald M. (54), Esq., practicing
attorney, Meyers, Hentemann, Schneider & Rea, Cleveland,
Ohio.

UNDERGRADUATE EDUCATION

Mr. Porter attended elementary school at St. Joseph's Seminary, Cleveland, Ohio and graduated in 1945.

St. Ignatius High School (1945-1949)

He then attended St. Ignatius High School, Cleveland, Ohio, as his brothers before him, graduating in 1949 with honors in the Classics Course (Greek and Latin). During his high school years, he served as a class officer all four years and was Secretary of the Senior Class. He lettered in varsity football (quarterback) and baseball (pitcher) for three years and was light-heavyweight and heavyweight boxing champion of the school in his third and fourth year respectively. He participated in the dramatic and debating societies and was sports editor of the school paper in his senior year. Upon graduation, he received the Senior Activities Award and the President's Academic Scholarship for one year to John Carroll University.

John Carroll University (1949-1953)

Upon matriculating to John Carroll University, Mr. Porter pursued a liberal arts degree (Major: history; Minors: philosophy and classical languages) and graduated A.B. cum laude in 1953. He was received into the National Jesuit Honor Society, Alpha Sigma Nu in his senior year. At John Carroll, he was active in student government, on the school paper, lettered in varsity football for three years and was heavy weight boxing champion of the University in his freshman year. He received a football scholarship his last three years. Mr. Porter joined R.O.T.C., rose to the rank of Cadet Battalion Commander and was a Distinguished Military Graduate. He was commissioned a Second Lieutenant, Transportation Corps, U.S. Army upon graduation and served in the U.S. Army for almost two years.

Employment During School Years

At an early age, Mr. Porter had a variety of summer time and holiday jobs, including temporary carrier for the U.S. Post Office, ditch-digger for East Ohio Gas, carousel attendant at Euclid Beach Park, rod-man for U.S. Geodetic Survey Team and stagehand.

MILITARY SERVICE

U.S. Army (1953-1955)

Following graduation from John Carroll University, he entered the U.S. Army Transportation Corps at Ft. Eustis, Virginia at the end of the Korean War. He served until being mustered out with the rank of First Lieutenant in April, 1955. During his service, he served with the 702nd Transportation Railway Battalion and became a Stevedore Officer and platoon leader with the 801st Port Company which was assigned to duty unloading ships at Thule Air Force Base, Greenland (800 miles from the North Pole). During his military service, he also played two seasons as quarterback and fullback with the Fort Eustis "Wheels," the post team which played other service teams all over the eastern seaboard.

LEGAL EDUCATION

University of Michigan Law School (1955-57)

Following military service, Mr. Porter attended the University of Michigan Law School at Ann Arbor, Michigan on the G.I. Bill. He was married then and had a one year old child, so he accelerated through Michigan in two years and three months rather than the usual three years. He graduated in August, 1957 with honors (Juris Doctor) and served as one of the Senior Editors of the Michigan Law Review. He took and passed the Ohio Bar Exam while still a senior at the Law School in the summer of 1957.

LAW PRACTICE

M.B. & H.H. Johnson (1957-1962)

Upon graduation from Michigan Law, Mr. Porter immediately joined a ten-man law firm in Cleveland, M.B. & H.H. Johnson. It had a very successful corporate practice representing many major corporations including White Motor, True Temper, Alcoa, Cleveland Builders Supply, Thew Shovel Co., Lorain Shovel, Steel Improvement & Forge (now Sifco), White Sewing Machine (now White Consolidated), Park Drop Forge and Ohio Crankshaft (now Park-Ohio). The firm had a general practice and Mr. Porter worked in different areas. As a young lawyer, he had an opportunity to work on major antitrust cases including USA v. White Motor which went to the U.S. Supreme Court. It was at this point in his career Mr. Porter was first introduced to acquisition work for White Motor and White Sewing. The two senior partners of the Johnson firm died within eight months of each other and the firm merged with another major Cleveland firm, McAfee Hanning.

**McAfee, Hanning, Newcomer,
Hazlett & Wheeler (1962-1967)**

The Johnson firm merged into the 35-man McAfee firm in September, 1967. It was there Mr. Porter began his trial work in earnest under the tutelage of a senior McAfee trial partner. During this period, Mr. Porter handled a number of cases for Sohio, McAfee's principal client, which had gas station operations and fleets of tankers operating throughout the state. At the same time, White Consolidated continued its ambitious acquisition program. Over his corporate career, Mr. Porter worked on over thirty acquisitions for White Motor and White Consolidated.

Squire, Sanders & Dempsey (1967 to date)

Eventually the McAfee firm merged with Squire, Sanders & Dempsey in 1967, the year Mr. Porter became a partner. The merger resulted in a 125-man firm, which today has grown to 425 lawyers. Upon joining Squire, Sanders & Dempsey, Mr. Porter was assigned to the Corporate Department where his corporate and acquisition work for White Consolidated continued unabated. Around 1970, Mr. Porter was asked to transfer to the Squire, Sanders trial department because of his antitrust and trial experience. Mr. Porter has been in the trial department ever since, handling many of the major pieces of litigation over the last twenty years. Since 1984, Mr. Porter has been head of the Squire, Sanders trial department which has grown to 120 trial lawyers and 40 legal assistants in five offices (Cleveland, Columbus, Washington, Miami and Phoenix). This responsibility has given him general familiarity with almost every facet of trial and appellate litigation.

Trial Experience

The nature of Mr. Porter's trial experience has been very broad-gauged (jury and bench trials) in Federal and state courts representing both corporate plaintiffs and defendants. The emphasis, however, has been on business, product liability and antitrust cases. Some highlights over the last twenty years have included: a multi-million dollar case for the Chicago & Northwestern Railway Co. v. McDowell-Wellman Engineering involving an iron ore transfer facility at Escanaba, Michigan; the defense of Austin Power Co. arising out of the Shaker Heights Police Station explosion; prosecution of a defective range burner recall case on behalf of Kelvinator v. Teledyne in Grand Rapids, Michigan; unfair competition cases for Anheuser-Busch, Mr. Coffee and Southern Ohio Bank; a private antitrust case against an asphalt paving monopolist in Northwestern Ohio (tried twice successfully to juries in Toledo); recovery of \$5 Million for the City of Akron v. Home Insurance arising out of the explosive

destruction of two miles of Akron sewers; prosecution of a private Clayton § 7 case to prevent Whirlpool's takeover of Kitchen-Aid; and recovery of \$26 Million for Central National Bank of Cleveland v. Dow Chemical arising out of the defective product Sarabond used in the 23-story Bank building. The Sarabond case lasted four months, one of the longest jury trials in the history of Cuyahoga County.

Trial Honors

Based on his trial work, Mr. Porter was honored by induction into the American College of Trial Lawyers in 1979, an organization consisting of the finest trial lawyers in the United States (about 1% of statewide lawyers). Mr. Porter is also listed in the Best Lawyers in America for Business Litigation (1989-90) at p. 543. Only twelve trial lawyers are named in the Cleveland area. For the past two years, Mr. Porter has served as President of the Judge Anthony J. Celebrezze Inn of Court (Cleveland) chartered by the National Inns of Court Foundation in Washington, D.C. U.S. District Judge John M. Manos is Counsellor to the Inn. This is a collegial body of Master Benchers and Barristers who promote trial excellence and ethics through formal programs designed to raise the standards of the trial practice. Mr. Porter is also listed in Who's Who in American Law (1990-1991) at p. 696. He has had for many years the highest designation (av) in the Martindale-Hubbell directory of all U.S. lawyers.

Directorships and Corporate Clients

For eleven years, Mr. Porter has served on the Board of Directors of Attorneys' Liability Assurance Society Ltd./Inc. (ALAS), the largest professional liability insurer of major U.S. law firms outside of New York City. For several years, he has been Chairman of the Nominating and Compensation Committee of the Board and has been on the Claims Committee since the Company's inception.

From 1979 to 1986, Mr. Porter served as a Director of White Consolidated Industries, Inc., a publicly-held Delaware corporation headquartered in Cleveland. White Consolidated was a leading manufacturer of major household appliances, textile machinery and machine tools in the United States until acquired by Electrolux A.B., an international Swedish conglomerate in 1986.

From the early 1970's until 1986, Mr. Porter also served as a director and corporate Secretary of Austin Powder Company, a closely-held corporation in Cleveland which was a major manufacturer and national distributor of industrial, mining and construction explosives until acquired in 1987.

Professional Organizations and Admissions

Mr. Porter has been a life-time member of the Cleveland, Ohio State and American Bar Associations and has been a member of the Antitrust, Business, Banking and Litigation Sections of those associations.

Mr. Porter is admitted to practice in Ohio since 1957; and is also admitted to The United States District Court for the Northern District of Ohio; the United States Court of Appeals for the Sixth Circuit and The United States Supreme Court.

CADc
cme

THE WHITE HOUSE
WASHINGTON

November 3, 1989

Dear Mr. Moore:

Thank you for your letter recommending Clarence Thomas for appointment to the United States Court of Appeals for the District of Columbia Circuit. You will be pleased to know that the President nominated Mr. Thomas to that position on October 30. Thank you for sharing your views with this office.

Sincerely,



Lee S. Liberman
Associate Counsel to the President

Charles B. Moore
Executive Vice President
Committee for Family America
One Family America Center
723 Second Street, N.E.
Washington, D.C. 20002

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1Name of Correspondent: Charles B. Moore☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Letter expressing strong support for
the nomination of Clarence Thomas
to be a Judge for the U.S. Court of
Appeals for the 11th Circuit

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>Chgo</u>	ORIGINATOR	<u>89.10.17</u>			<u>1/1</u>
<u>Cyax07</u>	Referral Note:	<u>A: 89.10.17</u>			<u>89.10.27</u>
	Referral Note:				
	Referral Note:				
	Referral Note:				
	Referral Note:				

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

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FOR OUTGOING CORRESPONDENCE:

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Completion Date = Date of Outgoing

Comments: _____

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Always return completed correspondence record to Central Files.

Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

082284C4



COMMITTEE FOR FAMILY AMERICA

ONE FAMILY AMERICA CENTER 723 SECOND ST., N.E. WASHINGTON, D.C. 20002 (202) 544-1464

October 10, 1989

Hon. C. Boyden Gray
Counsel to the President
The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

Dear Mr. Gray:

I write to express the strongest support for the nomination of Clarence Thomas to be a judge on the U.S. Court of Appeals for the D.C. Circuit.

During his tenure as its longest serving chairman, the Equal Employment Opportunity Commission increased enforcement actions, as well as the level of damages obtained, substantially above its performance during the Carter years. The charge by some congressmen that Mr. Thomas has either "a questionable enforcement record" (Detroit News, 8-1-89) or "an overall disdain for the rule of law" (Baltimore Sun, 9-10-89), means nothing more than "we want someone more liberal."

This is not what Article II, Section 2 of the Constitution envisions for the nomination and confirmation of federal judges. Mr. Thomas is thoroughly qualified, he is the President's choice, and would make a superb addition to the D.C. Circuit.

Sincerely,

Charles B. Moore
Executive Vice President

THE WHITE HOUSE
WASHINGTON

November 3, 1989

Dear Mr. Moore:

Thank you for your letter recommending Clarence Thomas for appointment to the United States Court of Appeals for the District of Columbia Circuit. You will be pleased to know that the President nominated Mr. Thomas to that position on October 30. Thank you for sharing your views with this office.

Sincerely,



Lee S. Liberman
Associate Counsel to the President

Charles B. Moore
Executive Vice President
Committee for Family America
One Family America Center
723 Second Street, N.E.
Washington, D.C. 20002

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) _____

Name of Correspondent: _____

Mr. Charles B. Moore☐ MI Mail Report

User Codes: (A) _____

(B) _____

(C) _____

Subject: _____

*cc: of a letter from [unclear]
summed to Charles Moore re:
the recommendation of Clarence Thomas***ROUTE TO:****ACTION****DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<i>Croft</i>	ORIGINATOR	<i>8/10/31</i>			<i>1 1</i>
<i>Chat 07</i>	Referral Note: <i>A</i>	<i>8/11/01</i>			<i>58/11/11</i>
	Referral Note:	<i>1 1</i>			<i>1 1</i>
	Referral Note:	<i>1 1</i>			<i>1 1</i>
	Referral Note:	<i>1 1</i>			<i>1 1</i>
	Referral Note:	<i>1 1</i>			<i>1 1</i>

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Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

252

October 25, 1989

Dear Mr. Moore:

Thank you for your letter on behalf of Clarence Thomas.

I have forwarded your recommendation to the appropriate White House staff for their review. You can be certain that Mr. Thomas will receive every consideration for this important post.

With best wishes,

Sincerely,

John H. Sununu
Chief of Staff

Mr. Charles B. Moore
Executive Vice President
Committee for Family America
One Family America Center
723 Second Street, N.E.
Washington, D.C. 20002

JHS/MO/KW/dsf4
JHS-03

cc: C. Boyden Gray with copy of incoming (FYI)
/cc: Mike Ortega, 60 OEOB



COMMITTEE FOR FAMILY AMERICA

ONE FAMILY AMERICA CENTER 723 SECOND ST., N.E. WASHINGTON, D.C. 20002 (202) 544-1464

October 10, 1989

C.B. Gray
Hon. John Sununu
Chief of Staff
The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

*JHS-3
Mr. Moore
... Clarence
Thomas
... Mr. Thomas
cc: C. Boyden
Gray*
Dear Governor Sununu:

I write to express the strongest support for the nomination of Clarence Thomas to be a judge on the U.S. Court of Appeals for the D.C. Circuit.

During his tenure as its longest serving chairman, the Equal Employment Opportunity Commission increased enforcement actions, as well as the level of damages obtained, substantially above its performance during the Carter years. The charge by some congressmen that Mr. Thomas has either "a questionable enforcement record" (Detroit News, 8-1-89) or "an overall disdain for the rule of law" (Baltimore Sun, 9-10-89), means nothing more than "we want someone more liberal."

This is not what Article II, Section 2 of the Constitution envisions for the nomination and confirmation of federal judges. Mr. Thomas is thoroughly qualified, he is the President's choice, and would make a superb addition to the D.C. Circuit.

Sincerely,

Charles B. Moore
Executive Vice President

THE WHITE HOUSE
WASHINGTON

November 14, 1989

Dear Mr. Garment:

Thank you for your letter recommending Marshall Breger for appointment to the United States Court of Appeals for the District of Columbia Circuit. Recommendations by individuals who are familiar with a candidate's personal and professional qualifications are an important factor in the deliberations of the President's Federal Judicial Selections Committee. Thus, I can assure you that your suggestions will be given thoughtful consideration during the selection process.

Sincerely,

16/ F.B.J.

C. Boyden Gray
Counsel to the President

Leonard Garment
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

FG059-01

☐ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING

Date Correspondence
Received (YY/MM/DD) 1 / 1 / 1

Name of Correspondent: Gerard Garment

☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Letter Supporting Marshall Breger (as)
Support of his Candidacy for appointment
to the District of Columbia Circuit Court
of Appeals

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>Cruz</u>	ORIGINATOR	<u>89.11.02</u>			<u>1</u> / <u>1</u> / <u>1</u>
<u>Cruz</u>	Referral Note: <u>A</u>	<u>89.11.03</u>		<u>5</u>	<u>89.11.13</u>
	Referral Note:				
		<u>1</u> / <u>1</u> / <u>1</u>			<u>1</u> / <u>1</u> / <u>1</u>
	Referral Note:				
		<u>1</u> / <u>1</u> / <u>1</u>			<u>1</u> / <u>1</u> / <u>1</u>
	Referral Note:				
		<u>1</u> / <u>1</u> / <u>1</u>			<u>1</u> / <u>1</u> / <u>1</u>
	Referral Note:				

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Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

LEONARD GARMENT
2101 L STREET, N. W.
WASHINGTON, D. C. 20037

November 1, 1989

Dear Governor Sununu,

There is not much I can add to what you already know about Marshall Breger, but I would like to offer this word of support for his candidacy for appointment to the District Of Columbia Circuit Court of Appeals.

He is a fine lawyer and a man of impeccable character; his views are sound and he is deserving of positive attention from the Administration by reason of his years of loyal and effective service.

I enjoyed meeting you and Mrs. Sununu at the Kristols the other night.

Sincerely,

den

The Honorable John H. Sununu
Chief of Staff
The White House
Washington, D.C. 20500

CA DC
ine

THE WHITE HOUSE
WASHINGTON

November 3, 1989

Dear Mr. Jipping:

Thank you for your letter recommending Clarence Thomas for appointment to the United States Court of Appeals for the District of Columbia Circuit. You will be pleased to know that the President nominated Mr. Thomas to that position on October 30. Thank you for sharing your views with this office.

Sincerely,



Lee S. Liberman
Associate Counsel to the President

Thomas L. Jipping, M.A., J.D.
Executive Director
Save America's Youth
One Family America Center
723 Second Street, N.E.
Washington, D.C. 20002

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

- ☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
 Date Correspondence Received (YY/MM/DD) 1/1

Name of Correspondent: Thomas D. Jipping

☐ MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: Letter expressing the strongest support for the nomination of Clarence Thomas to be a judge on the U.S. Court of Appeals to the DC Circuit

ROUTE TO:	ACTION	DISPOSITION
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD
<u>Civil</u>	ORIGINATOR	<u>8/10/16</u>
<u>Clax 07</u>	Referral Note: <u>A</u>	<u>8/10/17</u>
	Referral Note:	<u>5/8/17</u>
	Referral Note:	
	Referral Note:	
	Referral Note:	
	Referral Note:	

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S
AY

Save America's Youth

One Family America Center
723 Second Street, N.E.
Washington, D.C. 20002
(202) 544-1464

082304CU
CC... OFFICE
RECEIVED

OCT 13 1989

October 10, 1989

Hon. C. Boyden Gray
Counsel to the President
The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

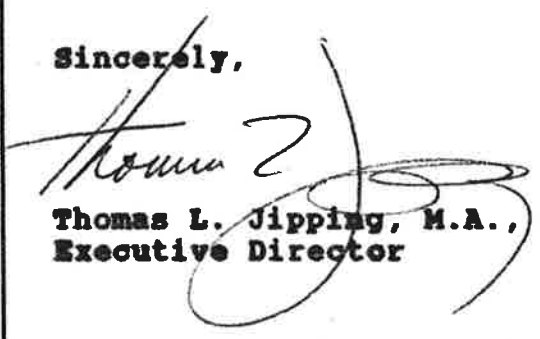
Dear Mr. Gray:

I write to express the strongest support for the nomination of Clarence Thomas to be a judge on the U.S. Court of Appeals for the D.C. Circuit.

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This is not what Article II, Section 2 of the Constitution envisions for the nomination and confirmation of federal judges. Mr. Thomas is thoroughly qualified, he is the President's choice, and would make a superb addition to the D.C. Circuit.

Sincerely,



Thomas L. Jipping, M.A., J.D.
Executive Director

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☒ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1/18Name of Correspondent: Thomas Jipping☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Letter expressing support for the nomination of Clarence Thomas to be a judge on the U.S. Court of Appeals for the D.C. Circuit

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
	<u>Croft</u>	ORIGINATOR	<u>8/10/18</u>			<u>1/1/18</u>
	<u>Croft 07</u>	Referral Note: <u>A</u>	<u>8/10/19</u>			<u>5/8/10/29</u>
		Referral Note:				
		Referral Note:				
		Referral Note:				
		Referral Note:				

ACTION CODES:

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure

- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:

- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:

- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: See: 082304cu

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083734CU

Save America's Youth

One Family America Center
723 Second Street, N.E.
Washington, D.C. 20002
(202) 544-1464

October 10, 1989

Hon. John Sununu
Chief of Staff
The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

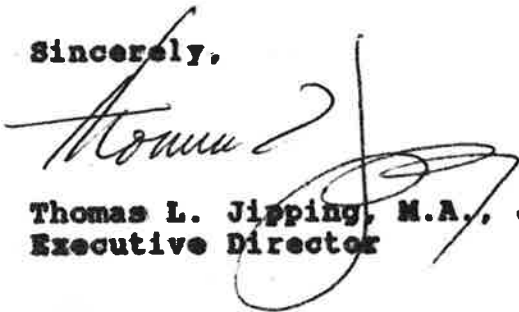
Dear Governor Sununu:

I write to express the strongest support for the nomination of Clarence Thomas to be a judge on the U.S. Court of Appeals for the D.C. Circuit.

During his tenure as its longest serving chairman, the Equal Employment Opportunity Commission increased enforcement actions, as well as the level of damages obtained, substantially above its performance during the Carter years. The charge by some congressmen that Mr. Thomas has either "a questionable enforcement record" (Detroit News, 8-1-89) or "an overall disdain for the rule of law" (Baltimore Sun, 9-10-89), means nothing more than "we want someone more liberal."

This is not what Article II, Section 2 of the Constitution envisions for the nomination and confirmation of federal judges. Mr. Thomas is thoroughly qualified, he is the President's choice, and would make a superb addition to the D.C. Circuit.

Sincerely,



Thomas L. Jipping, M.A., J.D.
Executive Director

CADC
(11/13/89)

THE WHITE HOUSE
WASHINGTON

November 3, 1989

Dear Ms. Woods:

Thank you for your letter recommending Clarence Thomas for appointment to the United States Court of Appeals for the District of Columbia Circuit. You will be pleased to know that the President nominated Mr. Thomas to that position on October 30. Thank you for sharing your views with this office.

Sincerely,



Lee S. Liberman
Associate Counsel to the President

Claudia A. Woods, Esq.
General Counsel
Save America's Youth
One Family America Center
723 Second Street, N.E.
Washington, D.C. 20002

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☒ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING

Date Correspondence
Received (YY/MM/DD)

Name of Correspondent:

Claudia A. Woods

☐ MI Mail Report

User Codes: (A) _____

(B) _____

(C) _____

Subject:

nomination of Clarence
Thomas to the U.S. Court of
Appeals for the D.C. Circuit

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Croft		ORIGINATOR	5/10/18			1/1
Quar		Referral Note:	5/10/19			5/10/19
		Referral Note:				
		Referral Note:				
		Referral Note:				
		Referral Note:				

ACTION CODES:

A - Appropriate Action
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D - Draft Response
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to be used as Enclosure

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Code = "A"
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Comments:

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Save America's Youth

One Family America Center
723 Second Street, N.E.
Washington, D.C. 20002
(202) 544-1464

October 10, 1989

CB. 6/17

Mr. John Sununu
Chief of Staff
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Nomination Of Clarence Thomas To The U.S. Court of
Appeals For The D.C. Circuit

Dear Mr. Sununu:

I am writing to thank President George Bush for his nomination of Mr. Clarence Thomas to be a federal appeals court judge on the D.C. Circuit. In addition to a letter you will receive from our Executive Director, Thomas Jipping, I am writing as a young black conservative and Christian attorney to offer my support and praise for President Bush's nomination.

While Mr. Thomas' outstanding and remarkable credentials alone make him a superb choice for the judgeship, his sensitivity and personal experiences make him an even greater choice to serve on the federal court known to decide some of the most important civil rights and constitutional questions of our country.

I also would like to thank Mr. Bush for boldly exercising his right to appoint the federal judge of his choice, regardless of the political hogwash both he and Mr. Thomas might encounter. In spite of the leftist opposition, allegedly representing the real concerns of black America, there are black Americans, including Democrats, such as myself, who think that Mr. Thomas is more than qualified for the job and will do just fine.

Mr. Sununu, I just wanted my President to know. Thank you.

Sincerely,

Claudia A. Woods, Esq.

Claudia A. Woods, Esq.
General Counsel

CAW/ca

cc: Thomas L. Jipping

... reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

George Washington's Farewell Address

THE WHITE HOUSE
WASHINGTON

November 8, 1989

Dear Justin:

Thank you for your letter recommending Clarence Thomas for appointment to the United States Court of Appeals for the District of Columbia Circuit. You will be pleased to know that the President nominated Mr. Thomas to that position on October 30. Thank you for sharing your views with this office.

Sincerely,

C. Boyden Gray
Counsel to the President

Justin Dart, Jr.
907 6th Street, S.W., Apt. 516C
Washington, D.C. 20024

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1Name of Correspondent: Justin Dart☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Letter supporting Clarence Thomas to the Federal Appeals Judge Gorsuch D.C.**ROUTE TO:****ACTION****DISPOSITION**

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>Craze</u>		ORIGINATOR	<u>89/10/17</u>			<u>1 / 1</u>
<u>Cyber 07</u>		Referral Note: <u>A</u>	<u>89/10/18</u>			<u>89/10/28</u>
		Referral Note:				
		Referral Note:				
		Referral Note:				
		Referral Note:				

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Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

Copy for Boyden Gray

0829WCU

JUSTIN DART, JR.
907 6TH STREET, S.W., APT. 516C
WASHINGTON, D.C. 20024
202-488-7684

COMMUNITY SERVICE

OCT 16 1989

October 13, 1989

THOMLTR.013

The Honorable Joseph R. Biden, Jr.
United States Senator
221 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Biden:

I write in support of the President's nomination of Clarence Thomas to be Federal Appeals Judge for the District of Columbia. I believe that his experience as Chairman of EEOC and in other roles fully qualifies him to be a federal judge.

In the course of serving five Presidential appointments in the area of disability policy, I have become aware of Mr. Thomas' consistent and knowledgeable support for the rights of people with disabilities. For example, he supported the appointment of the first disability rights attorney to become a member of the EEOC, and was instrumental in the organization of a series of successful conferences for employers on equal employment opportunity for people with AIDS.

Finally, I believe that the power to appoint federal judges is wisely vested in a democratically chosen President, and that the normal exercise of this power should be supported.

Sincerely,



Justin Dart

ACCESS TO A LIFE OF QUALITY

THE WHITE HOUSE
WASHINGTON

October 13, 1989

Dear Ms. Simmons:

Thank you for your letter recommending Dr. J. Clay Smith, Jr., for appointment to the United States Court of Appeals for the District of Columbia Circuit. Recommendations by individuals who are familiar with a candidate's personal and professional qualifications are an important factor in the deliberations of the President's Federal Judicial Selections Committee. Thus, I can assure you that your suggestions will be given thoughtful consideration during the selection process.

Sincerely,

C. Boyden Gray
Counsel to the President

Althea T. L. Simmons
Director/Chief Lobbyist
Washington Bureau, National Association for the
Advancement of Colored People
1025 Vermont Avenue, N.W., Suite 730
Washington, D.C. 20005

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1Name of Correspondent: A. Usher T. L. Simmons☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Letter recommending Dr. Clay Smith
to fill one of the vacancies on the U.S.
District Court for D.C.**ROUTE TO:****ACTION****DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>Croft</u>	ORIGINATOR	<u>89110105</u>			<u>1 1</u>
<u>at 07</u>	Referral Note: <u>A</u>	<u>89110106</u>			<u>5 89110116</u>
	Referral Note:	<u>1 1</u>			<u>1 1</u>
	Referral Note:	<u>1 1</u>			<u>1 1</u>
	Referral Note:	<u>1 1</u>			<u>1 1</u>
	Referral Note:	<u>1 1</u>			<u>1 1</u>

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Comments: _____

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079963CU

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1025 VERMONT AVENUE, N.W. • SUITE 730 • WASHINGTON, D.C. 20005
(202) 638-2269

September 27, 1989

C. Boyden Gray, Esq.
Counsel to the President
2 West Wing
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear Mr. Gray:

The National Association for the Advancement of Colored People has frequently shared its views with Republican and Democratic Administrations regarding judicial appointments to the Federal courts. The purpose of this letter is to advance the name of Dr. J. Clay Smith, Jr. to fill one of the vacancies on the United States Circuit Court for the District of Columbia.

Dr. Smith, a native of Omaha, Nebraska, is presently a professor of law at Howard University, where he recently served as dean. Dr. Smith grew up in an integrated community in Omaha. He excelled in both academics and sports. In a graduating class of over six hundred seniors, he was elected president of the senior class, a year after he attended Cornhuskers Boys' State, sponsored by the Nebraska American Legion, where he was elected governor. In both instances, Dr. Smith was the first person of his race to hold these offices. In sports, Dr. Smith competed in intercity tennis for his high school and placed second in his senior year in the intercity doubles tennis tournament. Awarded several academic scholarships, he enrolled at Creighton University, a private Jesuit university in Omaha in 1960.

On October 7, 1989, he will receive the outstanding alumni award from Creighton during a special ceremony in Omaha, Nebraska.

Dr. Smith excelled at Creighton. He debated and was elected to various offices by his peers, including the Student Board of Governors. He was the first black elected to the Board of Governors at Creighton University by the students in the College of Liberal Arts. He was graduated with a B. A. degree in 1964 and was immediately commissioned as a second lieutenant in the United States (regular) army.

Dr. Smith's entry into the United States Army was deferred, so that he could complete his legal training at the Howard University School of Law, which he did in 1967. During his three years at Howard Law School, Dr. Smith excelled as president of both the second and third year classes, and published in the Howard Law Journal. Dr. Smith then entered the United States Army as a captain, serving in the Judge Advocate General's Corps from 1967-1971.

It was during his days in the military that Dr. Smith tried his first cases and entered the newly-formed military judges program. He also acted as the Claims Judge Advocate of the military district of Washington and handled several large claims under the Federal Torts Claim Act. He won recognition for his superlative performance when he was honorably discharged from the service and awarded the Meritorious Service Medal.

Beyond his personal qualifications for the Federal bench, Dr. Smith is academically qualified. In 1970 and 1971, he earned an LL.M (labor law) and S.J.D. degrees from the George Washington National Law Center respectively. He has written extensively, and was elected to the Order of the Coif by the Coif Chapter at George Washington Law School.

Dr. Smith is also qualified to serve on the Federal bench based on his broad legal experiences. As an associate at the Washington, D. C. law firm of Arent, Fox, Kintner, Plotkin and Kahn, he worked in the anti-trust section, led by Earl W. Kintner. It was partly due to Mr. Kintner's encouragement that he wrote his doctoral dissertation on the ethical concerns involved in Federal class action litigation. Most of Dr. Smith's practice has involved Federal law and contact with Federal regulatory agencies, e.g., the Federal Trade Commission, and the Federal Communications Commission.

Dr. Smith left Arent, Fox, et al, in 1974 to become the first black appointed to a super grade position at the Federal Communications Commission, where he served as Deputy Chief of the Cable Television Bureau, and later as Associate General Counsel. At FCC, Dr. Smith, a Republican, worked under both Republican and Democratic administrations during his four years there.

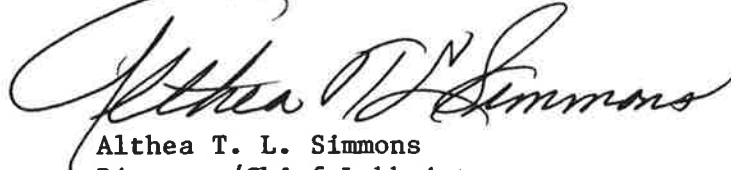
In 1978, Dr. Smith was appointed to a four-year term on the United States Equal Employment Opportunity Commission, serving as Acting Chair from 1981-1982. It was during these years that he led the Washington Bar Association as its president, the Federal Bar Association as its national president, and served in the House of Delegates of the American Bar Association.

In 1982, Dr. Smith joined the faculty at Howard University, the year that the Board of Trustees awarded him its Outstanding Alumni Award. He is currently a Fellow of the American Bar Foundation, is completing a term as Chair of the Minority Group section of the Association of American Law Schools, and is a member of the Board of Visitors at the Brigham Young University School of Law. He is a member of the Asbury United Methodist Church where he taught Sunday School for twenty years.

It is because of the broad, rich and diverse background of Dr. Smith that NAACP strongly urges that he be seriously considered for one of the vacancies on the Federal Circuit Court of Appeals in the District of Columbia.

A copy of Dr. Smith's resume is enclosed.

Sincerely yours,



Althea T. L. Simmons
Director/Chief Lobbyist

ATLS:lp

Enclosure

BIOGRAPHICAL SUMMARY
OF
J. CLAY SMITH, JR.

BORN: Omaha, Nebraska, April 15, 1942.

EDUCATION:

<u>Institution</u>	<u>Degree</u>	<u>Date</u>
Creighton University Omaha, Nebraska	A.B.	1964
Howard University School of Law Washington, D.C.	J.D.	1967
George Washington University National Law Center Washington, D.C.	LL.M.	1970
George Washington University National Law Center Washington, D.C.	S.J.D.	1977

ACADEMIC HONORS:

Order of Coif (Hon.)	George Washington University National Law Center	1978
----------------------	---	------

CAREER
SUMMARY:

<u>Position</u>	<u>Organization</u>	<u>Dates</u>
1. Captain, Lawyer	U.S. Army, Judge Advocates Generals Corps. (Awarded Dis- tinguished Service Medal (1971))	1967-1971
2. Associate (Antitrust Section)	Arent, Fox, Kintner, Plotkin & Kahn Washington, D.C.	1971-1974
3. Deputy Chief Cable Television Bureau	Federal Communications Commission	1974-1976
4. Associate General Counsel	Federal Communications Commission	1976-1978

CAREER

SUMMARY: (Cont'd)

<u>Position</u>	<u>Organization</u>	<u>Dates</u>
5. U.S. Commissioner (Appointed by President Jimmy Carter)	Equal Employment Oppor- tunity Commission	1978-1982
6 Acting Chairman (Appointed by President Ronald Reagan)	Equal Employment Oppor- tunity Commission	1981-1982
7. Professor of Law	Howard University School of Law Washington, D.C.	1982-present
8. Dean	Howard University School of Law	1986-1988

BAR ASSOCIATION

AFFILIATIONS:

<u>Position</u>	<u>Organization</u>	<u>Dates</u>
1. President	Washington Bar Association	1979-1980
2. National President	Federal Bar Association	1980-1981
3. Member	District of Columbia Bar	1968-
4. Member	Nebraska Bar	1967-
5. House of Delegates	American Bar Association	1981-1983
6. Fellow (Life)	American Bar Association Foundation	1982-
7. National Council	Federal Bar Association	1975-

SELECT HONORS, AWARDS AND

SPECIAL ACHIEVEMENTS:

<u>Description of Title/Award</u>	<u>Organization</u>	<u>Date</u>
1. Outstanding Alumnus Award (By Vote of Board of Trustees)	Howard University	1982
2. Public Member, Board of Social and Ethical Res- ponsibiliy	American Psychological Association	1985-1987

SELECT HONORS, AWARDS AND
SPECIAL ACHIEVEMENTS: (Cont'd)

<u>Description of Title/Award</u>	<u>Organization</u>	<u>Date</u>
3. Governor of Boys' State (First Black elected in nation)	American Legion (Nebraska)	1959
4. Chairman, Minority Law Professors, American Association of Law Schools	Association of American Law Schools	1989-1991

PUBLICATIONS AND PAPERS:

1955-1957

Wrote, arranged and recorded:
"Star of my Heart" (1955); "Teenage Problems" (1956); "Please Be
Mine" (1956) and "I Do" (1957).

1964

The Mystery of the Missing Link: A Defense of Faith, The Omaha Star,
July 24, 1964, at 2, col. 1.

1965

Poverty Side of the Street, Vol. 4, No. 1, The Howard University
Promethean 28 (Nov.).

1966

Sub-standard Housing and the Law in the District of Columbia,
12 How. L.J. 136 (with others).

Grieve Not For Me, Vol. 4, No. 2, The Howard University
Promethean 16 (March).

1967

Chronic Alcoholism -- Lack of Mens Rea -- A Defense to Public
Intoxication, 13 How. L.J. 202.

Public Housing, Vol. 1, No. 1, D.C. Housing Research Committee
Report, Howard University School of Law.

1969

Due Process and the Poor in Public Housing, 15 How. L.J. 422.

1970

Executive Order 10988 and 11491, and Craft Recognition in the Federal Service, 48 Military L. Rev. 1.

1972

How to Perfect a Claim Under the Federal Torts Claims Act, 8 ABA Law Notes 41 (January 1972). Reprinted in Civil Trial Practice Manual, in conjunction with the Hastings Law School-American Trial Lawyers Association Conference (1972-1975).

The Federal Trade Commission, 17 How. L.J. 724 (Book Review).

Keep on Pushin, Wash. Post, Nov. 26, 1972 at B7, col. 2.

1973

Primer on How to Perfect Claims Under the Federal Tort Claims Act, 44 Oklahoma Bar Journal 563: also, 42 Kansas Bar Journal 25.

1974

Toward a Houstonian School of Jurisprudence and the Study of Pure Legal Existence — In Memoriam of Professor Frank D. Reeves, 18 How. L.J. 1.

Codification of the Rules of Evidence: An Unreadiness, 33 Fed. B.J. 44.

District of Columbia Annotation to the Proposed Federal Rules of Evidence, 32 Fed. B.J. 270 (with Steve Phelps).

1975

Black Lawyers in the United States (1840-1900), Vol. 121, Part 13, Congressional Record 16550, 94th Cong., 1st Sess. (June 2, 1975). (Introduced by Congressman Harold E. Ford, Tenn.).

On the Federal Bar Association, Vol. 121, Part 26, Congressional Record 33954, 94th Cong., 1st Sess., (October 28, 1975). (Introduced on the Floor of the Senate by Senator Roman Hruska, Nebr.).

One Lone Kid in Boston, The Washington Star, Editorial Page, A-12 col. 3, Sept. 5, 1975, reprinted in Vol. 121, Part 24, Congressional Record 31270, 94th Cong., 1st Sess. (October 1, 1975). (Introduced by Congressman Charles B. Rangel, New York).

Bibliography-Selected Writings By Or About Black Lawyers: Towards a Houstonian School of Jurisprudence, 50th Annual Convention Program of the National Bar Association 25.

Primer on the Regulatory Development CATV (1950 - 1972),
18 How. L.J. 729.

The Role of the Military Trial Judge: An Overview, 34 Fed. B.J. 64.

Tort Law. Statement on H.R. 10439 Before the House Committee on the
Judiciary by the Chairman of the Tort Law Committee of the Federal Bar
Association, 34 Fed. B.J. 79.

Trial Advocacy: Conduct of Counsel, 22 Fed. Bar News 334.

World Peace Through Law, 22 Fed. B. News 245.

The Federal Communications Commission and EEO, 3 Cablelines Magazine 11
(Booker T. Washington Foundation Publication).

1977

The First Recipients of the Charles Hamilton Houston Medallion of
Merit, 20 How. L.J. 10.

Standards for Judicial Approval of Attorneys' Fees in Class Actions
and Complex Litigation, 20 How. L.J. 20.

Haitian Art At the World's Fair: 1893, Vol. 1, No. 6, Haitian Art
Newsletter 1 (Fall Ed.).

Dissertation. Federal Class Actions and Complex Litigation: Ethical
Concerns (for partial satisfaction of degree requirements of Doctor
of Juridical Science).

1978

Black Business in America: 1900, 6 Cablelines Magazine 10 (Booker T.
Washington Foundation Publication) (Jan./Feb.).

Haitian Art: The Brooklyn Museum Survey, Vol. 2, No. 4, Haitian Art
Newsletter 8 (Oct.-Nov.).

Haitian Art: Getting to Know You, Vol. 2, No. 1, Haitian Art
Newsletter 5 (April).

Testimony at Hearings on Nomination as United States Commissioner,
Equal Employment Opportunity Commission, Before the Committee on
Human Resources, U.S. Senate, 95th Cong., 2d Sess., Oct. 3.

1979

The Award of Attorneys' Fees in Title VII Litigation, 28 Fed. B. News 69 (1978); Vol. 1, No. 34 Legal Times of Washington, Jan. 22, 1979, p. 23. See also Daily Labor Reporter, No. 14 (BNA 1-19-79), at p. 2, A-8, D-1; Equal Employment Practice Guide — Federal Bar Assn., at Sec. ix, March.

The Broadcast Industry and Equal Employment Opportunity, 30 Labor L.J. 659 (November).

Telecommunications. The Communications Act of 1979, Vol. II, Part I, Hearings Before the Subcommittee on Communications, 96 Cong., 1st Sess., May, at pp. 377-400.

The Application of Title VII of the Civil Rights Act and Its Underlying Principles to International Law and Custom, BNA, Daily Labor Reporter, A-11, Sec. E, April 12.

My Beloved Carter G. Woodson Center, Vol. 125 Cong. Rec. No. 68, 96th Cong., 1st Sess. May 30, (Introduced by Congressman John Cavanaugh, Nebr.).

1980

A New Federal Agenda, Vol. 27, No. 10 Federal Bar News 183 (Oct.).

The Assimilation of Younger Lawyers and Recent Law Graduates Into the FBA, Vol. 27, No. 11 Federal Bar News 211 (Nov.).

Overlapping Jurisdiction of the EEOC and NLRB, 31 Labor L.J. 393 (with J.D. Schmelzer).

Career Patterns of Black Lawyers in the 1980's, 7 Black L.J. 75 (U. of Pa. Edition).

Youth Unemployment and the Age Act, 17 Legal Times of Washington 25, Sept. 29.

Apprenticeship and Age Discrimination, 8 J. of Intergroup Relations 52 (Winter 1980-1981).

Class Actions and the EEOC, 1980 Southwestern Legal Foundation, 26th Annual Institute on Labor Law 195.

Practicing Communications Law — The Tangents: The Federal Communications Commission and the Federal Trade Commission, 32 Ad. L. Rev. 457.

1980

Minority Participation in International Trade, 12 Nat'l Bar Bull. 3 (March).

Ollie May Cooper: The "Real Dean" of Howard University School of Law, 23 How. L.J. 368.

Civil Rights in the 80's. Daily Labor Reporter, A-8, Sec. E, Feb. 8.

1981

Salaries of the Federal Judiciary, Vol. 28, No. 1 Federal Bar News 231 (Jan.).

Random Concerns for the Decade, Vol. 28, No. 2 Federal Bar News 3 (Feb.).

The Competence Rule, Vol. 28, No. 3, Federal Bar News 27 (March).

The Half-Way Mark, Vol. 28, No. 4, Federal Bar News 55.

Toward an African Bar Association: A Proposal, Vol. 28, No. 5 Federal Bar News 87 (May).

CIVICS LEAP, Vol. 28, Nos. 6-7 Federal Bar News 115 (June/July).

Law, Reason and Creativity, Vol. 28, No. 8 Federal Bar News 139 (August).

Managing in a Multi-ethnic Multi-racial Workforce, Vol. 40, No. 1 Federal Bar News/Journal 163 (September).

The Marion County Lawyers' Club - 1932: A Peep at the 1980's, Before the Marion County Bar Association, Indianapolis, Ind., October 24, 1981, 127 Cong. Rec. S. 13567, 97th Cong., 1st. Sess., Nov. 17. (Introduced from the Floor by Sen. Richard G. Lugar, Indiana).

Gertrude E. Rush, Co-founder of the National Bar Association 13 Nat'l Bar Bull. 1 (June/July).

The EEOC Today -- An Update for the 1980's: A New Creativity, 1981 Labor Law Developments, 27th Annual Institute, Southwest Legal Foundation, Dallas, Tx., at 139-154.

Guidelines on Discrimination Because of Sex, 10 Cap. U. L. Rev. 471.

Affirmative Action, Daily Labor Reporter (BNA) 194, at F-1, Oct. 7.

Affirmative Action. Testimony Before the U.S. House of Representatives, Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 97 Cong., 1st Sess., October 7, 1981, reported at Labor Law Reports, OCH, Rept. No. 151, and at para. 5035 (Nov. 4).

Recent Developments in Employment Anti-Discrimination Laws, 33rd New York University Labor Conference Proceedings 121.

Labor Law. Sexual Harrassment in the Workplace, Testimony Before the U.S. Senate Committee on Labor and Human Resources, 97 Cong., 1st Sess., January 29, and April 21, at 336-396.

The Black Bar Association and Civil Rights, 15 Creighton L. Rev. 651.

1982

Budget/Management. Before the Subcommittee on Appropriations — On the Departments of Commerce, Justice and State, the Judiciary and Related Agencies, 97 Cong., 1st Sess., March 11, at 287 (1982 Budget).

In Defense of The Federal Judiciary, 29 Federal Bar News and Journal 471.

Louis Rothschild Mehlinger: The First Black Member of the Federal Bar Association, 45 Negro Hist. Bull. 93 (Dec.)

1983

The Role of Primary and Secondary School Teachers in the Motivation of Black Youth to Become Lawyers, 52 J. Negro Ed. 302.

The Marion County Lawyer's Club: 1932 and the Black Lawyer, 8 Black L.J. 170.

Toward Minority Visibility In Telecommunications Ownership, 12 Nat'l B.A.J. vii (Foreword to telecommunications symposium).

Louis Rothschild Mehlinger: The First One Hundred Years, 26 How. L.J. 459.

A Black Lawyer's Response To The Fairmont Papers, 26 How. L.J. 195.

The United States Constitution and the Black American, 14 Barrister 2.

1984

Memoriam: Clarence Clyde Ferguson, Jr., 97 Harv. L. Rev. 1267.

Forgotten Hero (Charles H. Houston) 98 Harv. L. Rev. 482. (Book Review).

Review: Affirmative Action, 27 How. L.J. 495.

The Legacy of King: America Honors a Hero, 2 New Directions 18.

Management By Delegation, 13 Bureaucrat 29 (Summer).

Testimony on The Federal Advisory Committee Act, Before The Senate Subcommittee On Investigation Management And Regulatory Affairs 98 Cong. 2d Sess. at 59 (June 21).

Brown Turns 30, 11 New Directions 24 (July).

Fortieth Anniversary of Steel and Tunstall, Vol. 2, No. 1, The Labor Agenda 5.

An Assessment of [Clarence Clyde] Ferguson's Life Has Begun, 27 How. L.J. 1079.

Deregulation of the Rule of Sevens. Testimony Before the Subcommittee on Telecommunications Consumer Protection, and Finance of the Committee on Energy and Commerce, House of Representatives, 98 Cong., 2d Sess., (Serial No. 98-176, at 69, Sept. 19), (with A. Joyner).

Mann Refuted, The Tuskegee News, July 26, at A-4, col. 1.

1985

Whither The Black Lawyer In Virginia, 34 Va. Bar News 8 (Aug.).

The EEOC's Standards for Employment Testing, 8 National Law Journal, 22, Sept. 16, (Part I).

The EEOC's Standards for Employment Testing, 8 National Law Journal 26, Sept. 30, (Part II).

The Contribution of the Howard University School of Law to the Right of the American Negro to Vote and Opening Remarks at the Howard Law Journal's Symposium on Voting Rights, 28 Howard L.J. 393.

D.C.'s Unfair Knockout of Tort Claims, 10 District Lawyer 35 (Nov.-Dec.).

Black Lawyers in the Federal Government: 1844-1940, 32 Federal Bar News and Journal 193.

Blacks and the Right, The Washington Afro-American, April 20, at 27, col. 4.

Law Professor Discusses Case, Tuskegee News, Feb. 28, at A4, col. 2.

1986

We are compelled to aid ASALH, Wash. Afro-American, July 26, at 4, col. 3.

Howard University Law School: An Investment in a New Century, Wash. Afro-American, July 5, at 5, col. 1.

The Early Days of the Howard Law Alumni Association of the Greater Washington Area, Vol. 1 No. 1 The Jurist 3 (December).

Earl Kintner: The Quiet Bumblebee, 33 Fed. B. News and Journal 106 (March) (with Justin Dingfelder).

Patricia Roberts Harris: A Champion in Pursuit of Excellence, 29 How. L.J. 437.

1987

The Valley of Opportunity, Before the entering class, Howard University School of Law, August 11, 1986, (published in Vol. 26, No. 2, The Barrister 2 (March).

Pure Legal Existence: Blacks and the Constitution, 30 How. L.J. 921.

Opening Comment, Symposium on The Legal Faces of the Hunger Problem, 30 How. L.J. 206.

Testimony Before Subcommittee on Education, Training and Employment of the Committee on Veterans' Affairs, House of Representatives (G.I. Bill), at 34-35, 39, 42-43, 166-167 (Feb. 18) (Serial No. 100-2).

1988

The MOVE Bombing, A Bibliographic Index, 31 How. L.J. 95.

THE WHITE HOUSE

WASHINGTON

July 14, 1989

CADC

Dear Ms. Murphy:

Thank you for your letter recommending Clarence Thomas. Please accept our apologies for the delay in responding. Recommendations by individuals who are familiar with a candidate's personal and professional qualifications are an important factor in the deliberations of the President's Federal Judicial Selections Committee. Thus, I can assure you that your suggestions will be given thoughtful consideration during the selection process.

Sincerely,



Lee S. Liberman
Associate Counsel to the President

Ms. Betty Southard Murphy
Baker & Hostetler
Suite 1100
Washington Square
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

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WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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☐ H - INTERNAL
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Name of Correspondent: Betty Southard Murphy

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Subject: Letter supporting the nomination of Clarence Thomas to the U.S. Court of Appeals for the D.C. Circuit to replace Judge Bork

ROUTE TO:

ACTION

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<u>Cyax07</u>	Referral Note: <u>A</u>	<u>8/05/26</u>			<u>5/10/06</u>
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May 19, 1989

The Honorable George Bush
President of the United States
The White House
Washington, D.C.

Re: Clarence Thomas

Dear Mr. President:

I am writing this letter in support of the nomination of Clarence Thomas to the U.S. Court of Appeals for the D.C. Circuit. He would be an outstanding replacement for Judge Bork.

As the Chairman of the EEOC, Clarence has done an extremely credible job under difficult circumstances. He is the type of person who would do honor to your administration. If you want any additional information, or if I could be of any further assistance, please let me know.

Sincerely,

Betty Southard Murphy
Betty Southard Murphy

BSM:ss

cc: Honorable Chase Undermeyer

JUDITH RICHARDS HOPE

40 CADG

Birth: November 30, 1940 Cincinnati, Ohio

Legal Residence: District of Columbia

Marital Status: Married Anthony J. Hope
2 children

Education: 1957 - 1961 Wellesley College
A.B. degree

1961 - 1964 Harvard Law School
J.D. degree

Bar: 1965 Ohio (inactive)
1965 District of Columbia
1969 California (inactive)

Experience: 1964 - 1967 Williams and Connolly
Associate

1968 California Rural Development
Corporation
Deputy Director

1968 - 1972 Greenberg, Bernhard, Weiss &
. Karma
Associate (part-time)

1972 - 1975 Coleman & O'Connell
Counsel (part-time)

1974 Pepperdine University
Adjunct Professor

1975 Sole practitioner
(shared ofc with Covey &
Covey)

1975 - 1977 Domestic Counsel's Office
The White House
Associate Director

1977 - 1981 Wald, Harkrader & Ross
Partner

1981 - present Paul, Hastings, Janofsky &
Walker
Partner

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