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BEEHLER, PAVITT & BETHEL*

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*GEORGE FRAZIER BETHEL
A PROFESSIONAL CORPORATION

OF COUNSEL
BEEHLER & PAVITT

February 12, 1991

Ms. Lee Liberman
Associate Counsel to the President
The White House
Washington, D.C. 20501

Re: California U.S. Central District Court Vacancies

Dear Lee:

This is to apprise you of my desire to fill one of the U.S. District Court positions here in the Central District of California, so that you will know I am sincerely interested in serving on the District Court, as well as on the Federal Circuit. My interest runs deeply into the procedural and substantive issues, and also the prospect of working with the Federal Judicial Center.

Have you had a chance to write anything since your article in the American University Law Review? I know you were somewhat concerned about the fact you did not have a chance to edit it as much as you would have liked to. However, I thought it was written with your normal enthusiastic high standards.

Cordially,

GFB/lg


George F. Bethel

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Received (YY/MM/DD) 1 1Name of Correspondent: Andrew Cord☐ MI Mail Report

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

Subject: letter from Dave Frohnmayer - interest in 9th circuit vacancy

ROUTE TO:

ACTION

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<u>CUAT 23</u>	<u>A</u>	<u>9/10/18</u>		<u>5</u>	<u>9/10/18</u>
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<u>CUGRAY</u>	<u>I</u>	<u>1 1</u>			<u>1 1</u>
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F - Furnish Fact Sheet
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THE WHITE HOUSE

1-18-91

Dear Dave -

Thank you for your letter, interest and understanding.

I will make sure the appropriate people here are aware of your "very strong interest." I will also make sure they know of my enthusiastic endorsement.

Keep in touch. - I will!

Sincerely, Andy Card

THE WHITE HOUSE
WASHINGTON

Honorable Dave Frohnmayer
Attorney General of Oregon
2875 Baker Boulevard
Eugene, Oregon 97403

AC HAS SEEN

DAVE FROHNMAYER
Attorney General of Oregon
2875 Baker Blvd.
Eugene, Oregon 97403

January 15, 1991

Dear Andy:

I know your mind is on many things these days. Nonetheless, I deeply appreciate your willingness to consider my very strong interest in the 9th Circuit vacancy.

As you requested, I enclose an updated vita. It is weighted exclusively to professional considerations. If I should recast it, or if you wish other information, please let me know. (I have provided this vita to Senators Hatfield and Packwood who were kind enough jointly to recommend my name to the Attorney General).

All best wishes, Andy. I hope you can help. In the meantime, our thoughts are with you, your colleagues and the President as you confront momentous decisions.

Warmest regards,

Dave

DAVE FROHNMAYER
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-6002

Residence
2875 Baker Boulevard
Eugene, Oregon 97403
(503) 686-0434

I. PROFESSIONAL BACKGROUND

Attorney General of Oregon (Elected: 1981-85; 1985-89;
1989-93)

- Chairman, Western Conference of Attorneys General, 1986-87
- President, National Association of Attorneys General, 1987-88
- Wyman Award, 1987 (awarded each year to the single Attorney General who best exemplifies the goals of the office)

Professor of Law (1971-80) and
Special Assistant to the University President (1971-79)
University of Oregon (Eugene, Oregon)

- Taught Constitutional law, Legislation, Torts, Legislative & Administrative Processes, Legal Issues in Health Care, Legal Issues in Education
- Legal counsel to President of University

State Representative
Oregon Legislative Assembly, three terms (1975-80)

- Served on Judiciary, Human Services, Education and other committees and task forces
- Voted highest in ranking of all 90 legislators in 1979 session for "integrity and courage" (Oregonian, August 1979)

Consultant
Civil Rights Division, U.S. Department of Justice
(1973-74)

Assistant to the U.S. Secretary of Health, Education and Welfare (1969-70)

- Writer and policy assistant for Secretaries Robert Finch and Elliott Richardson
- Top secret security clearance
- Helped develop health policy strategy for White House white paper

Associate, Pillsbury, Madison & Sutro
San Francisco, California (1967-69)

- Banking, commercial law, antitrust
- Pro bono indigent representation pursuant to appointment as counsel by Federal District Court

II. EDUCATION

Public Schools; Medford, Oregon

Harvard College, 1962, A.B.

- Magna Cum Laude in Government
- Thesis: "The Concept of the Elite and Liberal Democratic Thought"
- Phi Beta Kappa and the Detur Prize
- Publication: "The Concept of Totalitarianism and Present Day Soviet Russia," Adams House Journal of the Social Sciences

Oxford University, 1964, B.A. in Philosophy, Politics and Economics

- Rhodes Scholar
- President of Wadham College Debating Society
- Writer for The Oxford Tory

University of California, School of Law (Boalt Hall), Berkeley, California, 1967, J.D.

- Member, Board of Editors, California Law Review Research and Chief Note and Comment Editor)
- Order of the Coif
- Elected Graduation Class Speaker

Oxford University, 1971, M.A. in Philosophy, Politics and Economics

III. PROFESSIONAL STANDING

A. Ratings

Martindale-Hubble rating (1990) of "a.v." (highest rating possible by this authoritative private reference service for American lawyers).

Listed in: Who's Who in America; Who's Who in American Law; Who's Who in the West.

B. Bar Memberships and Admissions

United States Supreme Court
United States Court of Appeals for the Ninth Circuit
United States Court of Appeals for the Tenth Circuit
Oregon Supreme Court
Oregon Court of Appeals
Member, Oregon State Bar
Member, California State Bar (inactive)

IV. HONORARY DEGREES AND AWARDS

Outstanding Senior Man at Medford High School, Medford, Oregon
Detur Prize, Harvard
Phi Beta Kappa, Harvard
Rhodes Scholar, Oxford
Order of the Coif, University of California at Berkeley
Outstanding Educator of America, 1974
Eugene Junior First Citizen for Distinguished Community Service, 1974
Selected one of Five Outstanding Young Men of Oregon, 1975
Selected one of 50 legislators from 25 states to attend Eagleton Institute Conference on State Legislative Reform, 1975
Roger W. Williams Freedom of Information Award, Oregon Newspaper Publishers Association, 1981
Pioneer Award, University of Oregon, 1985
Wyman Award for Outstanding Service, National Association of Attorneys General, 1987
Parents of the Year Award (with spouse), Oregon Division of the American Association for Marriage and Family Therapy (1988)

Honorary Doctorate of Laws, Willamette University, 1988
Honorary Doctorate of Public Service, University of
Portland, 1989
Oregon Chapter of Leukemia Society of America Service to
Mankind Award, 1990

V. SUPREME COURT ADVOCACY

Personally argued and won six of seven cases before the United States Supreme Court -- the most cases and best record of any current state Attorney General.

1. Oregon v Kennedy, 456 US 667 (1982) (double jeopardy does not bar retrial of accused after prosecutor's prejudicial comment) (state prevailed)
2. Oregon v Bradshaw, 462 US 1039 (1983) (Miranda rule not expanded to exclude accused defendant's voluntary admissions initiated after proper police warnings) (state prevailed)
3. Tower v Glover, 467 US 914 (1984) (public defender not entitled to absolute immunity in case alleging massive and improbable conspiracy with prosecutors and judges) (state did not prevail)
4. Oregon v Elstad, 470 US 298 (1985) (Miranda rule not extended to exclude statements of defendant who was readvised of right to counsel after initial law enforcement error) (state prevailed)
5. Oregon Department of Fish & Wildlife v Klamath Indian Tribe, 473 US 753 (1985) (scope of treaty interpretation concerning state regulation of hunting and fishing rights on former reservation land) (state prevailed)
6. Whitley v Albers, 475 US 312 (1986) (inmates injured in suppression of prison riot not entitled to recover damages under §1983 for alleged violation of Eighth Amendment "cruel and unusual punishments" clause) (state prevailed)

-
7. Employment Div., Department of Human Resources of Oregon v. Smith, 110 S Ct 1595 (1990) (state can deny unemployment compensation for work-related misconduct based on use of drug, notwithstanding free exercise of religion claim for peyote use) (state prevailed) (see attached analysis of oral argument)

VI. SIGNIFICANT PROFESSIONAL RESPONSIBILITIES

A. Exercised national leadership in major litigation of historic significance:

1. Oil Overcharge Litigation

- (a) United States v Exxon. Co-chaired state Attorneys General task force and negotiating team since 1982. Selected by peers to present oral argument on appeal for 54 states, territories and possessions. Prevailed on oral argument, resulting in distribution of \$2.1 billion in indirect restitution to consumers through states. This was the then-largest final civil judgment in the history of American law. See United States v Exxon, 773 F2d 1240 (Temporary Emergency Court of Appeals, 1985) cert denied 196 S Ct 892 (1986).

- (b) In re Stripper Well Litigation. Co-chair of states' negotiating team. This extended proceeding culminated in the then-largest civil settlement in the history of American law (between \$4-6 billion). (administrative litigation continues)

I helped lead and participated in lengthy negotiations with states, the federal government, private parties, representatives of the petroleum industry and the general public. I presented the

single oral argument on behalf of all states, territories and possessions in favor of the settlement. (See 653 F Supp 108 (Dist Kan, 1986)) This judgment continues to benefit consumers of all American jurisdictions. (Note attached letter concerning my participation from chief U.S. Government negotiator for the Department of Energy, Avrom Landesman.)

- B. Supervised one of the largest law offices in Pacific Northwest for 10-year period -- practice involves defense against all criminal appeals (including capital cases), state civil litigation, consumer protection, organized crime prevention, child support enforcement, and legal advice and services to all Oregon state agencies and departments.
- C. Supervised state civil litigation and participated in joint federal and state investigation and prosecution of criminal acts perpetrated by leadership of Rajneesh commune in central Oregon. (1983-86) (Largest criminal conspiracy in history of Oregon.)
- D. Co-authored and supervised publication of significant manuals on administrative proceedings and open government legislation. Organized and keynoted major conferences on public law topics for citizens, government officials and attorneys. (1981-91)
- E. Editorial committee member and contributing author, The Office of Attorney General: Powers and Duties, (National Association of Attorneys General 1988)). Author and co-author of chapters entitled "Structure of State Legal Services" and "State Administrative Law."

VII. PRIZES

Each of the important professional competitions noted below was open nationally to all members of the American Bar Association. Each submission was judged anonymously by a panel of experts.

- A. First Prize, American Bar Foundation Samuel Poole Weaver Constitutional Law Essay Competition (\$5,000), 1972. Subject: "The Separation of Powers: An Essay on the Vitality of a Constitutional Idea." Published 52 Oregon Law Review 211 (1973).
- B. First Prize, American Bar Foundation Samuel Poole Weaver Constitutional Law Essay Competition (\$5,000), 1974, "An Essay on Executive Privilege." (First double winner in history of this competition.)
- C. One of three first prizes, National Legal Center for the Public Interest (\$1,000), 1979. Subject: "Official Responsibility: An Essay in Advocacy." Published Oregon State Bar Bulletin Forum, Vol. 2, No. 1 (Jan. 1980).
- D. First Prize, American Bar Association Ross Essay Competition (\$5,000), 1980. Subject: "Regulatory Reform: A Slogan in Search of Substance." Published 66 ABA Journal p. 871 (July 1980).

VIII. CRIMINAL LAW

- Executive Committee, Oregon District Attorneys Association (1981-present)
- Chair, Governor's Special Commission Against Violent Crime (1982-86)
- Chair, Governor's Commission Against Organized Crime (1981-present) (now merged to function also as U.S. Attorney's Law Enforcement Coordinating Committee)

- Author of Oregon RICO Act (see Frohnmayer, Arnold & Hamilton, "RICO: Oregon's Message to Organized Crime," 18 Willamette Law Review 1 (1982))
- Endorsed for Governor by all 36 District Attorneys and all 36 Sheriffs in Oregon (1990)

IX. SCHOLARSHIP AND PUBLICATIONS: SELECT BIBLIOGRAPHY

The following publications develop the author's perspectives on the following major themes: 1) the need for judicial self-restraint; 2) the importance of controls over abuses of administrative agency powers; 3) the role of elected officials in a separation of powers government; and 4) new mechanisms to assert the continuing importance of federalism in the American political structure:

A. Administrative Law

1. Frohnmayer, "The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform," 58 Oregon Law Review 411 (1980) (explaining complex statute and comparing state and federal administrative law developments).
2. Frohnmayer, "Regulatory Reform: A Slogan in Search of Substance," 66 ABA Journal 871 (1980) (Ross Essay Prize) (analyzes sources of regulatory power by federal agencies and proposes legislative and administrative reforms to curb excesses of authority).
3. Frohnmayer, "National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and the New Utah Administrative Procedure Act," 3 BYU Journal of Public Law 1 (1989) (comparing federal and state trends in administrative law and proposing controls on abuse of agency authority).

B. Legislative Processes

1. Linde & Frohnmayer, "Prescription for the Citizen Legislature: Cutting the Gordian Knot," 56 Oregon Law Review 3 (1977) (diagnosing the failures of the state legislative process and proposing fundamental reform to preserve the citizen legislature).
2. Frohnmayer, "The Legislative Function," 67 Oregon Law Review 41 (1988) (discussion of modern developments in state legislative procedures -- overtly opposing the creation by judiciary of monetary entitlements through expansive interpretation of state constitutional provisions).

C. Federalism

1. Frohnmayer, "A New Look at Federalism: The Theory and Implications of Dual Sovereignty," 12 Environmental Law 903 (1982) (this article examines the practical and theoretical justifications for continued vitality of the federalist principle of state authority).
2. Frohnmayer, "The Compact Clause, The Appointments Clause and the New Cooperative Federalism: The Accommodation of Constitutional Values in the Northwest Power Act," 17 Environmental Law 767 (1987) (this article examines creative possibilities of cooperative interstate agreements under the Compact Clause of the United States Constitution).

The author participated in writing the amicus curiae brief and presented oral argument on behalf of the northwest states and the National Governors Association in the principal case, Seattle Master Builders Ass'n v Pacific Northwest Elec. Power and Conservation Planning Council, 786 F2d 1359 (9th Cir 1986), cert denied, 479 US 1059 (1987).

D. Judicial Process and Judicial Review

1. Frohnmayer, "Legislatures and the Courts: Guarding the Guardians," 59 State Government 7 (1986) (critical of activist courts and noting limitations of courts as advocates of new social policies).
2. Frohnmayer, "Of Legislative Intent, the Perils of Legislative Abdication, and the Growth of Administrative and Judicial Power," 22 Willamette Law Review 219 (1986) (argument for clear legislative standards to control otherwise questionable activism by courts and administrative agencies).
3. Frohnmayer, "The Courts as Referee," in Frohnmayer & Baum, eds. The Courts: Sharing and Separating Powers at p. 51 (Eagleton Institute of Politics: 1989) (symposium presentation noting abdication of authority by elected officials to courts, and urging reassertion of legislative and executive's institutional power).
4. Frohnmayer, "The Separation of Powers: An Essay on the Vitality of a Constitutional Idea," (Weaver Essay Prize, supra) (urges vigorous assertion of powers by legislative and executive branches without requirements of exhaustive judicial review).
5. Frohnmayer, "Effective Written Argument," in Oregon State Bar Continuing Legal Education, Appellate Practice chapter 2 (1987) (discussing effective techniques for briefing federal and state appeals).

X. NATIONAL AND COMMUNITY SERVICE

Member, Board of Directors, National Marrow Donor Program
Member, Board of Directors, Lane County Chapter,
American Red Cross
Member, Board of Directors, Oregon Chapter, The Nature
Conservancy

Founder and Coordinator, Fanconi's Anemia Support Group
Campaign Steward, Oregon Committee for the Humanities
Honorary Chairman, Children's Miracle Network Telethon
for Sacred Heart Hospital (Eugene) and Doernbecher
Children's Hospital (Portland)
Member, Board of Content Advisors, The Constitution
Project (public television and educational film series
on the United States Constitution)
Advisory Board Member, Oregon Federation of Parents for
a Drug Free Youth
Board Member, Citizens for a Drug Free Oregon
Member, Honorary Support Group of Oregon Generations
Together
Honorary Chairperson, 1989 and 1990 Oregon Special
Olympics Law Enforcement Torch Run
Member, Doernbecher Children's Hospital Foundation
Advisory Board

XI. PERSONAL

- Born Medford, Oregon; July 9, 1940
(SSN 542-44-8898)
- Married to Lynn Diane Frohnmayer, National
Consultant on Child Abuse and Permanent Planning
for Foster Care Children
- Children:
Daughter, Kirsten, born 2-10-73
Son, Mark, born 7-19-74
Daughter, Kathryn, born 11-18-78
Son, Jonathan, born 12-7-84
Daughter, Amy, born 2-25-87
- Health: Excellent
- Hobbies: Skiing, white-water rafting, cycling,
gardening, music

confronted with the hidden, abused child, he told Burns, could not rely on a neglect or abuse statute. Added Scalia sarcastically: "Tough luck, kid. You're going to have to die, huh?"

Still not getting the answers he wanted, Scalia scolded Burns: "You have to fall back on the position that if there is no other way to prevent the social harm—even if it's as severe as the death of an individual—no other way to prevent that other than to punish the person who doesn't give you the information, that's too bad; you must let the harm occur."

Dryly, Burns said that situation did not exist "in the real world, in Maryland." But instead of talking about immunity as a way of getting information from the mother, Burns continued to focus on the neglect statute alternative.

Later, Burns missed repeated opportunities to show compassion for Maurice's plight without abandoning his own client. For example, Justice Kennedy told Burns at one point, "There is . . . the very real possibility that while we sit here this morning, that child is in need of care." Barely conceding the point, Burns commented blandly, "To be frank, your judgment [about that] is as good as mine."

And when Kennedy pressed Burns to say whether his client's Fifth Amendment right "overrides any interest we have in the welfare of that child," he found no way to soften an affirmative answer. Finally, Kennedy remarked, "And so you're saying that there is nothing that can be done for the welfare of the child." At that point, Burns's argument seemed beyond rescue.

DRUGS AND RELIGIOUS FREEDOM: David Frohnmayer's argument in *Employment Division of Oregon v. Smith* was a reminder of an old adage: A "slippery slope" argument is one of the easiest to make to the Court, but it is also one of the hardest to make well. Frohnmayer did so well with it that his opponent, Craig Dorsay, seemed caught in the downhill slide.

The *Smith* case is before the Court a second time. It involves two members of the Native American Church who were fired from their county jobs as drug abuse counselors because they ingested peyote buttons as part of a sacred Indian religious ritual. They were denied unemployment compensation—a denial they claimed violated their religious freedom.

In 1988 the Court ruled that if peyote use was a crime in Oregon, the state need not pay unemployment, but the Court did not address whether the Constitution protected the use of such a drug for religious purposes. Oregon's Supreme Court later ruled that it is unconstitutional to prosecute Native American Church members who use the drug in good faith for religious purposes. Therefore, the state court concluded, the state could not deny unemployment to the fired church members.

Frohnmayer, Oregon's attorney general, brought the case back to the Court on the constitutional issue. He lost no time suggesting that a ruling in favor of Native Americans' use of peyote could not be held to that situation alone. The issue, he said at the

outset, is, "Does the free exercise clause [of the First Amendment] require every state to exempt religious peyote use by the Native American Church, or perhaps even beyond that, other substance use by other religions, from the reach of generally applicable criminal laws?"

Frohnmayer began with a somewhat charitable bow to the sincerity of Native American Church members' fear that their religion would be threatened if peyote use were outlawed. He then used a question by Justice Scalia to emphasize that the case would extend to other claims of religious drug use.

Perhaps the most compelling aspect of the attorney general's "slippery slope" argument was the point he made more subtly. Playing upon the Court's worries about the scourge of drug abuse, Frohnmayer stressed heavily the "dangerous and powerful" nature of peyote as a hallucinogenic drug. He then linked that with the prospect that "other religions using other drugs" would be next in line for a religious exemption.

It was obvious that Frohnmayer was attempting to convince the justices that *Smith* was drawing the Court toward legitimizing illicit use of a wide variety of destructive substances, worsening the nation's overall drug problem.

was not a theoretical problem, since the Oregon courts now had before them a plea for exemption from Oregon's drug laws for religious users of marijuana.

Helping Frohnmayer's argument along further, Justice Scalia suggested that it was not just a problem of marijuana, but of "any other hallucinogenic drug, I would assume." Said the attorney general somewhat demurely: "Justice Scalia, that is one of the major reasons we have brought this case to this Court for a second time." The case, he added, "is in fact the thin edge of the wedge in which analytical distinctions are extremely difficult to draw."

The attorney general then maneuvered well around a line of questioning Justice Stevens initiated. If a state could flatly ban the use of drugs in religious ceremonies, Stevens asked, what about sacramental wine? Frohnmayer first said that that was not a controlled substance, adding that an argument for "religious accommodation" would be different for wine.

Seeing a way to strengthen his argument against peyote, the attorney general renewed his emphasis on the "very dangerous" character of a hallucinogenic drug.

Frohnmayer still had one more "slippery slope" plea to make for his

understandable, emotionally driven effort to shift the hearing away from the antidrug atmosphere Frohnmayer had left.

Justice Scalia, for one, was not diverted. "Do you disagree with what the attorney general said, that the whole purpose of the ingestion of peyote is its hallucinogenic effect?" Dorsay said he did not; however, he did disagree "that that ingestion is harmful."

He then launched into an argument that the Native American Church's history showed no evidence of misuse of peyote—clearly an attempt to refocus the Court's attention on the possible virtue of a single, narrow exemption for that church's practice.

Dorsay was unable to go very far with that, however, because he soon got bogged down in a series of questions over the unemployment compensation issue.

Taking up the constitutional argument, the Native Americans' lawyer then tried to meet Frohnmayer's drug abuse arguments directly. "We do not have any evidence in this case that peyote has been abused or that it contributes to the drug abuse problem," he asserted.

But that did not work particularly well for Dorsay, either. Justice Scalia, while conceding that there might be no risk of peyote's use spreading beyond that one church, nevertheless wondered why states could not ban even that use, on the simple premise that the drug was "dangerous."

When Dorsay replied that an official belief that a religious practice might be harmful was not enough to ban it, Scalia interrupted, "Excuse me, what do you mean? . . . You would not accept scientific evidence that the use of peyote is physically harmful?" Dorsay said he would not accept that. It was obvious, however, that he was simply inviting the Court into an unproductive inquiry: how to decide which scientific evidence to accept.

A bit later Justice White, picking up on the main "slippery slope" theme of the attorney general, pressed Dorsay about possible claims for religious exemptions for other drugs. The lawyer argued that a ruling his way would probably extend to other churches that make peyote use a ritual, but, he added, peyote would be "unique."

Justice O'Connor, however, was not willing to let him stop there: "How about marijuana use by a church that uses that as part of its religious sacrament?" Dorsay answered, weakly, "Well, see, I think we can get into a lot of examples, and I don't want to go down that road too far." Tellingly, O'Connor interrupted, "I'll bet you don't!" The courtroom burst into laughter—confirming how well the Frohnmayer argument had gone over with the crowd.

Indeed, the remainder of the argument was largely devoted to questions that the attorney general's argument had stirred among the justices—including a question (perhaps not entirely serious) from Scalia, wondering about a religious exemption for human sacrifice, when "only the Aztecs" would be accommodated.

There were no points of strong recovery by Dorsay.

If peyote lawfully could be used in a religious ritual, "how about marijuana use by a church?" Justice O'Connor wondered.

Justice Kennedy saw the connection immediately, wondering if there was any evidence of "the danger that peyote is diverted from religious use and, say, sold on the street in the normal drug distribution channels." The state's lawyer said that it was so available, "although not in great amounts." The unstated, but clear, implication was that the flow might increase after the *Smith* case.

When Frohnmayer was left alone to pursue his own line of argument, he ticked off the governmental interests in banning peyote and other drugs from authorized religious use. He warned of "a patchwork of exemptions of other drugs on a drug-by-drug, religion-by-religion, believer-by-believer basis."

In another variation of the "slippery slope" argument, the attorney general voiced his worry that if the Court allowed only the use of peyote and only by the Native American Church, then the problem of religious favoritism would arise, forcing state legislatures into the midst of potential Establishment Clause problems. And, he told Justice Kennedy, the only way out of those problems would be to "treat other religions clamoring for equal treatment on similar grounds in similar ways."

Sympathetically, Justice White told him a moment later, "You just don't want to have to face up to those problems. You want not to have any exemption at all." Said Frohnmayer: "That is correct." He added that it

side. He claimed that religious practices "can and do change." Thus, he said, the Court should be wary of fixing a practice as constitutionally protected so that there would be no stopping it if, in the future, it became an undeniably unsafe practice.

The attorney general's performance confronted his adversary with an uphill struggle. Dorsay, the director of the Oregon Legal Services Native American program in Portland, sensibly took on first the issue that Justice Stevens's questions about sacramental wine had raised. He slyly suggested that Frohnmayer had made what was, in essence, an ethnically biased argument.

"If Indian people were in charge of the United States right now, or in charge of the government," said Dorsay, "and you look at the devastating impact that alcohol has had on Indian people and Indian tribes through the history of the United States, you might find that alcohol was the Schedule One substance and peyote was not listed at all. And we are getting here to the heart of an ethnocentric view, I think, of what constitutes religion in the United States. And I think that needs to be looked at very hard before determining what is a dangerous substance and what is not."

The comment, of course, would have been more to the point if the issue in the case were whether a state could ban peyote as a general proposition. Even so, it was a somewhat

"July 17, 1986

"Dear Dave,

"As we await the final signal from the District Court in Wichita to implement the Settlement Agreement, I wanted to take this opportunity of letting you know how honored I feel to have worked with you on this exciting project. It is heart warming to realize that a man with such outstanding talent and personal integrity is a leader in the public sector on behalf of the States. Your good common sense and healthy insights were instrumental in making possible what will be regarded as a major breakthrough in the field of restitution and in the peaceful resolution of complex litigation. I very much appreciate the leadership you gave on many occasions and the wonderful spirit of compromise you spread throughout the settlement community. I hope there will [be] future occasions in which our paths will cross, particularly in peaceful settlements.

With best regards,

Avrom"

[Reproduction of actual handwritten letter (see reverse side) from Avrom Landesman, former Deputy Special Counsel and Director of Enforcement Programs for the Economic Regulatory Administration, U.S. Department of Energy, to Attorney General Dave Frohnmayer]

THE WHITE HOUSE
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DATE RECEIVED: JANUARY 21, 1991

NAME OF CORRESPONDENT: THE HONORABLE CONRAD BURNS

COUNSEL'S OFFICE
RECEIVED

SUBJECT: RECOMMENDS JACK RAMIREZ FOR A POSITION ON
THE NINTH CIRCUIT COURT OF APPEALS

FEB 1 1991

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	91/01/21	TC	TC
CHOC	REFERRAL NOTE:	A	91/02/04		1/1
L A HOLL	REFERRAL NOTE:	F	91/02/04		C 1/1 TC
99 DOT	REFERRAL NOTE:	F	91/02/04		C 1/1 TC
PPBULL	REFERRAL NOTE:	F	91/02/04		C 1/1 TC
Cuat 23	REFERRAL NOTE:	A	91/02/06	S	91/02/16 by
COMMENTS:	Reviewed. No further action necessary.				
	NRAP/KRM				
	3/6/91.				

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.

January 29, 1991

Dear Conrad:

Thank you very much for your recent letter to the President highly recommending your Chief of Staff, Jack Ramirez, for appointment to the Ninth Circuit Court of Appeals.

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 Jack. 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 Conrad Burns
United States Senate
Washington, D.C. 20510

FDM:HGP:

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

United States Senate

WASHINGTON, DC 20510-2603

January 17, 1991

FM
The Honorable George Bush
The White House
Washington, DC 20500

Dear Mr. President:

I recently learned that a vacancy will occur on the Ninth Circuit Court of Appeals around February 1, 1991.

My Chief of Staff, Mr. Jack Ramirez, has applied for the appointment to the Ninth Circuit. I believe it would be an excellent decision for you, for the judicial system, for this country, and for my state of Montana.

Jack Ramirez, at age 51, has a long and distinguished political and legal career. He was a senior partner in Montana's largest law firm before taking a leave of absence, at my request, to serve as my chief of staff. He is a noted trial lawyer in Montana and has been honored by designation as a Fellow of the American College of Trial Lawyers and an Advocate in the American Board of Trial Advocacy. He has the highest rating from Martindale-Hubbel and is listed in America's Best Lawyers.

Jack has also paid his dues as a Republican many times over. He served over twelve years in the Montana Legislature. In 1979, he was elected Minority Leader in the House in only his second term--something that was unprecedented then and has not occurred since. After his second term, he gave up his seat in the legislature to run for Governor of Montana. He won the Republican nomination in a three-way primary, but lost the general election. He was later re-elected to the legislature and was immediately selected again by his peers to serve in the leadership. He was Minority Leader of the House in his last term when he decided not to run again for the legislature.

Jack was one of your early supporters, serving as early as 1986 on the committee promoting your candidacy in Montana. He is conservative in his philosophy, but he is also very practical politically. He has been an advisor in numerous Republican campaigns in Montana, including my successful campaign against former Senator John Melcher.

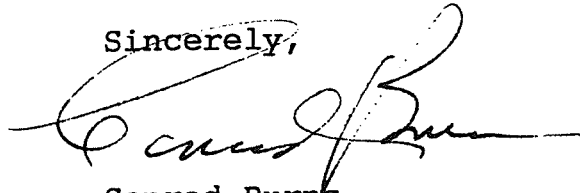
I obviously do not want to lose Jack as my Chief of Staff, but he has too much to offer this country and deserves more personally.

The Honorable George Bush
January 17, 1991
Page 2

Montana has not fared well on the court. The Ninth Circuit has traditionally selected one judge from each of the smaller states. Montana's "representative" has been Judge James R. Browning, a Kennedy appointee. Judge Browning received his law degree from the University of Montana Law School in 1941, but left the state immediately after graduation and never lived or worked as an adult in Montana. He came to Washington after Law school, worked for the Justice Department and then a Washington law firm, and was appointed to the circuit court in 1961 by President Kennedy. Browning, who is 71 years of age, recently went on a reduced caseload. All other states in the Ninth Circuit have fully active representatives. It is clearly Montana's turn for an appointment to the Ninth Circuit, particularly when we have such an outstanding candidate.

I do not know of a man in Montana who has more support from the legal, business, government and political communities. I sincerely ask for your favorable action.

Sincerely,

A handwritten signature in cursive script, appearing to read "Conrad Burns", written in dark ink.

Conrad Burns
United States Senator

CRB/pad

cc: Mr. Fred McClure
Mr. Boyden Gray
The Honorable Richard Thornburgh
Mr. Chase Untermeyer

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

rec'd 2/7
5:30 pm

DATE RECEIVED: JANUARY 30, 1991

NAME OF CORRESPONDENT: THE HONORABLE TED STEVENS

SUBJECT: RECOMMENDS JUDGE ANDREW KLEINFELD FOR AN
APPOINTMENT TO THE NINTH CIRCUIT COURT OF
APPEALS

FILE 2-1001

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	91/01/30	FM	A 91/01/31/TO
C40FC	REFERRAL NOTE:	A	91/02/04		I I
LAHoi.	REFERRAL NOTE:	I	91/02/04		C I I
99DOJ	REFERRAL NOTE:	I	91/02/04		C I I
PP Bull	REFERRAL NOTE:	I	91/02/04		C I I
Cuat 23	REFERRAL NOTE:	A	91/02/06	S	91/02/16/09
COMMENTS: ENCLOSURE <u>Reviewed. NO further action</u> <u>necessary. UPAP/KRM 3/6/91</u>					

ADDITIONAL CORRESPONDENTS: 2 MEDIA:L INDIVIDUAL CODES: 1220 1240
 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.

January 31, 1991

Dear Don:

Thank you very much for your recent letter to the President highly recommending Judge Andrew Kleinfeld for appointment to the Ninth Circuit Court of Appeals.

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 Kleinfeld. 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 Don Young
House of Representatives
Washington, D.C. 20515

FDM:HGP:

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

January 31, 1991

Dear Frank:

Thank you very much for your recent letter to the President highly recommending Judge Andrew Kleinfeld for appointment to the Ninth Circuit Court of Appeals.

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 Kleinfeld. 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 Frank H. Murkowski
United States Senate
Washington, D.C. 20510

FDM:HGP:

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

January 31, 1991

Dear Ted:

Thank you very much for your recent letter to the President highly recommending Judge Andrew Kleinfeld for appointment to the Ninth Circuit Court of Appeals.

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 Kleinfeld. 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 Ted Stevens
United States Senate
Washington, D.C. 20510

FDM:HGP:

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

ROBERT C. BYRD, WEST VIRGINIA, CHAIRMAN

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PETE V. DOMENICI, NEW MEXICO
CHARLES E. GRASSLEY, IOWA
DON NICKLES, OKLAHOMA
PHIL GRAMM, TEXAS

United States Senate

COMMITTEE ON APPROPRIATIONS

WASHINGTON, DC 20510-6025

January 29, 1991

JAMES H. ENGLISH, STAFF DIRECTOR
J. KEITH KENNEDY, MINORITY STAFF DIRECTOR

Frank H. Murkowski
The Honorable George Bush
The President
The White House
Washington, D.C. 20500

Dear Mr. President:

We understand that a vacancy recently opened up on the Ninth Circuit Court of Appeals. As you know, Alaska has not had an active judge on the Ninth Circuit since Judge Boochever assumed senior status in the mid-1980s. We are writing to request that you give serious consideration to selecting an Alaskan to fill the recent vacancy.

We strongly recommend Andrew Kleinfeld, who currently serves as a U.S. District Court Judge in Alaska. Russell Holland, the Chief Judge of the District of Alaska, supports our recommendation.

Judge Kleinfeld enjoys an excellent reputation within the Alaska Bar Association for his work as a private practitioner and a judge. During his fifteen years as a trial lawyer in Fairbanks, he received the highest rating possible from the Martindale-Hubbell Law Directory for his ethical and professional standards. His experience as a trial court judge and his service on the Ninth Circuit and other appellate panels make him an excellent candidate for the Ninth Circuit vacancy.

We recommend Judge Kleinfeld to you without reservation. Enclosed is a copy of his resume. We hope that you will give his candidacy favorable consideration.

With best wishes,

Cordially,

Frank H. Murkowski
FRANK H. MURKOWSKI
United States Senator

Ted Stevens
TED STEVENS
United States Senator

Don Young
DON YOUNG
Congressman for All Alaska

Enclosure

RESUME OF ANDREW J. KLEINFELD

January 13, 1991

PROFESSIONAL EXPERIENCE

Judge, United States District Court, District of Alaska, since July 14, 1986.

I regularly sit in Anchorage, Fairbanks, and Ketchikan, and have also sat in Nome. Like most judges in this circuit, I have served on panels of the Court of Appeals for the the Ninth Circuit. I also served on an appellate panel for the High Court of American Samoa.

Trial lawyer, Fairbanks, Alaska, 1971-1986.

I was a general practitioner. While the largest part of my practice was insurance defense litigation, I also did commercial litigation, plaintiffs' personal injury litigation, business and estate planning, pro bono litigation, and appellate litigation. In the early years of my practice, I also did domestic relations and criminal defense litigation.

The Martindale-Hubbell Law Directory, the comprehensive directory of the profession, rated me "av," its highest rating for both professional and ethical standards, from approximately 1981, when I first had sufficient experience to qualify for that rating. These ratings are awarded on the basis of confidential written and oral evaluations by the bench and bar in one's community.

United States Magistrate (part time), Fairbanks, Alaska, 1971-1974.

Law clerk to Justice Jay A. Rabinowitz, Alaska Supreme Court, 1969-1971.

Admitted to Alaska and Massachusetts bars, 1970 and 1973 respectively.

PROFESSIONAL ACTIVITIES

President, Alaska Bar Association, 1982-1983.

Board of Governors, Alaska Bar Association, 1981-1984.

President, Tanana Valley Bar Association, 1976-1977; vice-president 1974-1976; treasurer 1973-1974; secretary 1971-1973.

EDUCATION

Harvard Law School, J.D. 1969, cum laude;
Legislation Editor, Harvard Journal on Legislation.

Wesleyan University, Middletown, Connecticut, B.A. 1966, magna cum laude;
Phi Beta Kappa; High Distinction in social studies.

OTHER PUBLIC ACTIVITIES

Since becoming a judge, I have lectured extensively on legal topics for the Alaska Bar Association, the Tanana Valley Bar Association, and the Anchorage Bar Association. I have also presented numerous lectures on the Constitution, at schools, the University of Alaska, Bicentennial events, and elsewhere.

My publications (other than published decisions) include articles and book reviews on such legal topics as the Alaska civil rule on attorneys' fees awards, landlord tenant litigation, lawyers for people of moderate means, litigating with the federal government, school law, and domestic relations law.

Prior to becoming a judge, I was active in Republican Party politics in Alaska, and served on various boards over the years.

During the 1970s, I served as a lecturer at the University of Alaska on constitutional law, business law, and estate planning.

From 1985 to 1989, I taught at the Jewish Sunday School in Fairbanks.

PERSONAL

Born June 12, 1945.

Married since June 18, 1967 to Judith S. Kleinfeld, Professor of Psychology and Director of Northern Studies, University of Alaska.

Three children, Daniel Jonathan, Rachel Rebecca, and Joshua Seth, 16, 14, and 12 years old.

ADDRESS:

In Anchorage -
Federal Building - U.S. District Court
222 West Seventh Ave., Box 12
Anchorage, AK 99513
(907) 271-5625

In Fairbanks -
Federal Building - U.S. District Court
101 Twelfth Avenue, Box 1
Fairbanks, Alaska 99701
(907) 452-3213

75

ID# 212344

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

251 wdf
2/20

INCOMING

FG 052

DATE RECEIVED: FEBRUARY 12, 1991

NAME OF CORRESPONDENT: THE HONORABLE STEVE SYMMS

SUBJECT: RECOMMENDS JACK S. RAMIREZ FOR THE VACANCY
ON THE NINTH CIRCUIT COURT OF APPEALS

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	91/02/12	Sm	A 91/02/13
CUGray	REFERRAL NOTE:	A	91/02/20	L	1/1
LA Hall	REFERRAL NOTE:	I	91/02/20	L	C 1/1
99DOT	REFERRAL NOTE:	I	91/02/20	L	C 1/1
PP Bull	REFERRAL NOTE:	I	91/02/20	L	C 1/1
CUAT07	REFERRAL NOTE:	A	91/02/20	S	91/03/04

COMMENTS: Case out 2/25/91
Answered
Copies to CUAT 23

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

*ACTION CODES: *DISPOSITION *OUTGOING *
* * * * *
*A-APPROPRIATE ACTION *A-ANSWERED *CORRESPONDENCE: *
*C-COMMENT/RECOM *B-NON-SPEC-REFERRAL *TYPE RESP=INITIALS *
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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.

February 13, 1991

Dear Steve:

Thank you very much for your recent letter to the President highly recommending Jack S. Ramirez for appointment to the Ninth Circuit Court of Appeals.

We appreciate receiving your personal endorsement on behalf of Mr. Ramirez. I have taken the liberty of sharing your letter with the Office of the White House Counsel. You can be sure that the President's advisors will give Mr. Ramirez their most 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 Steven D. Symms
United States Senate
Washington, D.C. 20510

FDM:TSB:

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

Steve Symms

United States Senate

WASHINGTON, DC 20510

February 4, 1991

The Honorable George Bush
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

I understand there may soon be a vacancy on the Ninth Circuit Court of Appeals. I strongly recommend Jack S. Ramirez, Chief of Staff to Senator Conrad Burns of Montana.

Jack is clearly a dedicated, skilled professional. He has enjoyed the support of his colleagues both in the Montana legislature where he was twice-elected Republican leader and in the U.S. Senate where he is well-respected.

After 44 years living in Montana, and 20 years litigating and trying a wide variety of cases including natural resources, malpractice and railroad and product liability, Jack will serve the people of the Ninth Circuit with impartiality and experience in issues critical to the West. In addition to membership in the appropriate professional and political organizations, Jack was selected for partnership of his firm in 1972.

It is very fortunate that this vacancy will occur at a time when someone like Jack Ramirez is available to accept the nomination. Again, I urge you to select Jack for this most important judgeship. Please contact me if I could be of any assistance.

Sincerely,

Steve Symms
Steve Symms
United States Senator

SS/nor

cc. Attorney General Richard Thornburgh

DISTRICT OF ALASKA

H. Russel Holland

Chief Judge; Alaska
U.S. District Court; 222 West 7th Avenue; Box 54
Anchorage, AK 99513; (907) 271-5621
Spouse: Diane Holland; Children 3 adult children
Born 1936; appointed in 1984 by President Reagan

Education Univ. of Mich., B.B.A., 1958, L.L.B., 1961

Private Practice Stevens & Savage, Anchorage, 1965-66; Stevens, Savage, Holland, Erwin & Edwards, Anchorage, 1967-68; solo practitioner, Law Office of H. Russel Holland, Anchorage, 1968-70; Holland & Thornton, Anchorage, 1970-78; Holland, Thornton & Trefry, Anchorage, 1978; Holland & Trefry, Anchorage, 1978-84; Trefry & Brecht, Anchorage, 1984

Government Positions Employee, Alaska Court System, Anchorage, 1961; Employee, Dept. of Justice (U.S. Attorney's Office), Anchorage, 1963-65

Professional Associations A.B.A.; Alaska Bar Assn.; Anchorage Bar Assn.

Other Activities Member, Commonwealth North (described by Judge Holland as a nonprofit, nonpartisan organization, the purpose of which is to "bring wider perspectives to public policy issues affecting Alaska")

Lawyers' Evaluation Courteous to lawyers and litigants. Not influenced by the identities of the parties or the lawyers. Has a current docket; accommodates emergency requests. Has knowledge of current legal developments and a good understanding of the issues in both complex and ordinary cases. Rules on motions promptly and knowledgeably. Does not tend to push too hard for settlement. During trial, dislikes a lawyer's making numerous objections and somewhat strictly controls a lawyer's questioning of and general behavior toward witnesses.

Specific Comments: "Settlement oriented." "Expects parties to get together and work out procedural things before trial." "Well-prepared." "Doesn't promise things he can't do." "Free from arrogance. Has impressed me more than any judge I've ever appeared before." "Can be abrupt if attorneys don't give him what he wants, but extremely courteous man in general."

Andrew J. Kleinfeld

District Judge; Alaska
222 W. 7th Avenue, Box 12; Anchorage, AK 99513; (907) 271-5625
Born 1945; appointed in 1986 by President Reagan

Education Wesleyan Univ., B.A., 1966, magna cum laude, Phi Beta Kappa; Harvard Law School, J.D. 1969, cum laude

Private Practice Solo, 1971-1986

Government Positions Law Clerk, Justice Jay A. Rabinowitz, Alaska Supreme Court, 1969-71

Previous Judicial Positions U.S. Magistrate for the U.S. District Court, District of Alaska at Fairbanks, 1971-74

Professional Associations Alaska Bar Assn.: President (1982-83), Board of Governors (1981-84), Fourth Judicial District Discipline Panel (1983-86), Fourth Judicial District Fee Arbitration Panel (1977-80, 1983-86); Alaska Supreme Court Committee on Civil Rules, late 1970s, early 1980s; Liaison to Alaska Law Review, Duke Law School, 1983-86; Tanana Valley Bar Assn.: 1970-present, President (1975), Vice President (1974), Treasurer (1973), Secretary (1971-72), Legislation Committee (1970s, 1980s)

Political Activities Alaska Republican Party; American Israel Public Affairs Committee, Washington; Alaska and National Right-To-Life

Publications President's Columns as President of the Alaska Bar Assn., 1982-1983, published in the ALASKA BAR RAG; *Alaska: Where the Loser Pays the Winner's Fees*, 24 JUDGES' JOURNAL no. 2, p. 5 (spring 1985); *On Shifting Attorney's Fees in Alaska: A Rebuttal*, 24 JUDGES' JOURNAL no. 3, p. 39 (summer 1985); *Memorandum to School Board*, July 1, 1984, FAIRBANKS DAILY NEWS-MINER, Sept., 1984; *Lathrop v. Lampert Decision Spotlighted*, ALASKA BAR RAG, Nov.-Dec. 1978, p. 7; *1 Lawyers for People of Moderate Means*, 3 UCLA-ALASKA L. REV., 102 (1973); *Schwartz and Jacoby, Litigation with the Federal Government*, 1 UCLA-ALASKA L. REV., 102 (1971); *THE BALANCE OF POWER AMONG INFANTS, THEIR PARENTS AND THE STATE*, 4 FAMILY L. Q. 320, 409 (1970), 5 FAMILY L. Q. 63 (1971); *Teacher Dismissal Legislation*, 6 HARVARD J. LEG. 112 (1968); *A Divorce Reform Act*, 5 HARVARD J. LEG. 563 (1968); *Dump It on Compuserve (And Set Yourself Free)*, 1 PCM MAGAZINE 14 (No. 7) Jan. 1984; *Easy Menus*, COMPUTER USER MAGAZINE, Feb. 1984, at 69.

Noteworthy Rulings 1987: Granted defendants' motion for summary judgement after veteran brought action against U.S. News & World Report, its publisher, senior editor, and bureau chief for defamation and other torts for an article entitled "Vietnam's Sad Legacy: Vets Living in the Wild." *Sisemore v. U.S. News & World Report, Inc.*, 662 F.Supp. 1529

1988: Granted State's motion for summary judgement in an action brought by Alaskan native villages challenging the state's refusal to recognize tribal court adoption decrees. *Native Village of Venetie, I.R.A. Council v. State of Alaska*

1988: Ruled that Rule 11 sanctions would be imposed against a law firm for non-discovery and nondisclosure of witness's repudiation of an affidavit used by the law firm as basis for opposition to motion for extension of writ of attachment against client. *United Services Funds v. Ward*, 121 F.R.D. 673

Lawyers' Evaluation Courteous to lawyers and litigants. Not influenced by the identities of the parties or the lawyers. Has a current docket; accommodates emergency requests. Has knowledge of current legal developments and a good understanding of the issues in both complex and ordinary cases. Rules on motions promptly and knowledgeably. Does not tend to push too hard for settlement. Imposes long sentences. During trial, dislikes a lawyer's making numerous objections and somewhat strictly controls a lawyer's questioning of and general behavior toward witnesses.

Specific Comments: "Slow to get his written opinions out." "Excellent grasp of the law." "Requires much paperwork." "Very courteous, broad-minded, intelligent; is doing his job well." "Tough, stern judge." "Severe in sentencing, but not biased in opinions." "Has rules requiring attorneys to be prepared well before trial." "Doesn't like time wasters." "Highly regarded by the local bar."

James M. Fitzgerald

Senior Judge; Alaska
Federal Building; 701 C St.
Anchorage, AK 99513; (907) 271-5553
Born 1920; appointed in 1974 by President Ford

Education Willamette Univ., B.A., 1950, LL.B., 1951

Military Service U.S. Army, 1940-41; U.S. Marine Corps, 1942-46

Government Positions Asst. U.S. Attorney, First and Third Districts of Alaska, 1952-56; City Attorney, Anchorage, 1956-59; Legal Counselor to the Governor of Alaska, 1959; Commissioner of Public Safety, State of Alaska, 1959

Previous Judicial Positions Superior Court Judge, Alaska, 1959-72 (Presiding Judge, 1969-72); Associate Justice, Supreme Court of Alaska, 1972-75

Noteworthy Rulings 1980: Ruled that three national monuments created in Alaska by President Carter under the 1906 Antiquities Act were legal and that Carter did not exceed the limits of presidential authority in acting to preserve the lands. Anaconda Copper Co. had challenged Carter's establishment of the Gates of Arctic, Yukon Flats, and Admiralty Island national monuments, contending that their locations could make it impossible to mine several of the company's existing claims in Alaska.

1984: Ruled that the Secretary of the Interior abused his discretion when he entered into a land exchange with three Alaska Native corporations which would have allowed St. Matthew Island in the Bering Sea to be used as an oil transshipment base. Fitzgerald held that the Secretary, in deciding the land exchange was in the public interest, failed to adequately consider the environmental consequences to St. Matthew.

1985: Ruled that the government had authority to require Marathon Oil Co. to compute natural gas royalties based on landed sales price of liquefied natural gas (LNG) sold in Japan. Marathon had contended that the LNG was a different product sold in a distant market and that royalties should be computed based on the contract price of other gas sold at the wellhead.

Lawyers' Evaluation Usually courteous to lawyers and litigants. Not influenced by the identities of the parties or the lawyers. Tends to have a current docket; accommodates emergency requests. Has knowledge of current legal developments and a good understanding of the issues in both complex and ordinary cases. Tends to award average to low attorney's fees. Rules on motions knowledgeably but not promptly. Does not tend to push too hard for settlement. Tends to favor the government in criminal cases. Imposes average sentences. During trial, somewhat dislikes a lawyer's making numerous objections and strictly controls a lawyer's questioning of and general behavior toward witnesses. Has special procedures regarding documents: Requires vigorous

pretrial preparation; evidentiary issues handled before the start of trial.

Specific Comments: "Very good judge. Slow to rule due to heavy caseload." "Will show temper if things are not done the way he wants." "Generally excellent judge, but insists on running the court by his rules and terms." "High quality bench. We're lucky to have such a conscientious judiciary."

James A. von der Heydt

Senior Judge; Alaska
Federal Building; 701 C St.
Anchorage, AK 99513; (907) 271-5582
Born 1919; appointed in 1966 by President Johnson

Education Albion College, B.A., 1942; Northwestern Univ., J.D., 1951

Private Practice Nome, 1953-59

Government Positions Deputy U.S. Marshal, Nome, 1945-48; U.S. Commissioner, Nome, 1951-; U.S. Attorney, 1951-53; House of Representatives, Territory of Alaska, 1957-59

Previous Judicial Positions Presiding Judge, Superior Court, State of Alaska, 1959-66

Professional Associations A.B.A.; American Judicature Society; Federal Bar Assn.; Alaska Bar Assn. (Member, Board of Governors, 1955-59; President, 1959-60)

Pro Bono Activities President, Anchorage Fine Arts Museum

Other Activities Wilson Ornithologists Society; Sigma Nu; Phi Delta Phi; Mason (32 degree Shriner)

Noteworthy Rulings 1984: Issued a temporary restraining order prohibiting an Arizona art dealer from selling Alaskan Indian artifacts valued at more than \$2 million.

Lawyers' Evaluation Courteous to lawyers and litigants. Not influenced by the identities of the parties or the lawyers. Tends to have a current docket; accommodates emergency requests. Some say he does not have knowledge of current legal developments nor a good understanding of the issues in complex cases. Has a good understanding of the issues in ordinary cases. Rules on motions promptly but, some say, not knowledgeably. Tends to push too hard for settlement. Some say he tends to rule for the defendant in civil rights cases and tends to favor the government in criminal cases. Imposes average to heavy sentences. During trial, dislikes a lawyer's making numerous objections and strictly controls a lawyer's questioning of and general behavior toward witnesses.

Specific Comments: "Solid. Pragmatic. Fairly good on the law". "This judge is particularly anti-labor unions." "Not the most diligent or scholarly, but has a high level of common sense." "Hates to have cases go to trial. Will force settlements." "Doesn't like to schedule trials; won't give trial dates far in advance."

Lee - As you
can see, CBO
asked me to check
with you on this.
Mary C.



CA 9

UNITED STATES SENATE
WASHINGTON, D. C. 20510

CONRAD BURNS
MONTANA

January 14, 1991

RECEIVED
JAN 14 1991

Mr. Boyden Gray
Counsel to the President
The White House
Washington, DC 20500

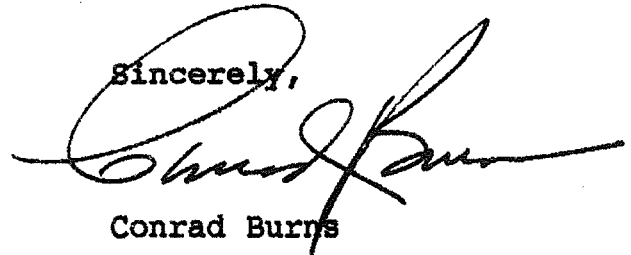
Dear Boyden:

I'm enclosing a copy of a letter I have written to President Bush asking that my Chief of Staff, Jack Ramirez, be appointed to the Ninth Circuit Court of Appeals.

I want to ask a personal favor of you. Please read the letter and call me. I'd like to know what I need to do to make this appointment happen. I've also written to Chase Untermeyer and Richard Thornburgh, but I need your help.

Thanks.

Sincerely,


Conrad Burns

But
check with
Lee
L.

Boyden —

Want me to put this
on your call sheet?

✓ Yes — No

United States Senate

WASHINGTON, DC 20510-2803

January 17, 1991

The Honorable George Bush
The White House
Washington, DC 20500

Dear Mr. President:

I recently learned that a vacancy will occur on the Ninth Circuit Court of Appeals around February 1, 1991.

My Chief of Staff, Mr. Jack Ramirez, has applied for the appointment to the Ninth Circuit. I believe it would be an excellent decision for you, for the judicial system, for this country, and for my state of Montana.

Jack Ramirez, at age 51, has a long and distinguished political and legal career. He was a senior partner in Montana's largest law firm before taking a leave of absence, at my request, to serve as my chief of staff. He is a noted trial lawyer in Montana and has been honored by designation as a Fellow of the American College of Trial Lawyers and an Advocate in the American Board of Trial Advocacy. He has the highest rating from Martindale-Hubbel and is listed in America's Best Lawyers.

Jack has also paid his dues as a Republican many times over. He served over twelve years in the Montana Legislature. In 1979, he was elected Minority Leader in the House in only his second term--something that was unprecedented then and has not occurred since. After his second term, he gave up his seat in the legislature to run for Governor of Montana. He won the Republican nomination in a three-way primary, but lost the general election. He was later re-elected to the legislature and was immediately selected again by his peers to serve in the leadership. He was Minority Leader of the House in his last term when he decided not to run again for the legislature.

Jack was one of your early supporters, serving as early as 1986 on the committee promoting your candidacy in Montana. He is conservative in his philosophy, but he is also very practical politically. He has been an advisor in numerous Republican campaigns in Montana, including my successful campaign against former Senator John Melcher.

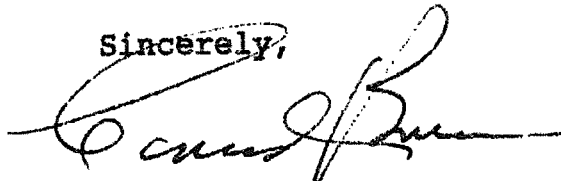
I obviously do not want to lose Jack as my Chief of Staff, but he has too much to offer this country and deserves more personally.

The Honorable George Bush
January 17, 1991
Page 2

Montana has not fared well on the court. The Ninth Circuit has traditionally selected one judge from each of the smaller states. Montana's "representative" has been Judge James R. Browning, a Kennedy appointee. Judge Browning received his law degree from the University of Montana Law School in 1941, but left the state immediately after graduation and never lived or worked as an adult in Montana. He came to Washington after Law school, worked for the Justice Department and then a Washington law firm, and was appointed to the circuit court in 1961 by President Kennedy. Browning, who is 71 years of age, recently went on a reduced caseload. All other states in the Ninth Circuit have fully active representatives. It is clearly Montana's turn for an appointment to the Ninth Circuit, particularly when we have such an outstanding candidate.

I do not know of a man in Montana who has more support from the legal, business, government and political communities. I sincerely ask for your favorable action.

Sincerely,

A handwritten signature in dark ink, appearing to read "Conrad Burns", written over a horizontal line.

Conrad Burns
United States Senator

CRB/pad

cc: Mr. Fred McClure
Mr. Boyden Gray
The Honorable Richard Thornburgh
Mr. Chase Untermeyer

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1 / 1Name of Correspondent: Andrew Card☐ MI Mail Report

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

Subject: Letter from Dave Frohnmayer - interest in 9th circuit vacancy

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>CUOFL</u>	ORIGINATOR	<u>9/10/18</u>			<u>1</u> / <u>1</u> / <u>1</u>
	Referral Note:				
<u>CUAT 23</u>	<u>A</u>	<u>9/10/18</u>		<u>5</u>	<u>9/10/2101</u>
	Referral Note:				
<u>CUGRAY</u>	<u>I</u>	<u>1</u> / <u>1</u> / <u>1</u>			<u>1</u> / <u>1</u> / <u>1</u>
	Referral Note:				
<u>CVAT 07</u>	<u>I</u>	<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:				

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

1-18-91

Dear Dave -

Thank you for your letter, interest and understanding.

I will make sure the appropriate people here are aware of your "very strong interest." I will also make sure they know of my enthusiastic endorsement.

Keep in touch. - I will!

Sincerely, Andy Card

THE WHITE HOUSE
WASHINGTON

Honorable Dave Frohnmayer
Attorney General of Oregon
2875 Baker Boulevard
Eugene, Oregon 97403

AC HAS SEEN

DAVE FROHNMAYER
Attorney General of Oregon
2875 Baker Blvd.
Eugene, Oregon 97403

January 15, 1991

Dear Andy:

I know your mind is on many things these days. Nonetheless, I deeply appreciate your willingness to consider my very strong interest in the 9th Circuit vacancy.

As you requested, I enclose an updated vita. It is weighted exclusively to professional considerations. If I should recast it, or if you wish other information, please let me know. (I have provided this vita to Senators Hatfield and Packwood who were kind enough jointly to recommend my name to the Attorney General).

All best wishes, Andy. I hope you can help. In the meantime, our thoughts are with you, your colleagues and the President as you confront momentous decisions.

Warmest regards,

Dave

DAVE FROHNMAYER
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-6002

Residence
2875 Baker Boulevard
Eugene, Oregon 97403
(503) 686-0434

I. PROFESSIONAL BACKGROUND

Attorney General of Oregon (Elected: 1981-85; 1985-89;
1989-93)

- Chairman, Western Conference of Attorneys General, 1986-87
- President, National Association of Attorneys General, 1987-88
- Wyman Award, 1987 (awarded each year to the single Attorney General who best exemplifies the goals of the office)

Professor of Law (1971-80) and
Special Assistant to the University President (1971-79)
University of Oregon (Eugene, Oregon)

- Taught Constitutional law, Legislation, Torts, Legislative & Administrative Processes, Legal Issues in Health Care, Legal Issues in Education
- Legal counsel to President of University

State Representative
Oregon Legislative Assembly, three terms (1975-80)

- Served on Judiciary, Human Services, Education and other committees and task forces
- Voted highest in ranking of all 90 legislators in 1979 session for "integrity and courage" (Oregonian, August 1979)

Consultant
Civil Rights Division, U.S. Department of Justice
(1973-74)

Assistant to the U.S. Secretary of Health, Education and Welfare (1969-70)

- Writer and policy assistant for Secretaries Robert Finch and Elliott Richardson
- Top secret security clearance
- Helped develop health policy strategy for White House white paper

Associate, Pillsbury, Madison & Sutro
San Francisco, California (1967-69)

- Banking, commercial law, antitrust
- Pro bono indigent representation pursuant to appointment as counsel by Federal District Court

II. EDUCATION

Public Schools; Medford, Oregon

Harvard College, 1962, A.B.

- Magna Cum Laude in Government
- Thesis: "The Concept of the Elite and Liberal Democratic Thought"
- Phi Beta Kappa and the Detur Prize
- Publication: "The Concept of Totalitarianism and Present Day Soviet Russia," Adams House Journal of the Social Sciences

Oxford University, 1964, B.A. in Philosophy, Politics and Economics

- Rhodes Scholar
- President of Wadham College Debating Society
- Writer for The Oxford Tory

University of California, School of Law (Boalt Hall), Berkeley, California, 1967, J.D.

- Member, Board of Editors, California Law Review Research and Chief Note and Comment Editor)
- Order of the Coif
- Elected Graduation Class Speaker

Oxford University, 1971, M.A. in Philosophy, Politics and Economics

III. PROFESSIONAL STANDING

A. Ratings

Martindale-Hubble rating (1990) of "a.v." (highest rating possible by this authoritative private reference service for American lawyers).

Listed in: Who's Who in America; Who's Who in American Law; Who's Who in the West.

B. Bar Memberships and Admissions

United States Supreme Court
United States Court of Appeals for the Ninth Circuit
United States Court of Appeals for the Tenth Circuit
Oregon Supreme Court
Oregon Court of Appeals
Member, Oregon State Bar
Member, California State Bar (inactive)

IV. HONORARY DEGREES AND AWARDS

Outstanding Senior Man at Medford High School, Medford, Oregon
Detur Prize, Harvard
Phi Beta Kappa, Harvard
Rhodes Scholar, Oxford
Order of the Coif, University of California at Berkeley
Outstanding Educator of America, 1974
Eugene Junior First Citizen for Distinguished Community Service, 1974
Selected one of Five Outstanding Young Men of Oregon, 1975
Selected one of 50 legislators from 25 states to attend Eagleton Institute Conference on State Legislative Reform, 1975
Roger W. Williams Freedom of Information Award, Oregon Newspaper Publishers Association, 1981
Pioneer Award, University of Oregon, 1985
Wyman Award for Outstanding Service, National Association of Attorneys General, 1987
Parents of the Year Award (with spouse), Oregon Division of the American Association for Marriage and Family Therapy (1988)

Honorary Doctorate of Laws, Willamette University, 1988
Honorary Doctorate of Public Service, University of
Portland, 1989
Oregon Chapter of Leukemia Society of America Service to
Mankind Award, 1990

V. SUPREME COURT ADVOCACY

Personally argued and won six of seven cases before the United States Supreme Court -- the most cases and best record of any current state Attorney General.

1. Oregon v Kennedy, 456 US 667 (1982) (double jeopardy does not bar retrial of accused after prosecutor's prejudicial comment) (state prevailed)
2. Oregon v Bradshaw, 462 US 1039 (1983) (Miranda rule not expanded to exclude accused defendant's voluntary admissions initiated after proper police warnings) (state prevailed)
3. Tower v Glover, 467 US 914 (1984) (public defender not entitled to absolute immunity in case alleging massive and improbable conspiracy with prosecutors and judges) (state did not prevail)
4. Oregon v Elstad, 470 US 298 (1985) (Miranda rule not extended to exclude statements of defendant who was readvised of right to counsel after initial law enforcement error) (state prevailed)
5. Oregon Department of Fish & Wildlife v Klamath Indian Tribe, 473 US 753 (1985) (scope of treaty interpretation concerning state regulation of hunting and fishing rights on former reservation land) (state prevailed)
6. Whitley v Albers, 475 US 312 (1986) (inmates injured in suppression of prison riot not entitled to recover damages under §1983 for alleged violation of Eighth Amendment "cruel and unusual punishments" clause) (state prevailed)

7. Employment Div., Department of Human Resources of Oregon v. Smith, 110 S Ct 1595 (1990) (state can deny unemployment compensation for work-related misconduct based on use of drug, notwithstanding free exercise of religion claim for peyote use) (state prevailed) (see attached analysis of oral argument)

VI. SIGNIFICANT PROFESSIONAL RESPONSIBILITIES

- A. Exercised national leadership in major litigation of historic significance:

1. Oil Overcharge Litigation

- (a) United States v Exxon. Co-chaired state Attorneys General task force and negotiating team since 1982. Selected by peers to present oral argument on appeal for 54 states, territories and possessions. Prevailed on oral argument, resulting in distribution of \$2.1 billion in indirect restitution to consumers through states. This was the then-largest final civil judgment in the history of American law. See United States v Exxon, 773 F2d 1240 (Temporary Emergency Court of Appeals, 1985) cert denied 196 S Ct 892 (1986).
- (b) In re Stripper Well Litigation. Co-chair of states' negotiating team. This extended proceeding culminated in the then-largest civil settlement in the history of American law (between \$4-6 billion). (administrative litigation continues)

I helped lead and participated in lengthy negotiations with states, the federal government, private parties, representatives of the petroleum industry and the general public. I presented the

single oral argument on behalf of all states, territories and possessions in favor of the settlement. (See 653 F Supp 108 (Dist Kan, 1986)) This judgment continues to benefit consumers of all American jurisdictions. (Note attached letter concerning my participation from chief U.S. Government negotiator for the Department of Energy, Avrom Landesman.)

- B. Supervised one of the largest law offices in Pacific Northwest for 10-year period -- practice involves defense against all criminal appeals (including capital cases), state civil litigation, consumer protection, organized crime prevention, child support enforcement, and legal advice and services to all Oregon state agencies and departments.
- C. Supervised state civil litigation and participated in joint federal and state investigation and prosecution of criminal acts perpetrated by leadership of Rajneesh commune in central Oregon. (1983-86) (Largest criminal conspiracy in history of Oregon.)
- D. Co-authored and supervised publication of significant manuals on administrative proceedings and open government legislation. Organized and keynoted major conferences on public law topics for citizens, government officials and attorneys. (1981-91)
- E. Editorial committee member and contributing author, The Office of Attorney General: Powers and Duties, (National Association of Attorneys General 1988)). Author and co-author of chapters entitled "Structure of State Legal Services" and "State Administrative Law."

VII. PRIZES

Each of the important professional competitions noted below was open nationally to all members of the American Bar Association. Each submission was judged anonymously by a panel of experts.

- A. First Prize, American Bar Foundation Samuel Poole Weaver Constitutional Law Essay Competition (\$5,000), 1972. Subject: "The Separation of Powers: An Essay on the Vitality of a Constitutional Idea." Published 52 Oregon Law Review 211 (1973).
- B. First Prize, American Bar Foundation Samuel Poole Weaver Constitutional Law Essay Competition (\$5,000), 1974, "An Essay on Executive Privilege." (First double winner in history of this competition.)
- C. One of three first prizes, National Legal Center for the Public Interest (\$1,000), 1979. Subject: "Official Responsibility: An Essay in Advocacy." Published Oregon State Bar Bulletin Forum, Vol. 2, No. 1 (Jan. 1980).
- D. First Prize, American Bar Association Ross Essay Competition (\$5,000), 1980. Subject: "Regulatory Reform: A Slogan in Search of Substance." Published 66 ABA Journal p. 871 (July 1980).

VIII. CRIMINAL LAW

- Executive Committee, Oregon District Attorneys Association (1981-present)
- Chair, Governor's Special Commission Against Violent Crime (1982-86)
- Chair, Governor's Commission Against Organized Crime (1981-present) (now merged to function also as U.S. Attorney's Law Enforcement Coordinating Committee)

- Author of Oregon RICO Act (see Frohnmayer, Arnold & Hamilton, "RICO: Oregon's Message to Organized Crime," 18 Willamette Law Review 1 (1982))
- Endorsed for Governor by all 36 District Attorneys and all 36 Sheriffs in Oregon (1990)

IX. SCHOLARSHIP AND PUBLICATIONS: SELECT BIBLIOGRAPHY

The following publications develop the author's perspectives on the following major themes: 1) the need for judicial self-restraint; 2) the importance of controls over abuses of administrative agency powers; 3) the role of elected officials in a separation of powers government; and 4) new mechanisms to assert the continuing importance of federalism in the American political structure:

A. Administrative Law

1. Frohnmayer, "The Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform," 58 Oregon Law Review 411 (1980) (explaining complex statute and comparing state and federal administrative law developments).
2. Frohnmayer, "Regulatory Reform: A Slogan in Search of Substance," 66 ABA Journal 871 (1980) (Ross Essay Prize) (analyzes sources of regulatory power by federal agencies and proposes legislative and administrative reforms to curb excesses of authority).
3. Frohnmayer, "National Trends in Court Review of Agency Action: Some Reflections on the Model State Administrative Procedure Act and the New Utah Administrative Procedure Act," 3 BYU Journal of Public Law 1 (1989) (comparing federal and state trends in administrative law and proposing controls on abuse of agency authority).

B. Legislative Processes

1. Linde & Frohnmayer, "Prescription for the Citizen Legislature: Cutting the Gordian Knot," 56 Oregon Law Review 3 (1977) (diagnosing the failures of the state legislative process and proposing fundamental reform to preserve the citizen legislature).
2. Frohnmayer, "The Legislative Function," 67 Oregon Law Review 41 (1988) (discussion of modern developments in state legislative procedures -- overtly opposing the creation by judiciary of monetary entitlements through expansive interpretation of state constitutional provisions).

C. Federalism

1. Frohnmayer, "A New Look at Federalism: The Theory and Implications of Dual Sovereignty," 12 Environmental Law 903 (1982) (this article examines the practical and theoretical justifications for continued vitality of the federalist principle of state authority).
2. Frohnmayer, "The Compact Clause, The Appointments Clause and the New Cooperative Federalism: The Accommodation of Constitutional Values in the Northwest Power Act," 17 Environmental Law 767 (1987) (this article examines creative possibilities of cooperative interstate agreements under the Compact Clause of the United States Constitution).

The author participated in writing the amicus curiae brief and presented oral argument on behalf of the northwest states and the National Governors Association in the principal case, Seattle Master Builders Ass'n v Pacific Northwest Elec. Power and Conservation Planning Council, 786 F2d 1359 (9th Cir 1986), cert denied, 479 US 1059 (1987).

D. Judicial Process and Judicial Review

1. Frohnmayer, "Legislatures and the Courts: Guarding the Guardians," 59 State Government 7 (1986) (critical of activist courts and noting limitations of courts as advocates of new social policies).
2. Frohnmayer, "Of Legislative Intent, the Perils of Legislative Abdication, and the Growth of Administrative and Judicial Power," 22 Willamette Law Review 219 (1986) (argument for clear legislative standards to control otherwise questionable activism by courts and administrative agencies).
3. Frohnmayer, "The Courts as Referee," in Frohnmayer & Baum, eds. The Courts: Sharing and Separating Powers at p. 51 (Eagleton Institute of Politics: 1989) (symposium presentation noting abdication of authority by elected officials to courts, and urging reassertion of legislative and executive's institutional power).
4. Frohnmayer, "The Separation of Powers: An Essay on the Vitality of a Constitutional Idea," (Weaver Essay Prize, supra) (urges vigorous assertion of powers by legislative and executive branches without requirements of exhaustive judicial review).
5. Frohnmayer, "Effective Written Argument," in Oregon State Bar Continuing Legal Education, Appellate Practice chapter 2 (1987) (discussing effective techniques for briefing federal and state appeals).

X. NATIONAL AND COMMUNITY SERVICE

Member, Board of Directors, National Marrow Donor Program
Member, Board of Directors, Lane County Chapter,
American Red Cross
Member, Board of Directors, Oregon Chapter, The Nature
Conservancy

Founder and Coordinator, Fanconi's Anemia Support Group
Campaign Steward, Oregon Committee for the Humanities
Honorary Chairman, Children's Miracle Network Telethon
for Sacred Heart Hospital (Eugene) and Doernbecher
Children's Hospital (Portland)
Member, Board of Content Advisors, The Constitution
Project (public television and educational film series
on the United States Constitution)
Advisory Board Member, Oregon Federation of Parents for
a Drug Free Youth
Board Member, Citizens for a Drug Free Oregon
Member, Honorary Support Group of Oregon Generations
Together
Honorary Chairperson, 1989 and 1990 Oregon Special
Olympics Law Enforcement Torch Run
Member, Doernbecher Children's Hospital Foundation
Advisory Board

XI. PERSONAL

- Born Medford, Oregon; July 9, 1940
(SSN 542-44-8898)
- Married to Lynn Diane Frohnmayer, National
Consultant on Child Abuse and Permanent Planning
for Foster Care Children
- Children:
Daughter, Kirsten, born 2-10-73
Son, Mark, born 7-19-74
Daughter, Kathryn, born 11-18-78
Son, Jonathan, born 12-7-84
Daughter, Amy, born 2-25-87
- Health: Excellent
- Hobbies: Skiing, white-water rafting, cycling,
gardening, music

confronted with the hidden, abused child, he told Burns, could not rely on a neglect or abuse statute. Added Scalia sarcastically: "Tough luck, kid. You're going to have to die, huh?"

Still not getting the answers he wanted, Scalia scolded Burns: "You have to fall back on the position that if there is no other way to prevent the social harm—even if it's as severe as the death of an individual—no other way to prevent that other than to punish the person who doesn't give you the information, that's too bad; you must let the harm occur."

Dryly, Burns said that situation did not exist "in the real world, in Maryland." But instead of talking about immunity as a way of getting information from the mother, Burns continued to focus on the neglect statute alternative.

Later, Burns missed repeated opportunities to show compassion for Maurice's plight without abandoning his own client. For example, Justice Kennedy told Burns at one point, "There is . . . the very real possibility that while we sit here this morning, that child is in need of care." Barely conceding the point, Burns commented blandly, "To be frank, your judgment [about that] is as good as mine."

And when Kennedy pressed Burns to say whether his client's Fifth Amendment right "overrides any interest we have in the welfare of that child," he found no way to soften an affirmative answer. Finally, Kennedy remarked, "And so you're saying that there is nothing that can be done for the welfare of the child." At that point, Burns's argument seemed beyond rescue.

DRUGS AND RELIGIOUS FREEDOM: David Frohnmayer's argument in *Employment Division of Oregon v. Smith* was a reminder of an old adage: A "slippery slope" argument is one of the easiest to make to the Court, but it is also one of the hardest to make well. Frohnmayer did so well with it that his opponent, Craig Dorsay, seemed caught in the downhill slide.

The *Smith* case is before the Court a second time. It involves two members of the Native American Church who were fired from their county jobs as drug abuse counselors because they ingested peyote buttons as part of a sacred Indian religious ritual. They were denied unemployment compensation—a denial they claimed violated their religious freedom.

In 1988 the Court ruled that if peyote use was a crime in Oregon, the state need not pay unemployment, but the Court did not address whether the Constitution protected the use of such a drug for religious purposes. Oregon's Supreme Court later ruled that it is unconstitutional to prosecute Native American Church members who use the drug in good faith for religious purposes. Therefore, the state court concluded, the state could not deny unemployment to the fired church members.

Frohnmayer, Oregon's attorney general, brought the case back to the Court on the constitutional issue. He lost no time suggesting that a ruling in favor of Native Americans' use of peyote could not be held to that situation alone. The issue, he said at the

outset, is, "Does the free exercise clause [of the First Amendment] require every state to exempt religious peyote use by the Native American Church, or perhaps even beyond that, other substance use by other religions, from the reach of generally applicable criminal laws?"

Frohnmayer began with a somewhat charitable bow to the sincerity of Native American Church members' fear that their religion would be threatened if peyote use were outlawed. He then used a question by Justice Scalia to emphasize that the case would extend to other claims of religious drug use.

Perhaps the most compelling aspect of the attorney general's "slippery slope" argument was the point he made more subtly. Playing upon the Court's worries about the scourge of drug abuse, Frohnmayer stressed heavily the "dangerous and powerful" nature of peyote as a hallucinogenic drug. He then linked that with the prospect that "other religions using other drugs" would be next in line for a religious exemption.

It was obvious that Frohnmayer was attempting to convince the justices that *Smith* was drawing the Court toward legitimizing illicit use of a wide variety of destructive substances, worsening the nation's overall drug problem.

was not a theoretical problem, since the Oregon courts now had before them a plea for exemption from Oregon's drug laws for religious users of marijuana.

Helping Frohnmayer's argument along further, Justice Scalia suggested that it was not just a problem of marijuana, but of "any other hallucinogenic drug, I would assume." Said the attorney general somewhat demurely: "Justice Scalia, that is one of the major reasons we have brought this case to this Court for a second time." The case, he added, "is in fact the thin edge of the wedge in which analytical distinctions are extremely difficult to draw."

The attorney general then maneuvered well around a line of questioning Justice Stevens initiated. If a state could flatly ban the use of drugs in religious ceremonies, Stevens asked, what about sacramental wine? Frohnmayer first said that that was not a controlled substance, adding that an argument for "religious accommodation" would be different for wine.

Seeing a way to strengthen his argument against peyote, the attorney general renewed his emphasis on the "very dangerous" character of a hallucinogenic drug.

Frohnmayer still had one more "slippery slope" plea to make for his

understandable, emotionally driven effort to shift the hearing away from the antidrug atmosphere Frohnmayer had left.

Justice Scalia, for one, was not diverted. "Do you disagree with what the attorney general said, that the whole purpose of the ingestion of peyote is its hallucinogenic effect?" Dorsay said he did not; however, he did disagree "that that ingestion is harmful."

He then launched into an argument that the Native American Church's history showed no evidence of misuse of peyote—clearly an attempt to refocus the Court's attention on the possible virtue of a single, narrow exemption for that church's practice.

Dorsay was unable to go very far with that, however, because he soon got bogged down in a series of questions over the unemployment compensation issue.

Taking up the constitutional argument, the Native Americans' lawyer then tried to meet Frohnmayer's drug abuse arguments directly. "We do not have any evidence in this case that peyote has been abused or that it contributes to the drug abuse problem," he asserted.

But that did not work particularly well for Dorsay, either. Justice Scalia, while conceding that there might be no risk of peyote's use spreading beyond that one church, nevertheless wondered why states could not ban even that use, on the simple premise that the drug was "dangerous."

When Dorsay replied that an official belief that a religious practice might be harmful was not enough to ban it, Scalia interrupted. "Excuse me, what do you mean? . . . You would not accept scientific evidence that the use of peyote is physically harmful?" Dorsay said he would not accept that. It was obvious, however, that he was simply inviting the Court into an unproductive inquiry: how to decide which scientific evidence to accept.

A bit later Justice White, picking up on the main "slippery slope" theme of the attorney general, pressed Dorsay about possible claims for religious exemptions for other drugs. The lawyer argued that a ruling his way would probably extend to other churches that make peyote use a ritual, but, he added, peyote would be "unique."

Justice O'Connor, however, was not willing to let him stop there: "How about marijuana use by a church that uses that as part of its religious sacrament?" Dorsay answered, weakly, "Well, see, I think we can get into a lot of examples, and I don't want to go down that road too far." Tellingly, O'Connor interrupted, "I'll bet you don't!" The courtroom burst into laughter—confirming how well the Frohnmayer argument had gone over with the crowd.

Indeed, the remainder of the argument was largely devoted to questions that the attorney general's argument had stirred among the justices—including a question (perhaps not entirely serious) from Scalia, wondering about a religious exemption for human sacrifice, when "only the Aztecs" would be accommodated.

There were no points of strong recovery by Dorsay.

If peyote lawfully could be used in a religious ritual, "how about marijuana use by a church?" Justice O'Connor wondered.

Justice Kennedy saw the connection immediately, wondering if there was any evidence of "the danger that peyote is diverted from religious use and, say, sold on the street in the normal drug distribution channels." The state's lawyer said that it was so available, "although not in great amounts." The unstated, but clear, implication was that the flow might increase after the *Smith* case.

When Frohnmayer was left alone to pursue his own line of argument, he ticked off the governmental interests in banning peyote and other drugs from authorized religious use. He warned of "a patchwork of exemptions of other drugs on a drug-by-drug, religion-by-religion, believer-by-believer basis."

In another variation of the "slippery slope" argument, the attorney general voiced his worry that if the Court allowed only the use of peyote and only by the Native American Church, then the problem of religious favoritism would arise, forcing state legislatures into the midst of potential Establishment Clause problems. And, he told Justice Kennedy, the only way out of those problems would be to "treat other religions clamoring for equal treatment on similar grounds in similar ways."

Sympathetically, Justice White told him a moment later, "You just don't want to have to face up to those problems. You want not to have any exemption at all." Said Frohnmayer: "That is correct." He added that it

side. He claimed that religious practices "can and do change." Thus, he said, the Court should be wary of fixing a practice as constitutionally protected so that there would be no stopping it if, in the future, it became an undeniably unsafe practice.

The attorney general's performance confronted his adversary with an uphill struggle. Dorsay, the director of the Oregon Legal Services Native American program in Portland, sensibly took on first the issue that Justice Stevens's questions about sacramental wine had raised. He slyly suggested that Frohnmayer had made what was, in essence, an ethnically biased argument.

"If Indian people were in charge of the United States right now, or in charge of the government," said Dorsay, "and you look at the devastating impact that alcohol has had on Indian people and Indian tribes through the history of the United States, you might find that alcohol was the Schedule One substance and peyote was not listed at all. And we are getting here to the heart of an ethnocentric view, I think, of what constitutes religion in the United States. And I think that needs to be looked at very hard before determining what is a dangerous substance and what is not."

The comment, of course, would have been more to the point if the issue in the case were whether a state could ban peyote as a general proposition. Even so, it was a somewhat

"July 17, 1986

"Dear Dave,

"As we await the final signal from the District Court in Wichita to implement the Settlement Agreement, I wanted to take this opportunity of letting you know how honored I feel to have worked with you on this exciting project. It is heart warming to realize that a man with such outstanding talent and personal integrity is a leader in the public sector on behalf of the States. Your good common sense and healthy insights were instrumental in making possible what will be regarded as a major breakthrough in the field of restitution and in the peaceful resolution of complex litigation. I very much appreciate the leadership you gave on many occasions and the wonderful spirit of compromise you spread throughout the settlement community. I hope there will [be] future occasions in which our paths will cross, particularly in peaceful settlements.

With best regards,

Avrom"

[Reproduction of actual handwritten letter (see reverse side) from Avrom Landesman, former Deputy Special Counsel and Director of Enforcement Programs for the Economic Regulatory Administration, U.S. Department of Energy, to Attorney General Dave Frohnmayer]

THE WHITE HOUSE
WASHINGTON



Andy,

As we discussed at the last Judicial
Selection meeting, do you want to
run this by the Governor and then
take it in to the President?

Lee

21 June 1990



THE WHITE HOUSE
WASHINGTON

June 21, 1990

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY *CM*
COUNSEL TO THE PRESIDENT

SUBJECT: Thomas Nelson, Candidate for the U.S. Court of Appeals for the Ninth Circuit

Thomas Nelson is a candidate for a vacancy on the U.S. Court of Appeals for the Ninth Circuit. That circuit includes Washington, Oregon, California, Arizona, New Mexico, Idaho, and Montana. The judge who left the bench, creating the vacancy, was from Idaho.

Although Nelson is not as good a candidate as most of those we are recommending to you for the courts of appeals, we have not found a better candidate from Idaho; Nelson is acceptable and he is strongly supported by Senator McClure.

The ABA gave Nelson a "Well qualified/qualified" rating, their second highest. However, one issue developed in the course of the FBI check of which we thought you should be aware. Nelson told the Bureau that he had taken puffs on marijuana cigarettes on two occasions, ten and eleven years ago, when Nelson was 42/43 years old. On both occasions, Nelson was attending a party held by somebody else where the cigarettes were passed around.

Senator Biden's and Thurmond's staff have both indicated that they are personally uncomfortable with signing off on this because Nelson was a grown man who should have known better. Senator McClure has talked to both Senators, though, and he says that they have both agreed not to make an issue of this matter. Biden added the caveat that he could only speak for himself, not the other Democrats. Senator McClure would like us to proceed with the nomination anyway and has committed to do everything in his power to cause it to be approved.

Nelson does not appear to have any other real confirmation vulnerabilities. The advantage of going forward is that in light of the strong support for this candidate from a conservative Republican Senator, we are likely to establish a ten year statute of limitations for this level of drug use, thus strengthening the rule we established in the case of Tim Ryan. On the other side, there is a small risk of embarrassment, particularly given the Judiciary Committee's general tendency to seize on objections to nominees and what happened with Doug Ginsburg's nomination to the Supreme Court. Accordingly, we thought you ought to have an opportunity to register a negative.

From the Desk of

LAURA NELSON

12-27-90

Dear Lee,

I thought you'd like
to see this article on
Judge Goodwin.

Please let me know
if, or when, some letters
from people who know
Larry Siskind would be
helpful in your consider-
ation of him for the
Ninth Circuit.

Fondly,

Laura

Today's FORNIA OPINION VICE

ATIONAL LAW

DATE OF HAWAII: officials not subject principles in the and segregation of t lands. 9TH CIR.

SENTENCING

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DISCRIMINATION

IMUNITY COLLEGE HC: Fair Employ- g Commission may nsatory damages in ssment cases.

ER: Fair Employ- g Act not exclusive l harassment claim CAL.SUP.CT.

RY

ACKA: Verdict not ick on jury's sub- cesses. C.A. 4TH

OPERTY

BERT: No recrea- cy after dissolu- ds relationship.

D SEIZURE

OCK: Warrantless , incoming calls nt circumstances.

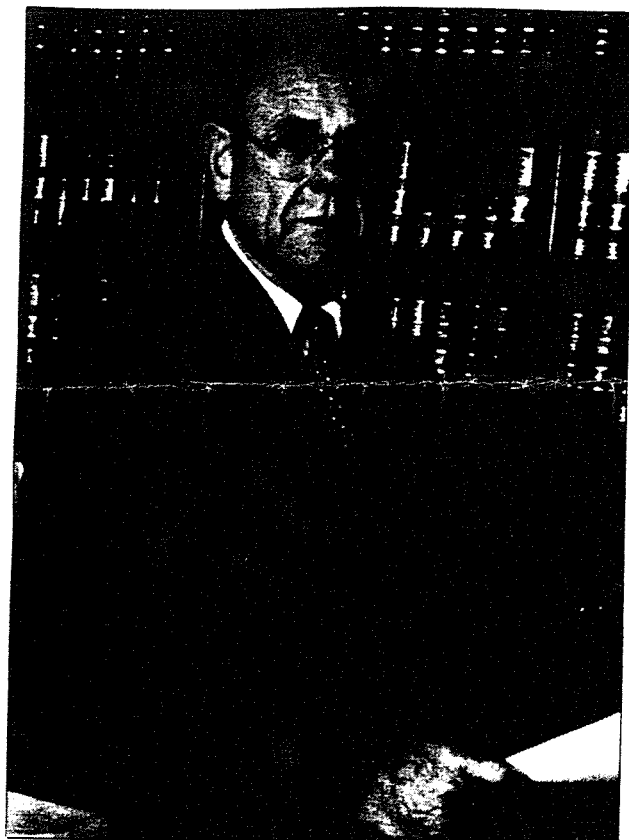
ECURITY

DEPARTMENT OF MAN SERVICES: received under community prop- e" for SSI pur-

MPENSATION

V. MYERS: ute affords rem- hose granted un- pensation laws.

OK INSIDE



THE RECORDER FILE (1989)

ALFRED GOODWIN:

"Christmas is a funny thing. It makes you realize that there are more important things in life than just work, work, work."

Goodwin Plans to Take Senior Status on Jan. 31

Wallace Will Take Over as Circuit's Chief Judge

BY PETER ARONSON
RECORDER STAFF WRITER

Saying it's time to work less and enjoy life more, Alfred Goodwin announced Wednesday he will step down as chief judge of the Ninth Circuit U.S. Court of Appeals on Jan. 31.

Goodwin, who became presiding judge in June 1988, will be replaced by Ninth Circuit Judge J. Clifford Wallace.

Goodwin, 67, will become a senior judge and will be able to devote all his working time to cases. As presiding judge of the nation's largest circuit, Goodwin said he worked long hours — sometimes seven days a week — with about half of his time spent on administrative duties. During the past 14 months those duties have been dominated by efforts to find the Ninth Circuit a new home in the wake of

the October 1989 Loma Prieta earthquake, which severely damaged the old headquarters at Seventh and Mission streets.

He also was the court's point man in fighting a congressional bill earlier this year that proposed splitting the Ninth Circuit in two.

He acknowledged that a factor in his stepping down was frustration in dealing with the General Services Administration, the federal agency that leases, builds and maintains court facilities. Goodwin blames the agency for delays in finding the new headquarters.

"I suppose some of the frustration with the space problems weighed a little on my mind," he said. "I got to thinking, 'You don't really have to do this.'"

What Goodwin would rather be doing

SEE GOODWIN PAGE 7

AG Says No On Lungren's Pick for Deputy

But Lungren Aide Says Stirling Will Get Post

BY BILL AINSWORTH
RECORDER STAFF WRITER

SACRAMENTO — Dan Lungren's first action as attorney general-elect — appointing a conservative Sacramento County judge as his chief deputy — violates the state constitution, the current attorney general concluded Wednesday.

In a 24-page letter Attorney General John Van de Kamp said Lungren's appointment of M. David Stirling as chief deputy violates Article VI, Section 17, which bars judges from accepting other public offices.

And although it was Lungren who asked Van de Kamp's office to draft the opinion, he will now ignore it.

"The attorney general-elect is convinced that the appointment is a constitutional one and that David Stirling is qualified for the position based on our interpretation," said Dave Puglia, Lungren's press secretary.

Van de Kamp's conclusion does not have the force of law. It would take a successful suit to void Lungren's appointment of Stirling, said Richard Martland, a chief assistant attorney general who was one of the opinion's authors.

Still, Van de Kamp's letter casts a shadow over a transition that has been delayed by the tight race between Republican Lungren and Democrat Arlo Smith. Smith, the San Francisco district attorney, still has a suit before the state Supreme Court seeking to throw out the 1.2 million absentee ballots that provided Lungren's winning margin.

Stirling, appointed a Sacramento County Superior Court judge in 1989, ran unopposed in November for a six-year term. He announced he would resign his seat before that term begins Jan. 7 to avoid the constitution's prohibition on accepting another public job during the middle of a judicial term.

Article VI, Section 17 states that during the term for which a judge was "selected" he "is ineligible for public employment or public office other than judicial employment or judicial office."

SEE AG SAYS PAGE 7

Goodwin Plans to Take Senior Status Jan. 31

CONTINUED FROM PAGE 1

is hearing cases and enjoying more leisure activities — spending time with his four grandchildren, five children, and brothers and sisters, many of whom live in his native Oregon, where he has a home. He said he'll be able to spend more time outdoors horseback riding and working on his tree farm.

"Christmas is a funny thing," he said. "It makes you realize that there are more important things in life than just work, work, work."

Goodwin notified his colleagues of the decision in a letter dated Wednesday. He could have become a senior judge when he turned 65 2½ years ago but opted to

become chief judge, he wrote, "because of the honor and the professional challenge of presiding over this great court."

Goodwin's peers praised the chief judge for keeping the Ninth Circuit functioning smoothly after the quake and for making as much progress as he did on a new headquarters. Some of the staff will begin moving into the new facility at Two Rincon Center this spring.

"This was a huge, huge administrative burden, which he handled extremely well," said Ninth Circuit Judge Dorothy Nelson.

She and others said Goodwin has an

uncanny ability to communicate and get along with the circuit's diverse group of judges.

"Judge Goodwin has no enemies in the world that I know of," Nelson said. "He is one of the most loved and revered men on and off the court I have ever seen."

Ninth Circuit Judge Arthur Alarcon said Goodwin was able to maintain harmony among his peers.

"His great talent as an administrator is his charm and his wit and his keen understanding of people," he said. "He didn't let any fires get started."

Goodwin, who replaced James Brown-

ing as chief judge, was appointed to the Ninth Circuit by President Richard Nixon in 1971. He had spent the two preceding years on the U.S. District Court for the District of Oregon, and the nine years before that as an associate justice of the Oregon Supreme Court. He began his judicial career on the Lane County, Ore., Circuit Court.

Wallace, 62, also a Nixon appointee, takes over based on seniority. He said his biggest challenge will be trying to devise ways for the court to deal with its ever-increasing caseload. He said he has some ideas, but that it's too early to talk about them.

High Court Exposes 115 to Further Challenges

CONTINUED FROM PAGE 3

hearsay during preliminary hearings and the elimination of post-indictment preliminary hearings in felony cases.

By contrast, Grace Suarez, head of research for the San Francisco public defender's office, argued that the California Supreme Court's ruling signed Prop 115's death warrant.

"There's no question," she said, "that

the *Raven* decision gutted 115. . . . What is left of 115 . . . is nothing to really worry about, frankly."

As an example, Suarez pointed to the measure's provision for judicial *voir dire*, claiming it "at worst makes no difference and at best favors the defense." That aspect of 115 has, in fact, come under at-

tack recently by prosecutors, who claim that it is tougher to win a conviction with judge-selected juries.

"Many of the statutory aspects of 115 do not pass state constitutional muster," Suarez said.

But San Francisco criminal defense attorney Robert Bryan said defendants hop-

ing to challenge Prop 115's surviving provisions had better not expect to get much respect from the California Supreme Court.

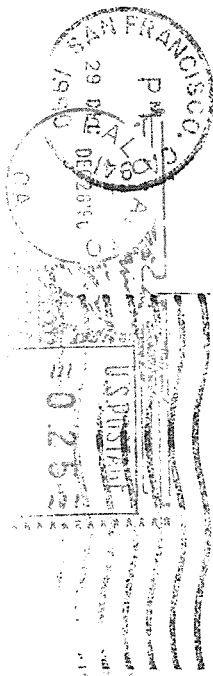
"This court is callous to the rights of little people," Bryan said. "We've probably seen the edge of the parameter on what the court is going to do on 115."

Directory of Certified Public Accountants

ATTORNEYS AT LAW

PALO ALTO, CALIFORNIA 94304

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TO THE PRESIDENT
ROOM 115 OLD EXECUTIVE OFFICE BLDG
WASHINGTON D C 20500

[illegible]

LEE LIEBERMAN

CAG

KLEINFELD

The following is a brief summary of Judge Kleinfeld's most noteworthy published decisions since his appointment as a Federal district court judge in May of 1986. I have tried to focus upon those opinions of Judge Kleinfeld that speak in some significant way to the nature of his judicial philosophy.

Alaska Laborers v. Constructions Inc., 644 F.Supp. 1104 (1986)

In this case, JK interpreted a union collective bargaining contract through resort to close analysis of its text and that of a trust agreement cited within it, e.g. "The quoted phrase is repeated in each of the four sections of the agreement on trust funds. I think a fair construction requires that the capitalized word 'Laborers' be read to mean members of the unions... designated on the cover of the document. The capitalization of the word suggests membership in the designated labor unions. Why else use a capital 'L'? The document does not generally capitalize nouns."

Mathews v. N.Slope Borough, 649 F.Supp. 1571 (1986)

In this case, JK rejected plaintiff's attempt to evaluate a Title VII wrongful discharge action on the basis of a disparate impact standard, instead setting forth a disparate treatment standard. Further, he properly relied upon the Supreme Court's decision in Burdine to avoid shifting the burden of proof to the defendant following a prima facie case being made by the plaintiff. Although presented with a case in which some evidence that a racially-charged work environment existed, JK did not let this distract him from even stronger evidence that the plaintiff's discharge was directly related to poor work performance, not to any sense of racial animus. In a prior opinion relating to this same case, 646 F.Supp. 943, JK held that Title VII contained no jury trial rights. He also declined to exercise pendant jurisdiction over related state claims by the plaintiff for breach of contract and intentional infliction of emotional distress. "A federal judge should avoid needless decisions of state law."

St. Paul Fire v. Sauer, 648 F.Supp. 959 (1986)

JK held that Alaska's tort statute of limitations barred a suit against a contractor alleging breach of implied duty. In rejecting the plaintiff's argument that such a result would be unfair, JK again undertook an extremely close analysis of the relevant statute and concluded that "the words of the statute, however, cannot be reconciled with this reading... sometimes because it develops historically rather than as a comprehensive scheme of deduction and logic, the law contains inconsistencies difficult to reconcile with logic or policy. Even if there is no sensible reason, the legislature has considerable discretion to draw lines as it chooses in this area. Courts are not constitutionally empowered to rewrite statutes when they imagine that if the legislature were to examine them, it would do so."

Witt v. JP, Inc., 655 F.Supp. 480 (1987)

JK rejected the notion that a statute of limitation was a "mere technicality" and denied a contract claim by a construction firm for work done by the firm on a public works project. He refused to read in a requirement that the government must have been "prejudiced" in order to assert the statute of limitations defense.

Sweet Summer Night Music v. Aiken, 659 F.Supp. 52 (1987)

In determining whether the "juke box exemption" applied to a claim of copyright infringement, JK held that a juke box located on a stage on which "naked women" danced, which was inaccessible to members of the audience, did not constitute a "coin-operated phonorecord player... readily examined by the public." Payment of royalties on copyrighted music was therefore required by the defendant-jukebox owner.

Sisemore v. U.S. News, 662 U.S. 1529 (1987)

JK denied summary judgement to a national newsmagazine in a defamation action by a Vietnam veteran who claimed that magazine had suggested that he suffered from mental disease stemming from his war experiences. Issue of whether actual malice existed on the part of the magazine was irrelevant since veteran was not a "public figure". JK found that a material issue of fact existed since a reasonable reader of the magazine could have concluded that its characterizations of the plaintiff were the result of "careful reporting, not [mere] heated argument... Factual inaccuracies to make the plaintiff fit the preconceived stereotype in the 'story idea' might be deemed by a jury in these circumstances to amount to a reckless disregard for the truth."

U.S. v. Boltz, 663 F. Supp. 956 (1987)

In this case, JK interpreted FRCP 11 (relating to the inadmissibility of statements made in the course of plea negotiations with the Government) to require the suppression of statements made by the defendant in the course of negotiations over immunity, dismissal of charges and the acceptance of lesser charges where they occurred between himself and the Government, even prior to formal charges being filed by the Government. "Since they related to ultimate disposition of a threatened criminal case against him, they are properly characterized as 'plea discussions'. Most lawyers and laymen would understand the phrase to mean just such discussions."

Interior Glass v. FDIC, 691 F.Supp. 1255 (1988)

In the course of resolving dispute between state bank and the FDIC, JK again engaged in an intelligent and close analysis of the words of the relevant statutes. "Stretching... to cover lawyer's letters would violate the principle of ejusdem generis... If a lawyer's letter were an 'other paper', the uncertainty of the law would be magnified by problems of interpreting the letters."

U.S. v. Bal, 694 F.Supp. 1404 (1988)

JK held that a prior indictment did not automatically lapse upon the filing of a superseding information but that a motion to dismiss and an order dismissing the indictment were required, even though double jeopardy would have barred an actual prosecution on the indictment after a judgement on the information. "The procedural reason is that the FRCP allows dismissal on the Government's motion only 'by leave of court'. This implies that the filing of an information with the word 'superseding' in the title cannot function effectively as a dismissal of the indictment because the information is filed at the Government's discretion, not 'by leave of court'.

U.S. v. Hoffman, 733 F.Supp. 314 (1990)

Federal law provides that defendants violating terms of supervised release following terms of imprisonment may, if they violate the terms of the release, be required to serve "all or part of the term of supervised release" in prison. JK interpreted law to require drug trafficker, who had already served maximum one year term in prison, to serve an additional year in prison if he violated terms of release at any time during his one year supervised release. "Defendant would have the court read the statutes in combination to mean that a defendant cannot be required to serve more than a statutory maximum of one year, even if he violates a condition of supervised release. If the statutes were ambiguous, the rule of lenity might compel such a reading. But a hypothetical case demonstrates that the statutes cannot possibly mean what the defendant suggests... [Only the court's interpretation] gives meaning to all of the statutes that Congress passed with regard to the sentence which can be imposed for a misdemeanor such as the defendant's."

Venetie v. Alaska, 687 F.Supp. 1380 (1988)

In this case, JK interpreted the 11th Amendment in the context of claims by Alaskan native Indians that they were entitled to welfare benefits administered by the State of Alaska. Although the sought-after relief was fashioned in the manner of an injunction (to pay funds wrongfully withheld), JK concluded that the 11th Amendment prevented a federal district court from requiring that the State pay such monies. "Nor can the federal court issue a declaratory judgement regarding past conduct. Such a judgement either operates as res judicata in a subsequent state proceeding for damages or else is purposeless, so it is tantamount to a money judgement." Further, while recognizing that Fitzpatrick v. Bitzer upheld Congress' authority to "abrogate" the 11th Amendment pursuant to its 14th Amendment "enforcement" powers, JK relied upon Atascadero's requirement that the abrogation be "unmistakable" to reject the argument that the Congress had abrogated through a general statute conferring jurisdiction on district courts to resolve federal question cases brought by Indian tribes. "The general reference to 'all civil actions' is exactly the kind of language which under Atascadero cannot amount to abrogation." Relying upon their ratification sequence, JK further refused to infer that the Congress had abrogated the 11th Amd. pursuant to its Article I power to "regulate commerce... with the Indian Tribes".

The following is a summary of circuit court decisions that relate to opinions by Judge Kleinfeld and which provide additional insight into his judicial philosophy.

U.S. v. Lemon, 824 F.2d 763 (1987)

In this decision, the 9th Circuit held that JK did not commit reversible error in (a) failing to give specific unanimity instruction in the matter of defendant's possession of a firearm where defendant had expressly admitted during trial his possession of such firearm; or (b) failing to instruct jury on justification defense to charge of being a felon in possession where facts did not warrant.

Cabasug v. INS, 837 F.2d 880 (1988)

In this decision, JK sitting by designation on 9th Circuit authored an opinion holding that the Congress, by virtue of its "almost plenary" power in the area of immigration, was entitled to provide for the deportation of aliens unlawfully possessing machine guns or sawed-off shotguns, without the possibility of discretionary relief by the INS, even though it had chosen to allow for such potential relief in the case of aliens committing arguably more serious crimes. "We do not agree with the implicit proposition that the Constitution requires the Congress to lay out crimes on a spectrum and grant at least as much discretion for the less serious as for any more serious crimes... Congress may fashion a sanction without discretionary mitigating features in order to deter a kind of conduct about which it is especially concerned... rational means to achieve the legitimate purpose of deterring the forbidden weapons by aliens." JK also clearly recognized that the plaintiff in this case, under the guise of asking the courts to correct an administrative aberration by the INS, was in fact asking it to overturn a considered judgement of the Congress.

Sparling v. Hoffman, 864 F.2d 635 (1988)

9th Circuit upheld JK decision to dismiss complaint for failure to plead the factual elements of fraud, after repeated invitations by the court to do so, even though analysis of every "cause of action" in the complaint set forth all of the required elements. Circuit also upheld JK's dismissal of RICO claim by plaintiff-shareholders against another corporation on the grounds that RICO claims based upon injuries done to a corporation cannot be claimed derivatively. JK held that plaintiffs had no standing to argue such derivative claims.

New Alaska v. Guetschow, 869 F.2d 1298 (1989)

9th Circuit upheld JK decision to dismiss claims against defendant on grounds that they were not subject to diversity jurisdiction where complaint failed to allege that plaintiff's principle place of business (and its place of incorporation) were somewhere other than Alaska, the domicile of the defendant.

U.S. v. Cannizzaro, 871 F.2d 809 (1989)

9th Circuit upheld JK's decision that law allows consecutive sentences to be imposed for convictions for armed robbery and use of a firearm in the commission of a felony. Also upheld his decision that he was not required to make specific findings of fact concerning a defendant's financial condition and ability to pay restitution prior to issuing an order requiring restitution.

U.S. v. Remsing, 874 F.2d 614 (1989)

9th Circuit (Skopil, Nelson, Brunetti) found that JK acted improperly in failing to review a magistrate's suppression order on a de novo basis, where he was requested to do so by prosecutors. Rather, JK adopted magistrate's order and granted the suppression motion without reviewing a transcript or recording of the proceedings before the magistrate. Defendant was charged with fish & game violations and suppressed evidence included guns, animal hides, skulls, antlers and records of hunting trips.

U.S. v. Lefler, 880 F.2d 233 (1989)

9th Circuit upheld JK decision that statute authorizing U.S. Marshal to furnish defendants with transportation to places where they are required to go under the terms of probation did not "by its plain language" apply to transportation costs incurred to hearings to determine the costs of prosecution to be taxed against a defendant.

U.S. v. Restrepo, 884 F.2d 1294 (1989)

9th Circuit upheld JK decision that a defendant's sentence could be enhanced for the "possession" of a firearm even where there was no finding of a connection or nexus between the firearm and the offense. JK also upheld in allowing the admission into evidence of prior acts of criminal conduct by defendant where this was accompanied by limiting instruction that such conduct admissible only for purposes of proving matters relating to the defendant's state of mind and not his propensity for committing the immediate offense.

U.S. v. Smith, 912 F.2d 322 (1990)

9th Circuit upheld JK decision that double jeopardy did not bar a criminal action against an individual following a bad conduct discharge by the Army against the individual on the basis of the same facts.

Wages v. IRS, 915 F.2d 1230 (1990)

9th Circuit upheld JK that taxpayer did not have Bivens claim against IRS agents where specific alternative remedies for disputes arising out of the collection of taxes were expressly provided by Congress. Also upheld JK that a judge who concludes that he lacks subject-matter jurisdiction in a case has no power to rule alternatively on merits of case.

U.S. v. Restrepo, 903 F.2d 643 (1990)

9th Circuit upheld various JK rulings on the application of the sentencing guidelines to a convicted narcotics trafficker: (a) sentencing judge can properly consider quantities of drugs for which defendant not convicted in determining base offense level for sentencing; (b) preponderance of evidence standard controls judicial sentencing determinations; and (c) the application to the defendant of clarified guidelines, rather than new guidelines, did not constitute an ex post facto application of the law. As Judge Pregerson said in dissent to the first of these propositions, "As a consequence, punishment for the convicted counts is automatically increased... The majority's interpretation probably will make the prosecutor's job easier. Under their holding, the Government need only convict the defendant of one count to punish him or her for all related criminal behavior proved by a preponderance of the evidence."

Noatak v. Hoffman, 896 F.2d 1157 (1990)

9th Circuit reversed JK (Noonan, Thompson), with Kozinski dissenting, in this case involving dismissal for lack of jurisdiction of Indian claims against state officials for revenue sharing monies appropriated by legislature for cities and villages. Circuit found that 11th Amendment did not bar suit, both because states consented to such suits under Article I, section 8 providing Congress with authority to regulate commerce with Indian tribes and because of general legislation enacted by Congress which provided district courts with jurisdiction to hear civil suits by Indian tribes and which "abrogated" 11th Amendment (see also Venetie). As court expressed it, the issue in case was "Do the principles of federalism implicit in the 11th Amendment indicate that the states possess immunity from suit by an Indian tribe?" However, court effectively avoided issue in concluding that state in consenting to the Constitution and to federal jurisdiction of Indian affairs has effectively consented to being sued. "The 11th Amendment has not revoked the consent of the states, because neither in terms nor purpose does the amendment apply to Indian tribes. No other general immunity protects the state from suit by the tribes."

In addition to the summary contained in Venetie, I would call your attention to the following statements by JK in connection with the meaning of the 11th Amendment: "The non-literal reading of the words of the Amendment by the courts adds mystery. If the point of the Amendment were to preserve the states as sovereigns free from federal judicial interference, why ignore the phrase 'or equity' in the Amendment which would seem to bar suits for injunctive relief? If private remedies are needed to effectuate the 14th Amendment, why not read the 'citizens of another State' language to mean that the Amendment permits suits in law or equity by citizens of the same state, but not citizens of another state? 11th Amendment jurisprudence exemplifies Holmes' proposition that a 'page of history is worth a volume of logic'... In any event, whether it makes sense or not, the distinctions are imposed by higher courts than this one."

**THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

ID# 201447

*See need 1-7-91
for file*

INCOMING

DATE RECEIVED: DECEMBER 31, 1990

NAME OF CORRESPONDENT: THE HONORABLE ALFRED T. GOODWIN

SUBJECT: SUBMITS HIS RESIGNATION FROM REGULAR ACTIVE
SERVICE AS A UNITED STATES CIRCUIT JUDGE,
EFFECTIVE JAN 31 91

		ACTION	DISPOSITION	
ROUTE TO:		ACT	DATE	TYPE C
OFFICE/AGENCY	(STAFF NAME)	CODE	YY/MM/DD	RESP D YY/MM/DD
RONALD GEISLER		ORG	90/12/31	C91 10/03
PPBULL	REFERRAL NOTE:	A	90/01/03	1 1
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COMMENTS: *Clerk has original. Copy to Justice (S. Fox)*
to draft reply

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: _____

MI MAIL USER CODES: (A) _____ (B) _____ (C) _____

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*ACTION CODES:      *DISPOSITION      *OUTGOING      *
*                  *                  *              *
*A-A-APPROPRIATE ACTION *A-ANSWERED      *CORRESPONDENCE: *
*C-COMMENT/RECOM      *B-NON-SPEC-REFERRAL *TYPE RESP=INITIALS *
*D-DRAFT RESPONSE     *C-COMPLETED      *          OF SIGNER *
*F-FURNISH FACT SHEET *S-SUSPENDED      *          CODE = A   *
*I-INFO COPY/NO ACT NEC*          *COMPLETED = DATE OF *
*R-DIRECT REPLY W/COPY *          *          OUTGOING  *
*S-FOR-SIGNATURE      *          *              *
*X-INTERIM REPLY      *          *              *
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KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING
LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS
MANAGEMENT.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALFRED T. GOODWIN

Chief Judge

United States Courthouse
125 South Grand
P.O. Box 91510
Pasadena, California 91109-1510

December 26, 1990

The President
of the United States
The White House
Washington, D. C.

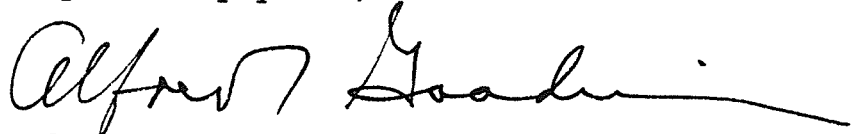
Dear Mr. President:

Pursuant to 28 U.S.C. § 371(b), it is my intention to retire from regular active service as a United States Circuit Judge on January 31, 1991. Under § 371(b), I will continue to perform judicial service as a senior circuit judge and retain my office, staff and chambers.

I am writing you at this time in order to expedite the appointment of my successor, pursuant to § 371(d).

It has been a privilege to serve as an active member of the federal judiciary since December 11, 1969, and I look forward to service as a senior judge.

Respectfully yours,

A handwritten signature in dark ink, appearing to read 'Alfred T. Goodwin', with a long, sweeping horizontal line extending to the right.

Alfred T. Goodwin
Chief Judge

Copy to: The Chief Justice of the United States

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

FG-025

rec'd 1-8-91

See return

for files

DATE RECEIVED: DECEMBER 31, 1990

NAME OF CORRESPONDENT: THE HONORABLE ALFRED T. GOODWIN

SUBJECT: SUBMITS HIS RESIGNATION FROM REGULAR ACTIVE
SERVICE AS A UNITED STATES CIRCUIT JUDGE,
EFFECTIVE JAN 31 91

ROUTE TO: OFFICE/AGENCY		(STAFF NAME)	ACTION ACT CODE	DATE YY/MM/DD	TYPE RESP	C D	COMPLETED YY/MM/DD
RONALD GEISLER			ORG	90/12/31			C91 10/03
REFERRAL NOTE:							
PPBULL			A	90/01/08			1/1
REFERRAL NOTE:							
CU ATT 07 Liberman			I	90/01/08			1/1
REFERRAL NOTE:							
REFERRAL NOTE:							
REFERRAL NOTE:							

COMMENTS:

Clerk has original. Copy to Justice (S. Jay)
to draft reply

ADDITIONAL CORRESPONDENTS:

MEDIA: L INDIVIDUAL CODES:

MI MAIL

USER CODES: (A) (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	*
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I-INFO COPY/NO ACT NEC		*OUTGOING	*
*R-DIRECT REPLY W/COPY *			*
*S-FOR-SIGNATURE			*
*X-INTERIM REPLY			*

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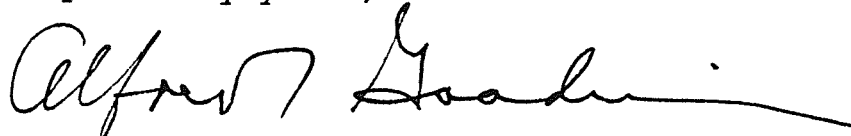
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Alfred T. Goodwin
Chief Judge

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FOR THE NINTH CIRCUIT**

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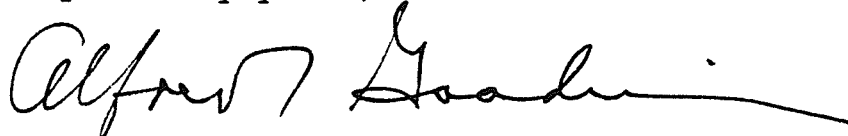
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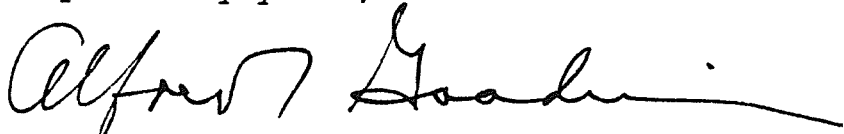
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Alfred T. Goodwin
Chief Judge

Copy to: The Chief Justice of the United States

THE WHITE HOUSE

WASHINGTON

October 19, 1990

Dear Mr. Morgan:

Thank you for your interest in being considered for an appointment to the U.S. Court of Appeals, Ninth Circuit and for forwarding your resume to us.

I have referred your letter and resume to the appropriate selection officials, who, I can assure you, will give your qualifications every consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read "Lee S. Liberman", with a horizontal line extending to the right.

Lee S. Liberman

Associate Counsel to the President

W. Robert Morgan, Esquire
Morgan, Allmand, Pennypacker & Deacon
1651 North First Street
San Jose, California 95112

ID # 130723 CU

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☒ O - OUTGOING☒ H - INTERNAL☒ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 1Name of Correspondent: W. Robert Morgan☐ MI Mail Report

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

Subject: Requesting that he be considered for
nomination as a judge for the Ninth 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>WRC</u>	ORIGINATOR	<u>90104105</u>			<u>1</u> <u>1</u>
	<u>Cuato7</u>	Referral Note: <u>A</u>	<u>9004106</u>			<u>5</u> <u>9010415</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: Close out - answered 10/18/90

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Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

16
ROBERT H. MORGAN
KEVIN D. ALLMAND
PHILIP H. PENNYPACKER
LINDA A. DEACON

JAMES SHULMAN
HEATHER M.D. GREEN
GORDON J. FINWALL
STUART D. KIRCHICK

MORGAN, ALLMAND, PENNYPACKER & DEACON

ATTORNEYS AT LAW

1651 NORTH FIRST STREET
SAN JOSE, CALIFORNIA 95112
(408) 453-7677
FAX (408) 283-1166

130723cu
W. ROBERT MORGAN
OF COUNSEL

March 28, 1990

C. Boyden Gray
President George Bush
White House
Washington D.C.

Dear Mr. President:

I am a California Lawyer with vast experience in the practice of law. I am also a farmer with a considerable reputation in the field of Morgan Horses on a national basis. I have represented drug companies in the past, such as Barnes Hind Pharmaceutical in Palo Alto, California.

At present, I am of counsel for a lawfirm having reached the age of 65.

I have a number of friends in Congress such as Norm Mineta and I am his campaign manager.

Senator Alquist of California is also a friend of mine and I am his campaign manager.

I am an admirer of yours even more so since the capture of Noriega. I hope you will nominate me for Judge of the Ninth Circuit.

I believe I will have the support of a Democratic Senator. I am sending a copy of this letter to him so that he will know of my interest. Senator Alan Cranston has been a personal friend of mine for some time. While I do not know Senator Pete Wilson as well, I hope that I would also have his support so I am sending a copy of this letter to him.

The practice of the laws are a very serious thing to me. I was elected president of the Santa Clara County Bar Association, and in Santa Clara County that is no small accomplishment since we have over five hundred lawyers here and a popular election.

I was later elected to a member of the Board of Governors of the State Bar and served as Vice-President of the California State Bar.

President George Bush
March 28, 1990
Page Two

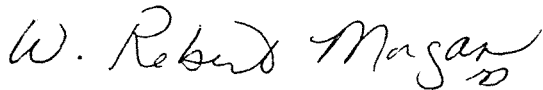
One of the honors which I have nationally is that I have been elected a member of the International Academy of Trial Lawyers. This group selects the best trial lawyers in the United States and invites them to become a member. I am a member of that association and have served as treasurer and president of the association.

At one time I had a fantastic interest in federal law and would like to bring that experience to the bench.

I have a lot of common sense and do not do radical things just for the purpose of doing them. I am not afraid of new challenges.

~~I would like to be interviewed by you for this position if Senator Cranston and Senator Wilson offer me as a candidate and if you would be considering me for this position.~~ At present, I am recovering from an injury to my hip. I anticipate I will be walking normally free of a cane in about two weeks. I hope I have your serious consideration.

Very truly yours,



W. ROBERT MORGAN

WRM/gsg4

cc: Congressman Norm Mineta
Senator Alan Cranston
Senator Pete Wilson
Congressman Don Edwards

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OKI AMERICA, INC.,
Plaintiff-Appellee,
v.
MICROTECH INTERNATIONAL, INC.,
Defendant-Appellant.

No. 88-1561
D.C. No.
CV-86-20417-SW
OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer M. Williams, District Judge, Presiding

Submitted January 9, 1988*
San Francisco, California

Filed April 7, 1989

Before: James R. Browning, Robert R. Beezer and
Alex Kozinski, Circuit Judges.

Per Curiam; Concurrence by Judge Kozinski

SUMMARY

Torts

Affirming a summary judgment, the court held that neither the evidence nor the pleadings established the existence of the tort of bad faith denial of the existence of a contract.

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

In its pleadings, appellee Oki America, Inc. asserted that there was no contract entered into between the parties, and that a course of dealing between them allowed the contract to be cancelled prior to delivery. The evidence indicated that Oki believed that the contract could be cancelled at will and that the parties did not agree as to its meaning. Microtech argued that the pleadings and evidence established the tort.

[1] The elements of the tort of bad faith denial of the existence of a contract are: (1) the denial of the existence of a contract (2) in bad faith, and (3) without probable cause. [2] Although pleadings may give rise to admissions, the assertion of inconsistent affirmative defenses does not constitute such an admission. [3] One of the two inconsistent pleas cannot be used as evidence in the trial of the other because a contrary rule would place a litigant at his peril in exercising the liberal pleading provisions of the Federal Rules. [4] An assertion that the terms of a contract preclude relief is not a denial of the existence of the contract.

Circuit Judge Kozinski concurred, observing that the tort is another example of judicial interference with business relationships.

COUNSEL

Russell J. Hanlon, Berliner, Cohen & Biagini, San Jose, California, for the defendant-appellant.

James E. Jackson, Cupertino, California, for the plaintiff-appellee.

OPINION

PER CURIAM:

The trial court granted Oki summary judgment on Microtech's counterclaim for the bad faith denial of the existence of

a contract. Microtech appeals, claiming a genuine dispute of material fact exists as to whether Oki denied the existence of the contract.

[1] The elements of this tort are: (1) the denial of the existence of a contract (2) in bad faith, and (3) without probable cause. *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 769 (1984). Mere denial of liability under a contract does not suffice; the defendant must deny the existence of the contract. *Quigley v. Pet, Inc.*, 162 Cal.App.3d 877, 890-92 (1984).

Summary judgment is reviewed *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). We must determine, viewing the evidence in the light most favorable to Microtech, whether any genuine issue of material fact exists and whether Oki was entitled to judgment as a matter of law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

[2] First, Microtech notes Oki asserted as an affirmative defense that "[t]here was no contract entered into between the parties." Although pleadings may give rise to authorized admissions under Fed. R. Evid. 801(d)(2)(C) and be considered despite the hearsay rule, 4 D. Louisell & C. Mueller, *Federal Evidence* § 425, at 302 (1980), this pleading is not an admission. Oki alleged three mutually inconsistent affirmative defenses: (1) no contract existed, (2) course of dealing and usage of trade permitted it to "cancel its performance at any time prior to 30 days before shipment date," and (3) performance was legally impossible.

[3] Such inconsistent pleading is permissible under Fed. R. Civ. P. 8(e)(2). Therefore, as the Fifth Circuit has ruled, "one of two inconsistent pleas cannot be used as evidence in the trial of the other" because a contrary rule "would place a litigant at his peril in exercising the liberal pleading . . . provisions of the Federal Rules." *Continental Ins. Co. v. Sherman*, 439 F.2d 1294, 1298-99 (5th Cir. 1971); *see also* 4 D. Louisell

& C. Mueller § 425, at 306 & n.75. In addition, this pleading is not sufficient to establish the elements of the tort: "once litigation has commenced, the actions taken in its defense are not . . . probative of whether [a] defendant in bad faith denied the contractual obligation prior to the lawsuit." *Palmer v. Ted Stevens Honda Inc.*, 193 Cal.App.3d 530, 539 (1987).

[4] Second, Microtech relies on Oki's affirmative defense that there existed between the two parties "a course of dealing which allowed the party issuing a purchase order to cancel its performance at any time prior to 30 days before shipment date." This evidence fails for the same reasons as Microtech's reliance on Oki's affirmative defense that there was no contract between the two parties. In addition, an assertion the *terms* of a contract preclude relief is not a denial of the *existence* of the contract.

Third, Microtech points to testimony of Oki's Vice President of Sales that he believed Oki or Microtech could unilaterally cancel the contract at any time for any reason. This, too, is evidence of Oki's view of the meaning of contract terms rather than of its refusal to acknowledge the contract.

Fourth, Microtech relies on the underscored portion of the following quotation from a letter Oki's president wrote Microtech:

While I appreciate your belief that you have a binding contract, I must also respectfully argue that our agent, Advanced Design Group, clearly described our pricing dilemma on its quote of December 9, 1985. As you have acknowledged, you accepted our quote in your purchase order and this note was a prominent and in fact crucial part of that quote. Therefore we feel strongly that you accepted the price renegotiation language.

Read in context, this letter provides no support for Microtech's assertion Oki denied the existence of the contract.

Rather, the letter disputes Microtech's view of the terms of the contract.

Finally, Microtech offers the testimony of a third party that an Oki sales manager told him "Oki had no intentions o[f] delivering the product at the prices that they agreed upon" and that "Oki never had a written contract stating the firm prices over the schedule of the contract." This conceded hearsay, Microtech submits, is admissible under Fed. R. Evid. 801(d)(2)(D) as the admission of a party's agent.

As proponent of this evidence, Microtech must demonstrate it is "a statement by [Oki's] agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D); *Breneman v. Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir. 1986). This Microtech failed to do. On the contrary, the sales manager testified "Microtech was not in my geography. I knew nothing about Microtech as a customer with regard to anything." Since the sales manager's statement did not concern a matter within the scope of his employment as Rule 801(d)(2)(D) requires, *see Breneman*, 799 F.2d at 473, testimony regarding his statement is inadmissible.

Microtech failed to identify any admissible evidence that Oki denied the existence of the contract. Summary judgment for Oki was therefore appropriate.

AFFIRMED.

KOZINSKI, Circuit Judge, concurring:

Nowhere but in the Cloud Cuckooland of modern tort theory could a case like this have been concocted. One large corporation is complaining that another obstinately refused to acknowledge they had a contract. For this shocking miscon-

duct it is demanding millions of dollars in punitive damages. I suppose we will next be seeing lawsuits seeking punitive damages for maliciously refusing to return telephone calls or adopting a condescending tone in interoffice memos. Not every slight, nor even every wrong, ought to have a tort remedy. The intrusion of courts into every aspect of life, and particularly into every type of business relationship, generates serious costs and uncertainties, trivializes the law, and denies individuals and businesses the autonomy of adjusting mutual rights and responsibilities through voluntary contractual agreement.

I

In inventing the tort of bad faith denial of a contract, *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984), the California Supreme Court has created a cause of action so nebulous in outline and so unpredictable in application that it more resembles a brick thrown from a third story window than a rule of law. *Seaman's* gives nary a hint as to how to distinguish a bad faith denial that a contract exists, from a dispute over contract terms, from a permissible attempt to rescind a contract, or from "a loosely worded disclaimer of continued contractual responsibility." *Quigley v. Pet, Inc.*, 162 Cal. App. 3d 877, 890, 208 Cal. Rptr. 394 (1984).

Small wonder: It is impossible to draw a principled distinction between a tortious denial of a contract's existence and a permissible denial of liability under the terms of the contract. The test — if one can call it such — seems to be whether the conduct "offends accepted notions of business ethics." *Seaman's*, 36 Cal. 3d at 770. This gives judges license to rely on their gut feelings in distinguishing between a squabble and a tort. As a result, both the commercial world and the courts are needlessly burdened: The parties are hamstrung in developing binding agreements by the absence of clear legal principles; overburdened courts must adjudicate disputes that are

incapable of settlement because no one can predict how — or even by what standard — they will be decided.

Seaman's throws kerosene on the litigation bonfire by holding out the allure of punitive damages, a golden carrot that entices into court parties who might otherwise be inclined to resolve their differences. Punitive damages once were reserved for truly outrageous conduct; even then, awards were relatively small. See, e.g., *Lanigan v. Neely*, 4 Cal. App. 760, 89 P. 441 (1907) (punitive damages awarded for breach of promise of marriage when plaintiff's reliance on the promise resulted in pregnancy); *Scheps v. Giles*, 222 S.W. 348 (Tex. Civ. App. 1920) (punitive damages awarded for wrongful discharge where employer publicly called employee a liar and ordered her out of his sight). Today punitive damages are obtained in cases involving fairly innocuous conduct, see, e.g., *April Enters., Inc. v. KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983) (plaintiff sued defendant for erasing videotapes of television shows, although the contract explicitly authorized such erasure; jury awarded \$14 million in punitive damages); *Klimek v. Hitch*, 124 Ill. App. 3d 997, 464 N.E. 2d 1272 (1984) (landowner sued his neighbor for trespass and destruction of a hedgerow; court awarded \$10 compensatory damages and \$14,500 punitive damages), often in amounts that seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint.

This tortification of contract law — the tendency of contract disputes to metastasize into torts — gives rise to a new form of entrepreneurship: investment in tort causes of action. "If Pennzoil won \$11 billion from Texaco, why not me?" That thought must cross the minds of many enterprising lawyers and businessmen. A claim such as "defined" by *Seaman's* is a particularly attractive investment vehicle: The potential rewards are large, the rules nebulous, and the parties unconstrained by such annoying technicalities as the language of the contract to which they once agreed. Here, for example, the contract was largely beside the point. Microtech instead

relied on statements in Oki's pleadings, rumors racing through the Oki grapevine, and a letter in which Oki's president offers his interpretation of the contract. On the basis of these minutiae, Microtech ginned up a claim of \$600,000 in compensatory damages and \$2.5 million in punitive damages. And why not? Even a one in ten chance of winning would justify an investment of over \$300,000 in attorney's fees.

As this case illustrates, business relationships are complex organisms, not always as neatly structured as one could wish for. The record presents plausible support for both sides insofar as the contract dispute is concerned. That issue settled early in the litigation, everyone presumably having learned a valuable lesson on the need to tidy up business relationships.

But the case drags on, kept alive by Microtech's vain hope of parlaying a business squabble into a \$3.1 million gold mine. The judicial machine keeps churning, fueled by the energies of the lawyers, the parties, a district judge, three appellate judges, their respective staffs and other myriad components of the judicial process, all to resolve a claim that turns out to be next to frivolous. One shudders to imagine the resources that would be consumed in adjudicating a more colorable *Seaman's* case. We surely have more pressing claims on our limited resources — safeguarding the environment, protecting the rights of the accused, preventing encroachments on constitutionally protected liberties, to name a few — than helping Microtech soothe its bruised feelings over a quarrel with its supplier.

II

The eagerness of judges to expand the horizons of tort liability is symptomatic of a more insidious disease: the novel belief that any problem can be ameliorated if only a court gets involved. Not so. Courts are slow, clumsy, heavy-handed institutions, ill-suited to oversee the negotiations between

corporations, to determine what compromises a manufacturer and a retailer should make in closing a mutually profitable deal, or to evaluate whether an export-import consortium is developing new markets in accordance with the standards of the business community. *See generally* Snyderman, *What's So Good About Good Faith? The Performance Obligation in Commercial Lending*, 55 U. Chi. L. Rev. 1335, 1361 (1988).

Moreover, because litigation is costly, time consuming and risky, judicial meddling in many business deals imposes onerous burdens. It wasn't so long ago that being sued (or suing) was an unthinkable event for many small and medium-sized businesses. Today, legal expenses are a standard and often uncontrollable item in every business's budget, diverting resources from more productive areas of entrepreneurship. Nor can commercial enterprises be expected to flourish in a legal atmosphere where every move, every innovation, every business decision must be hedged against the risk of exotic new causes of action and incalculable damages. *See generally*, P. Huber, *Liability: The Legal Revolution and its Consequences* 153-71 (1988).

Perhaps most troubling, the willingness of courts to substitute voluntary contractual arrangements to their own sense of public policy and proper business decorum deprives individuals of an important measure of freedom. The right to enter into contracts — to adjust one's legal relationships by mutual agreement with other free individuals — was unknown through much of history and is unknown even today in many parts of the world. Like other aspects of personal autonomy, it is too easily smothered by government officials eager to tell us what's best for us. The recent tendency of judges to insinuate tort causes of action into relationships traditionally governed by contract is just such overreaching. It must be viewed with no less suspicion because the government officials in question happen to wear robes.

III

Fortunately, the tide seems to be turning. The California Supreme Court is once again leading the way. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988), has taken a bite out of *Seaman's* by holding that tort remedies are not available for breach of the implied covenant of good faith and fair dealing in an employment contract. *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), revived the common sense rule that third parties cannot sue insurers for unfair insurance practices, overruling *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).

But much remains to be done. As this case demonstrates, *Seaman's* is a prime candidate for reconsideration. Others come to mind: *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) (rejecting the notion that a contract can ever have a plain meaning); *Casey v. Proctor*, 59 Cal. 2d 97, 109, 378 P.2d 579, 28 Cal. Rptr. 307 (1963) (holding that a release of unknown claims has no effect in the absence of evidence "apart from the words of the release"); and *April Enters., Inc. v. KTTV*, 147 Cal. App. 3d 805, 195 Cal. Rptr. 421 (1983) (holding that a party can be liable in tort for actions authorized by the contract). At long last, however, we seem to be moving in the right direction.

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Clerk, U.S. Court Of Appeals
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Lee S. Liberman, Esq.
Associate Counsel
Office of Counsel to the President
The White House
Washington, D.C. 20500

THE WHITE HOUSE

WASHINGTON

May 23, 1989

Dear Mr. Devine:

Thank you for your letter of April 27, 1989 recommending Mr. C. Timothy Hopkins for appointment to the United States Court of Appeals for the Ninth Circuit and Mr. Standish Forde Medina for appointment to the United States Court of Appeals for the Second 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

Mr. Thomas J. Devine
641 Lexington Avenue
New York, New York 10022

cc: MURRAY DICKMAN
MARK PAOLETTA

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

FG052

DATE RECEIVED: MAY 02, 1989

NAME OF CORRESPONDENT: MR. THOMAS J. DEVINE

SUBJECT: RECOMMENDS C. TIMOTHY HOPKINS FOR APPOINTMENT
TO NINTH CIRCUIT COURT AND STANDISH FORDE
MEDINA FOR THE SECOND CIRCUIT IN NEW YORK

		ACTION		DISPOSITION	
ROUTE TO:		ACT	DATE	TYPE	C COMPLETED
OFFICE/AGENCY	(STAFF NAME)	CODE	YY/MM/DD	RESP	D YY/MM/DD
C. BOYDEN GRAY		ORG	89/05/02		___/___/___
	REFERRAL NOTE:				
MARK PAOLETTA		RSI	89/05/02		C 89/05/02
	REFERRAL NOTE:				
JAN BURMEISTER		RSI	89/05/02		C 89/05/02
	REFERRAL NOTE:				
<i>C. Boyden Gray</i>		<i>A</i>	<i>89/03/03</i>		<i>5-89/05/14</i>
	REFERRAL NOTE: <i>CBC signature</i>				
<i>Cy 0707</i>		<i>D</i>	<i>89/05/04</i>		<i>S 89/05/14</i>
	REFERRAL NOTE:				

COMMENTS: PERSONAL FRIEND

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: _____

MI MAIL USER CODES: (A) _____ (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.

11
Boyden Gray
cc: M. Paoletti
D. Sumner

THOMAS J. DEVINE
641 LEXINGTON AVENUE
NEW YORK, NEW YORK 10022

212/593-1777

April 27, 1989

Dear George:

I want to go to bat for two good friends of mine who are candidates for Circuit Court vacancies. They are C. Timothy Hopkins for what is traditionally the Idaho seat on the Ninth Circuit and Standish Forde Medina for the Second Circuit here.

You will remember Tim from a fundraiser at his home in Idaho Falls some time ago and my telling you that he successfully led our counteroffensive against the Federal Land Bank in my Beaver Creek Ranch days, when nobody else in the country was winning. Tim is a fine lawyer, has been a real trooper among Idaho Republicans and would make a first rate judge. Any political opposition you might find would be traceable to Tim's putting principle first in the last political days of George Hansen (not to be confused with Orval Hansen), demonstrating what we all look for in a federal judge.

Forde Medina is a partner of Debevoise & Plimpton, a prominent litigator and a towering figure in the legal community here. I mean figuratively, because he stands six four. His grandfather was the legendary Harold Medina and Forde would like to serve on the same Court. Among many others, Stan Resor would attest from professional and personal experience that Forde would be a superb choice for the Second Circuit, which I understand needs an energetic New York City resident to help otherwise very senior members carry a heavy load. In particular, Forde is experienced in the complex corporate and financial cases which tend to find their way to this Circuit.

Boyden Gray and Chase Untermeyer have growing files on both. I want to assure you that Tim and Forde are both personally the greatest, as Jonathan would say, and eminently deserving.

You are doing wonders. The best to you and Bar from Alix and me.

Sincerely,



President George Bush
The White House
Washington, DC 20501

RESUME'

Maurice O. Ellsworth
United States Attorney
District of Idaho

Address:

United States Attorney's Office
550 W. Fort, Box 037
Boise, Idaho 83724
(208) 334-1211

Home: P.O. Box 668
Boise, Idaho 83701
(208) 336-6747

Professional:

United States Attorney for Idaho, appointed July, 1985 and currently serving in that position.

Associate Solicitor, United States Department of the Interior, Washington, D.C. - 1981-1985.

Private Practice - Hailey and Carey, Idaho
1979-1980.

Elected Blaine County, Idaho Prosecuting Attorney, November, 1976.
Served from December, 1976 until January, 1979.

Private Practice - Hailey, Idaho
1975-1976.

Bar Memberships:

State of Idaho
Idaho United States District Court
Ninth Circuit Court of Appeals
United States Supreme Court

Education:

Juris Doctorate - Arizona State University, College of Law
1975.

Bachelor of Science, Political Science - Arizona State University
1972.

Interests:

Reading, water skiing, bicycling, art, current events.

References:

Available Upon Request

Curriculum Vitae

Louis A. Stahl

C A 9

D. Ct. Arizona

C (Charles Rice)

PROFESSIONAL

Partner, Streich, Lang, Weeks & Cardon, Attorneys at Law, 2100 First Interstate Bank Plaza, Phoenix, Arizona 85001.

Eighteen years experience in civil litigation.

Admitted to practice before all Arizona courts, the U.S. District Court for the District of Arizona, the Ninth Circuit Court of Appeals and the U.S. Supreme Court.

Member of the State Bar of Arizona, the Maricopa County Bar Association and the American Bar Association. Member, Defense Research Institute, Phoenix Association of Defense Counsel.

AV rated by Martindale-Hubbell.

Recent Professional Positions

Member, State Bar of Arizona's Committee on Rules of Professional Conduct (Ethics Committee)

Frances Lewis Lawyer in Residence, Washington & Lee Law School (Fall 1986)

Chairman, State Bar of Arizona's Professional Liability Committee (1983-1986)

Vice-Chairman, Health Insurance Committee, Section of Insurance, Negligence and Compensation Law, American Bar Association (1973-1979)

Contributing Editor, "The Forum" (published by the American Bar Association (1976-1979))

PUBLICATIONS

Author: "Ex Parte Interviews With Enterprise Employees: A Post-Upjohn Analysis", 44 Washington & Lee Law Review 1181 (1987)

Co-author: "Standardized Agreements and the Parol Evidence Rule: Defining and Applying the Expectations Principle," 26 University of Arizona Law Review 793 (1984)

Contributing author: "Arizona Attorneys' Fees Manual" (published by the State Bar of Arizona) (1987)

Co-author: "Paralegal Services and Awards of Attorneys' Fees Under Arizona Law," 20 Arizona Bar Journal 21 (1984)

SEMINAR PANELIST

Maximizing Your Effectiveness In Taking and Defending Depositions (State Bar of Arizona, October 1988)

Emerging Trends in Lender Liability (Arizona Bankers Association, December 1987)

Lender Liability in Arizona (Professional Educational Systems, Inc., November 1987)

The Evolution of First Party Bad Faith (Arizona Trial Lawyers Association, November 1984)

EDUCATIONAL BACKGROUND

Notre Dame Law School

Doctor of Jurisprudence, summa cum laude (1971)

Honors

Graduated first in class

Recipient of full three-year scholarship and grant

Dean Konop Award (given each year to member of the senior class "who has the best record in scholastic grades, application, deportment and achievement")

O'Meara Award (presented annually to a member of the graduating class "for outstanding academic achievement")

Duquesne University

Graduate studies in political science (1965-66)

Wheeling Jesuit College

Bachelor of arts, magna cum laude (1962)

Honors

Dean's list - four years

Medal for second highest cumulative average
among B.A. candidates

Woodrow Wilson Fellowship nominee

Activities

Conservative Club (President)

Political Science Club (Treasurer)

Philosophy Club

Columnist - School Newspaper

RECENT ACTIVITIES AND MEMBERSHIPS

Current

Arizona Republican Caucus

Phoenix Chamber of Commerce

Arizona Bar Foundation (Founding Fellow)

Notre Dame Club of Phoenix

Previous

Trunk 'N Tusk Club of Phoenix

Volunteers for Reagan-Bush (1980)

Arizona Republican Party's Lawyers' Ballot
Security Committee (1980)

Phoenix and Maricopa County Young Republicans

Founding member, Vice President, Director and legal counsel to Performing Arts Combined Talent (PACT), a non-profit corporation dedicated to exposing all segments of the community to cultural events

PERSONAL

Home Address	307 W. Royal Palm Road Phoenix, Arizona 85021
Telephone	(602) 997-2939 (home) (602) 229-5210 (office)
Date of Birth	October 31, 1940
Marital Status	Married to Mary Kathleen Quinn; four daughters

Availability subject to granting of leave of absence or other mutually satisfactory arrangement with law firm.

References available upon request.

GUY HURLBUTT

Background

Guy Hurlbutt, 46, is Associate General Counsel and Assistant Secretary of Boise Cascade. In that capacity, he heads Boise Cascade's litigation section and manages litigation in state and federal courts nationwide. From 1981 to 1984, Mr. Hurlbutt served as U.S. Attorney in the District of Idaho. He received a J.D. from the University of South Carolina Law School in 1970 and a Master of Laws in Environmental Law from George Washington University in 1974. Mr. Hurlbutt clerked for Chief Judge Robert Martin in the District of South Carolina from 1971 to 1974. After his clerkship, he went to work for the Office of the Idaho State Attorney General, where he handled civil and criminal litigation and eventually rose to the position of Chief Deputy Attorney General. Mr. Hurlbutt was in private practice in Boise from 1978 to 1981.

Department (Philosophy)

Mr. Hurlbutt has the most federal court experience and the best judicial philosophy of any of the six candidates. He is not brilliant, but he is a strong believer in an original meaning jurisprudence and he articulately expounds the dangers of any other type of jurisprudence. In discussing precedent, Mr. Hurlbutt said that a federal judge's oath is to the Constitution, not the precedent, although he of course recognizes the need for a lower court to follow the binding precedent of a higher court. One interviewer considered Mr. Hurlbutt's discussion of the Ninth Amendment one of the best he had ever heard. Mr. Hurlbutt was also strong on criminal justice issues. He said that he would challenge anybody to find the exclusionary rule or Miranda in the Constitution. It seems, however, that he is not particularly outraged by Miranda. He also questions how anybody can honestly challenge the constitutionality of the death penalty given that it is explicitly recognized in the Constitution. On other issues of importance, such as the right to privacy and discrimination, Mr. Hurlbutt also identified himself as a strong judicial conservative.

State (Reputation)

Mr. Hurlbutt has an excellent reputation in Idaho for conscientiousness, conservatism, intelligence, honesty, and industry. The GOP National Committeewoman, the only individual to whom we spoke that expressed even minor concern about Mr. Hurlbutt, was mainly troubled by the fact that Mr. Hurlbutt is not a native Idahoan. The Republican judges in the area and the

Boise District Attorney said that Mr. Hurlbutt's nomination would be enthusiastically received by the bar. Mr. Hurlbutt is particularly respected for having done an excellent job as U.S. Attorney. The current U.S. Attorney and Steve Trott also highly recommend Mr. Hurlbutt.

Confirmation

Mr. Hurlbutt is a member of the Mountain States Legal Foundation.

EDWARD LODGE

Background

Edward Lodge, 54, has been a bankruptcy judge in Boise since January of this year. He received an LL.B. in 1960 from the University of Idaho Law School. Prior to going on the bankruptcy bench, Judge Lodge spent 23 years as a state district judge. He is the youngest judge ever appointed to the state district bench in Idaho and is the recipient of many honors for judicial excellence. Judge Lodge also spent two years on the probate bench and was in private practice for three years in the early 1960s.

Department (Philosophy)

Although Judge Lodge may be a political conservative, it was difficult for his interviewers to determine whether he is a judicial conservative or whether he in fact has any judicial philosophy. This is mainly because Judge Lodge, unless pushed, was both unable and unwilling to discuss anything in his interviews other than Idaho law. One interviewer described the interview with Judge Lodge as sleep inducing. What useful information the interviewers could get from Judge Lodge was not particularly favorable. For instance, he said that the criminal justice system works well and that any perception otherwise is due to the media. He also said that judges should have some sentencing discretion and he therefore is not a strong supporter of the sentencing guidelines. Judge Lodge could not think of any examples of judicial activism. When pressed, he finally mentioned a judge who was almost impeached for particularly bad temperament, thus equating temperament with activism. Judge Lodge also could not come up with any Supreme Court Justice, current or past, with whom he identifies. One interviewer wondered whether Judge Lodge could even name a Supreme Court Justice. In hypotheticals that he was able to discuss, Judge Lodge often resorted to a balancing test. He said that he would throw out an objective intelligence test used by either a private or government employer because smart people who can pass tests are not always capable of converting their intelligence into good job performance. He also said that we have a living Constitution that must be interpreted in light of ongoing sociological change. Judge Lodge says there is definitely a constitutional right to privacy that emanates from the 14th Amendment, the Bill of Rights, and case law. The bottom line is that Judge Lodge is completely and totally unfamiliar with the federal court system and is not even close to being of circuit court caliber.

State (Reputation)

Judge Lodge is known as an excellent and experienced trial judge with a very good temperament. He is also known as a very solid political conservative. Judge Lodge has been active in the Republican Party and a strong Reagan backer over the years. Judge Ryan, a Reagan appointee to the district court in Idaho, says that Judge Lodge operates as a judge on the principle of stare decisis. We are told by Chief District Judge Callister, a Ford appointee, and Greg Bower, the Boise District Attorney, that Judge Lodge would lean towards judicial restraint. The Canyon County Sheriff describes Judge Lodge's judicial philosophy as very fair, impartial, and balanced. He said that Judge Lodge attempts to fall within the spirit of the law but in a workable fashion. The Sheriff adds that Judge Lodge has "model" judicial temperament and that he can not think of anybody better qualified for the bench.

Confirmation

No major confirmation problems are anticipated.

GEORGE GRANATA

Background

George Granata, 42, has been a state district judge in Burley, Idaho since 1977. He received a J.D. from St. Mary's University Law School in 1972. After graduating law school, Judge Granata was associated with the law firm of Church, Church & Snow in Burley and was also a Cassia County Deputy Prosecuting Attorney until 1975. At that time, he began serving as a lawyer magistrate on a court with small claims civil jurisdiction and criminal jurisdiction over traffic and misdemeanor cases. He was reelected to that position once before he was appointed to the district bench.

Department (Philosophy)

Judge Granata was ranked second to Mr. Hurlbutt by the interviewers even though he explicitly rejects the founders and totally caricatured an original meaning jurisprudence. Judge Granata basically thinks we are looking to put a "Nixonite" strict constructionist trial judge on the Ninth Circuit who is anti-abortion and pro-death penalty. Judge Granata said that he considers a statute's history more important than its words and that he could be convinced by strong evidence of legislative intent to render an interpretation of a statute that is inconsistent with the plain meaning of its words. In his defense, however, Judge Granata seemed genuinely concerned about the process of judging and about judges who overstep their bounds. Unfortunately, he was really unable to respond to arguments in favor of an original meaning jurisprudence. Apart from his own instincts and philosophy, which are more conservative than liberal, he has no standard which he could consistently apply as a judge. Therein lie seeds that could possibly sprout into a very bad jurisprudence. One can see this in the positions he took in his interviews. He criticized Roe and Griswold but defended Skinner v. Oklahoma and Miranda. He also defended the Supreme Court's decision to review the Runyon case and said he would defend a Supreme Court decision which narrowed the scope of the commerce clause but that the incorporation doctrine is settled and should not be reconsidered. He also had no problem in declaring that the due process clause should be interpreted to bar arbitrary and capricious state action. Judge Granata's best discussion was in the area of discrimination, where he clearly believes very strongly in an intent requirement.

State (Reputation)

Judge Granata comes from a small town in Idaho and is less prominent than the other candidates. Apart from mentioning his excellent reputation, none of the people to whom we spoke knew Judge Granata.

Confirmation

No major confirmation problems are anticipated.

BLAKE HALL

Background

Blake Hall, 35, is a partner at the Idaho Falls law firm of Anderson, Pike, and Bush, where he has a litigation practice. He is also the Republican Party State Chairman and a member of the Republican Party's Western States Chairman's Association. From 1980 to 1983, Mr. Hall was a partner at Ririe, Lee, Jenkins, and Hall. He began practicing with that law firm as an associate in 1979. Mr. Hall received a J.D. from the George Washington University Law Center in 1979. He is a past legislative assistant for Senator McClure.

Department (Philosophy)

Mr. Hall does not yet have the necessary experience to go on the circuit court. Although his interviews indicated that he is on the right track, he has some way to go in fully developing his judicial philosophy. Mr. Hall seems generally outraged by the federal judiciary's usurpation of power from the other branches and would like to go on the Ninth Circuit to help get it back on the right track. He considers it very important to appoint judges with the right philosophy. On the other hand, Mr. Hall seems to have crammed for his interviews and one interviewer found it difficult to get him involved in anything more than a superficial discussion of, for instance, Dean Pound's concept of social jurisprudence, which Mr. Hall had criticized. Mr. Hall's discussion of most issues, including the right to privacy and the role of precedent, was exactly what one would expect from an intelligent and thoughtful judicial conservative but he was awful in his discussion of disparate impact. He could not get away from his argument that an objective job requirement could have no rational basis. He never understood that the question was one of intent. Mr. Hall finally came down supporting the notion that statistics alone can support a finding of discrimination. Although he may not continue to hold this view if he studied this issue, it is a strong indication that his conservative judicial philosophy, which is no doubt seriously held, has not yet gelled and that Mr. Hall would be a much better circuit court candidate some time in the future. He also looks younger than 35.

State (Reputation)

The judges to whom we spoke and the Boise District Attorney do not know Mr. Hall. The Republican National Committeeman and National Committeewoman, not surprisingly, speak very highly of Mr. Hall. They particularly cite his mild temperament and his dedication to his family. The Committeeman describes Mr. Hall's

philosophy as moderate to conservative while the Committeewoman describes it as conservative. They also mention that Mr. Hall is a very hard worker and that he has been a very strong supporter of President Reagan.

Confirmation

Mr. Hall is only 35 years old.

TIMOTHY HOPKINS

Background

Timothy Hopkins, 52, received a J.D. from the George Washington University Law School in 1963. While in law school, Mr. Hopkins was assistant editor of the George Washington Law Review. Mr. Hopkins has been in private practice ever since he graduated law school. He is currently the senior partner of Hopkins, French, Crockett, Springer & Hoopes in Idaho Falls, where he has a general practice. Mr. Hopkins is active in the local community and the bar.

Department (Philosophy)

Mr. Hopkins' buzzword is "traditionalism." He wants to preserve and maintain the system, for which he has high regard. This translates into a slavish regard for precedent. Mr. Hopkins said that he does not have a judicial philosophy and that judges can, for the most part, decide cases based on precedent. His practice has been primarily confined to the state courts. As a lawyer, Mr. Hopkins values predictability and accountability, and he said he would continue to hold these values as a federal judge. Mr. Hopkins is yet another individual who believes that "there comes a time" when judges have no alternative but to change the law. Since he has no philosophy, it is presumably he who determines this time. Mr. Hopkins explicitly acknowledges a law making role for the Supreme Court. He said that he finds it incredible that lawyers who are given the chance to appear before the Supreme Court and be a part of "law making" are often not prepared. Also, in responding to a hypothetical on the cruel and unusual punishment clause, Mr. Hopkins said that he "would leave it to the Supreme Court to amend the Constitution." Mr. Hopkins said that he is satisfied with the evolutionary change from the Warren Court because there are many threads of consistency. He likes Justice O'Connor because he feels that it was a politically savvy move and about time to put a woman on the Supreme Court. Mr. Hopkins is the most intelligent of the candidates, but he is probably also the most liberal.

State (Reputation)

Blake Hall, the Republican State Chairman and himself a candidate for this position, says that Mr. Hopkins is the most liberal of the candidates. The Republican National Committeeman, Dick Bauer, says that Mr. Hopkins is more liberal than most Republicans in the area (although he is not liberal on an absolute scale), and there would be surprise over his nomination

for that reason. Mr. Hopkins has a good reputation in the bar among those who know him but he is not well known.

Confirmation

Mr. Hopkins is perceived to have taken anti-environment positions solely to benefit his own property.

THOMAS NELSON

Background

Thomas Nelson, 51, is a resident attorney in the Boise office of the Twin Falls law firm of Nelson, Rosholt, Robertson, Tolman & Tucker. His practice emphasizes public utility law and water rights. Before joining his present firm in 1979, Mr. Nelson spent fourteen years with the Twin Falls law firm of Parry, Robertson, and Daly. Mr. Nelson received an LL.B. from the University of Idaho in 1962. From 1963 to 1965, he was Assistant Attorney General and later Deputy Attorney General of Idaho, in which capacity he represented various state agencies and worked on criminal matters. Mr. Nelson is a fellow in the American College of Trial Lawyers and is active in the bar and local community.

Department (Philosophy)

Mr. Nelson is so precedent bound that it is difficult to discuss anything else with him. He described his philosophy as "middle of the road to conservative," distinguishing one with a "conservative" philosophy, such as Chief Justice Rehnquist, as somebody who reads "only the words of the Constitution and never goes further." Mr. Nelson said that it is a mistake for the Supreme Court to review any precedent unless its rule has become unworkable or has led to "impossible results." He said that we can live with a violation of the law (unless the circumstances of it are severe) better than we can live with change in the law. Mr. Nelson volunteered that he has always been a fan of Justice Kennedy's but that he may have to temper his enthusiasm since Justice Kennedy voted to reconsider Runyon. While Mr. Nelson's temperament is impressive, he never referred to the Constitution in any hypothetical and it is not clear that he thinks it has anything to do with judging. He has no problem with the notion of a living Constitution, as he demonstrated in his answer to a cruel and unusual punishment hypothetical. In the area of criminal law, Mr. Nelson said that he does not oppose the recent inroads on the exclusionary rule since there has not been an outright reversal. Mr. Nelson was awful on a question of statutory interpretation and, although he mentioned that he believes intent should be a sine qua non of discrimination for private employers, he believes that more "sensitivity" could be required of government employers.

State (Reputation)

Mr. Nelson seems to be well respected in the Idaho community. Judge Callister, the Chief Judge in the District, considers Mr.

Nelson a problem solver as opposed to a problem creator. The judge also mentions that Mr. Nelson is respected throughout the state and that he has never been involved in an "activist case." Judge Ryan, the Reagan appointed judge in the district, describes Mr. Nelson's philosophy as moderate to conservative.

Confirmation

Mr. Nelson specializes in representing Idaho Power, an unpopular client among environmentalists.

THE WHITE HOUSE

WASHINGTON

May 22, 1989

Dear Judge Burnett:

Thank you for your letter recommending C. Timothy Hopkins for appointment to the United States Court of Appeals for the Ninth 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

The Honorable Donald L. Burnett, Jr.
Judge
Idaho Court of Appeals
537 W. Bannock Street
Boise, Idaho 83720

cc: MURRAY DICKMAN
MARK PAOLETTA

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

INCOMING

DATE RECEIVED: APRIL 26, 1989

NAME OF CORRESPONDENT: THE HONORABLE DONALD L. BURNETT JR.

SUBJECT: RECOMMENDS C. TIMOTHY HOPKINS OF IDAHO FALLS
FOR APPOINTMENT TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

ROUTE TO: OFFICE/AGENCY (STAFF NAME)		ACTION		DISPOSITION	
		ACT CODE	DATE YY/MM/DD	TYPE RESP	C COMPLETED D YY/MM/DD
C. BOYDEN GRAY		ORG	89/04/26		___/___/___
	REFERRAL NOTE: _____				
MARK PAOLETTA		RSI	89/04/26		C 89/04/26
	REFERRAL NOTE: _____				
LANNY GRIFFITH		RSI	89/04/26		C 89/04/26
	REFERRAL NOTE: _____				
<i>Cuafc</i>	REFERRAL NOTE: <i>CBG signature</i>		<i>89/04/27</i>		___/___/___
<i>Cy 4007</i>	REFERRAL NOTE: <i>D</i>		<i>89/04/28</i>		<i>89/05/08</i>
	REFERRAL NOTE: _____				

COMMENTS:

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 2130 _____

IF MAIL USER CODES: (A) _____ (B) _____ (C) _____

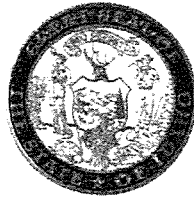
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*	*	*CORRESPONDENCE:	*
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS	*
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* OF SIGNER	*
*D-DRAFT RESPONSE	*C-COMPLETED	* CODE = A	*
*F-FURNISH FACT SHEET	*S-SUSPENDED	*COMPLETED = DATE OF	*
I-INFO COPY/NO 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.

STATE OF IDAHO
COURT OF APPEALS

30466

C. Boyden Gray
cc M Paoletta
cc Larry Sullivan
DONALD L. BURNETT, JR.
JUDGE



537 W. Bannock Street
Boise, Idaho 83720
(208) 334-5168

April 17, 1989

The Honorable George Bush
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

The Department of Justice is evaluating candidates for nomination to the United States Court of Appeals for the Ninth Circuit. I respectfully invite your personal attention to C. Timothy Hopkins of Idaho Falls.

Tim Hopkins is a superb craftsman of the law and a distinguished statesman for the legal profession. His peers have elected him to the Board of Commissioners of the Idaho State Bar and to the Board of Directors of the Idaho Law Foundation. Recently, he served on a blue-ribbon committee that prepared an appellate practice manual for Idaho lawyers. He was selected to author the chapter on writing effective briefs and to serve as a co-editor of the entire publication. His scholarship and graceful command of language made him the obvious choice.

The Department of Justice will find many other examples of Tim Hopkins' outstanding achievements as a lawyer and as a public citizen. I can think of no other candidate whose grasp of substantive law, sense of fairness, and unselfish commitment to public service are so widely admired.

This letter is wholly unsolicited although I have, of course, received Mr. Hopkins' permission to send it. If he is appointed to the Ninth Circuit, Tim Hopkins will be an anchor of restrained, balanced judgment in the federal courts, and an enduring credit to your Administration.

Sincerely,

Donald L. Burnett, Jr.
Donald L. Burnett, Jr.

MD/MP

THE WHITE HOUSE
WASHINGTON

CBG/LSL: lckm
CBGray
LSLieberman
Chron

May 22, 1989

Dear Judge Gilroy:

Thank you for your letter recommending Robert E. Jones for appointment to the United States Court of Appeals for the Ninth 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

The Honorable Patrick D. Gilroy
Presiding Judge
Circuit Court of Oregon
Fifth Judicial District
Clackamas County Courthouse
Oregon City, Oregon 97045

cc: MURRAY DICKMAN
MARK PAOLETTA

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

ID# 035177

FG053

INCOMING

DATE RECEIVED: MAY 10, 1989

NAME OF CORRESPONDENT: THE HONORABLE PATRICK D. GILROY

SUBJECT: RECOMMENDS ROBERT E. JONES FOR APPOINTMENT
TO POSITION ON THE FEDERAL DISTRICT COURT OF
THE NINTH CIRCUIT

		ACTION		DISPOSITION	
ROUTE TO:		ACT	DATE	TYPE	C COMPLETED
OFFICE/AGENCY	(STAFF NAME)	CODE	YY/MM/DD	RESP	D YY/MM/DD
C. BOYDEN GRAY		ORG	89/05/10		___/___/___
	REFERRAL NOTE:				
MARK PAOLETTA		RSI	89/05/10		C 89/05/10
	REFERRAL NOTE:				
BILL CANARY		RSI	89/05/10		C 89/05/10
	REFERRAL NOTE:				
<i>Croft</i>			<i>8/10/85</i>		___/___/___
	REFERRAL NOTE: <i>CBG signature</i>				
<i>Cyatoz</i>		<i>D</i>	<i>89/05/16</i>		<i>5 89/05/26 cs.</i>
	REFERRAL NOTE:				

COMMENTS:

ADDITIONAL CORRESPONDENTS: MEDIA:L INDIVIDUAL CODES: 2300

IG MAIL USER CODES: (A) (B) (C)

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*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       *                      *                      *
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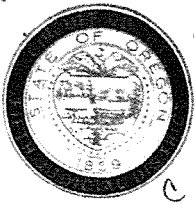
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REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE
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LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS
MANAGEMENT.

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CIRCUIT COURT OF OREGON



c Boyden Gray
cc M. Padetta
cc B. Canary

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
OREGON CITY, OREGON 97045

May 4, 1989

PATRICK D. GILROY
CIRCUIT JUDGE
PERSONAL

COURTROOM 1
(503) 655-8687

President George H. Bush
The White House
Washington, DC 20500

Re: Justice Robert E. Jones: Proposed Appointment to the
Federal District Bench

Dear President Bush:

Today's paper brought me the news that the Honorable Robert E. Jones, Associate Justice of the Oregon Supreme Court, is being recommended to you by both Senator Hatfield and Senator Packwood for appointment next fall to fill a vacancy on the Federal District Court for the Ninth Circuit.

I have been a member of the bar for more than 28 years and for the last fourteen years have served as a circuit court judge. Throughout that period of time I have observed Justice Jones function as a trial lawyer, trial judge and Associate Supreme Court Justice. He has performed admirably in all of those capacities and has, as well, established an excellent scholastic reputation by reason of his fine work as a law professor at the Lewis and Clark School of Law.

Justice Jones would be an outstanding addition to the Federal District Bench. He is highly regarded by the bench and bar of Oregon and is, by background and experience, uniquely qualified for a position on the Federal Court.

I join our distinguished Senators in recommending Justice Jones for appointment to the Federal District Court for the Ninth Circuit.

Very truly yours,

Patrick D. Gilroy
Patrick D. Gilroy
Presiding Judge

PDG:sh

cc: The Honorable Richard Thornburgh
The Honorable Mark O. Hatfield
The Honorable Robert Packwood

THE WHITE HOUSE
WASHINGTON

CAg

Gerald Schroeder - Idaho

THE WHITE HOUSE
WASHINGTON

CAg

Philip Johns -
Alaska - Andy Plunkfield?
Hawaii - Alan Kay?

NINTH CIRCUIT

Senator McClure has recommended four candidates for our consideration. Two, Duff McKee and Gerald Schroeder, are State trial court judges. The other two, Thomas Nelson and Timothy Hopkins, are private practitioners. Judge Schroeder appears to be the only one who should be considered further.

Judge Schroeder has been a trial judge for the last twelve years. In response to the Justice Department's request for materials, he provided six opinions and two articles. From this limited sample it is difficult to come to any definite conclusions. The opinions are mostly good, although two of them are open to criticism. In one, he refused to enforce a decision by the Idaho Department of Health and Welfare to recoup medicaid funds from a nursing home that had not reported the level of care of its patients in the manner required by regulation. One of the two grounds he relied on (that the Department had incorrectly believed it lacked discretion not to recoup) was quite plausible, but the other (basically, that recovery would be unjust) was not. The other opinion involved the firing of a Chief of Campus Security by a State School. Judge Schroeder first seems to have stretched the definition of employees outside the protection of the Idaho Civil Service laws to avoid their application to the plaintiff, and then reviewed the reasons for the decision to fire him in a manner that essentially revisited the entire question afresh, though he ultimately upheld it.

Judge Schroeder's articles are cautious but pretty good. One indicates considerable skepticism about the Warren Court's refashioning of the juvenile justice system as well as about the general proposition that any justice system can solve the problem of juvenile delinquency. The other examines the relationship between technology and the Constitution, and criticizes the analogy between the Constitution and a living organism or a machine. Instead, he argues, "It is the written form of our social contract which we reinterpret. If we do that well we abide by the contract envisioned by the founders. If we do it poorly, we ignore the contract." The article also subtly criticizes Roe v. Wade.

On balance, Judge Schroeder should be considered further, depending on what other candidates can be found in Idaho.

Judge McKee has been on the bench for four years. In response to the Justice Department's request for materials, he sent in his ten favorite opinions. Three of these are quite problematic. In one, he ruled that notwithstanding a statute forbidding the counting of time spent on parole toward completion of a recommitted parole violator's sentence, that time had to be counted if the parole violator was again paroled, thus requiring the parole violator's permanent release. In another, he excluded evidence obtained pursuant to a search warrant on concluding that

the warrant was insufficiently precise and that the search therefore violated the Fourth Amendment. The lack of particularity was due to the omission of the street name, although the warrant contained the number and a description of the premises. (McKee also noted that "the search warrant does not place the premises in Ada County, or even the State of Idaho," leading one to wonder if in the future, warrants in the Fourth Judicial District of Idaho will have to specify "the United States, the Planet Earth, the Milky Way, the Universe.") He also refused to apply the "good faith" exception to the exclusionary rule, even though it was devised precisely to allow use of evidence obtained in technical but good faith violation of the Fourth Amendment. Finally, in the third opinion, he found that a plaintiff could sue those involved in the peer review process that resulted in his dismissal from a hospital despite a statute that provided that participation in that process "shall not subject any person ... to any liability or action for money damages or other legal or equitable relief." McKee concluded that the plaintiff had a right to "judicial review" separate from the availability of any relief he might obtain from that review.

These three opinions would likely be sufficient cause for rejecting Judge McKee even if they were part of a random sample of his work. That he selected them from his corpus as three of his favorites seems dispositive.

Thomas Nelson and Timothy Hopkins were considered by the Justice Department during the Reagan administration. From the descriptions of their views that resulted from that consideration, they do not appear to satisfy President Bush's insistence on judges who will "interpret the Constitution, not legislate from the bench."

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CADc.

CAROLYN B. KUHL

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Los Angeles, CA 90071
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Pacific Palisades, CA 91604
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LEGAL EMPLOYMENT:

Partner, Munger, Tolles & Olson, Los Angeles, California
September, 1986 - Present

Civil business litigation in federal and state court including defense of government contractors in matters involving the False Claims Act, defense of major health insurer in first party bad faith litigation, litigation involving employment disputes, and various contract and tort actions. Advice and analysis in connection with lawsuits and legislative matters involving the U.S. Department of Justice.

Deputy Solicitor General, U.S. Dept. of Justice
November, 1985 - July, 1986

Responsibility for briefing and arguing cases before the United States Supreme Court and oversight of the government's appellate litigation in various areas. Served as Acting Solicitor General when the Solicitor General was recused or absent.

Deputy Assistant Attorney General, Civil Division, U.S. Dept. of Justice
June, 1984 - October, 1985

Supervised Federal Programs Branch (90 attorneys) as well as Appellate Staff (see below). Responsibility for all civil trial litigation (affirmative and defensive) involving federal agency programs, including cases challenging the legality or constitutionality of agencies' actions or regulations.

October, 1982 - October, 1985

Supervised Appellate Staff and Regulatory and Legislative Staff of the Civil Division (40 attorneys). Responsibility for all civil appellate litigation handled by the Department of Justice.

LEGAL EMPLOYMENT: (continued)

Special Assistant to the Attorney General of the United States
July, 1981 - October, 1982

Staff work for the Attorney General including general oversight of the activities of several Department components; speeches and other public appearances on behalf of the Department of Justice.

Associate, Munger, Tolles & Rickershauser
November, 1978 - July, 1981

Experience in antitrust counseling and litigation, securities litigation, defense of major class action suit involving commodity futures trading, general civil litigation in federal and state court.

Law Clerk to the Honorable Anthony M. Kennedy, United States Court of Appeals for the Ninth Circuit
August, 1977 - September, 1978

EDUCATION:

Law School

Duke University School of Law, J.D. 1977
Order of the Coif
Duke Law Journal: Editorial Board; Outstanding Editorial Board Member Award, 1977

College

Princeton University, A.B. Cum Laude in Chemistry 1974
Certificate in Program in Science in Human Affairs

Secondary School

St. Joseph's Academy, St. Louis -- Valedictorian 1970

PROFESSIONAL ACTIVITIES AND BAR MEMBERSHIPS:

Member of California, Missouri, and District of Columbia Bars
Member, American Law Institute
Public Member, Administrative Conference of the United States
Member, Board of Visitors, Duke Law School
Fellow, Private Adjudication Foundation

PERSONAL:

Married to William F. Highberger
Partner at Gibson, Dunn & Crutcher

SELECTED SPEECHES AND TESTIMONY:

Presentation at American Bar Association Annual Meeting on
"Prosecuting and Defending Lawsuits under the False Claims
Act", August 8, 1988

Address to Indiana University School of Law Federalist Society,
concerning Separation of Powers and the Qui Tam Provisions of
the False Claims Act, March 26, 1988

Testimony before the Senate Judiciary Committee in support of the
nomination of Anthony M. Kennedy to be Associate Justice of
the United States Supreme Court, December 17, 1987

Address as part of Colloquium on Improving Dispute Resolution:
Options for the Federal Government, June 1, 1987

Testimony before the Subcommittee on Administrative Law and
Governmental Relations of the House Judiciary Committee,
concerning HHS Policy of Acquiescence, July 25, 1985

Testimony before the Subcommittee on Courts, Civil Liberties, and
the Administration of Justice of the House Judiciary
Committee concerning the Reauthorization of the Equal Access
to Justice Act, April 30, 1985 and March 14, 1984

Testimony before the House Committee on Government Operations,
concerning Government Reorganization H.R. 6225 (legislative
veto), September 20, 1984

Testimony before the Senate Finance Committee, concerning Social
Security Administration's Nonacquiescence Policy, January
25, 1984

Testimony before the House Committee on Veterans' Affairs,
concerning Judicial Review of Veterans' Claims, July 21, 1983

Presentation at the Aspen Institute on "Use of Alternative
Dispute Resolution in Contract Disputes with the Government",
program sponsored by Center for Public Resources,
June 24, 1983

Presentation to the Council of the Litigation Section of the
American Bar Association, October 9, 1982

Panelist for Open Forum on Judicial Activism sponsored by Phi
Beta Kappa Association of Chicago, June 18, 1982

Address to the American Judges Association Mid-Year Conference,
April 23, 1982

Testimony before the Subcommittee on Criminal Law of the Senate
Judiciary Committee, on A Bill to Eliminate the Bar of the
Act of State Doctrine in Certain Cases, September 14, 1981