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Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Binder - Kuhl, Carolyn B. - Nominee to the United States Court of Appeals for the Ninth Circuit [1]

FRC ID:
9598

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Carolyn B. Kuhl

Nominee to the United States Court of Appeals for the Ninth Circuit

Carolyn Kuhl
Ninth Circuit Court of Appeals

TABLE OF CONTENTS

I. General Materials and Support

1. Affirmative Talking Points
2. Biography
3. Letters of Support
4. Responses to Written Questions

II. Opposition

III. Civil Rights

1. General Affirmative Talking Points
   A. *Iwekaogwu v. City of Los Angeles*, 75 Cal. App. 4th 803 (1999)
2. Bob Jones University
   A. Charles Fried, *Time Traveling to Thwart a Judge*, LA TIMES, Jan. 17, 2003.
   B. *Letter from Lawrence Tribe to Attorney General William French Smith*, Feb. 10, 1984.
   C. Jonathan Groner, *Going After the Bush Bench*, LEGAL TIMES, Jan. 28, 2002.
3. Affirmative Action
   A. *Affirmative Action Today: A Legal and Practical Analysis*, BNA SPECIAL REPORT, 1986.
4. Sexual Harassment
   A. *Meritor Savings Bank v. Vinson*
   B. Government's Brief
   C. Stuart Taylor, *Sex Harassment on Job is Illegal*, NEW YORK TIMES, June 20, 1986.
5. Sex Discrimination in Education – VMI
   A. Amicus Brief filed in *VMI v. U.S.* (No. 92-1213)

IV. Abortion

1. *Thornburgh v. American College of Obstetricians & Gynecologists*
   A. 476 U.S. 747 (1986)
   B. Government's Brief
   C. Excerpt from *Order and Law* by Charles Fried
2. *Planned Parenthood Federation v. Heckler*
   A. 712 F.2d 650 (D.C. Cir. 1983)
   B. Government's Brief
   C. Government's Reply Brief

3. *Rust v. Sullivan*
    A. 500 U.S. 173 (1991)
    B. Amicus Brief filed on behalf of the American Academy of Medical Ethics

V. Whistleblower Protections

1. *Madden v. General Dynamics Corporation*, 4 F.3d 827 (9th Cir. 1993)

VI. SLAPP Statute

1. *Ashkenazy v. Liu* (*Moore v. Liu* on Appeal)
    A. Superior Court Order, No. BC149503
    B. Court of Appeal Opinion, 69 Cal. App. 4th 745 (1999)

VII. Representation of Big Business

1. *Nelson v. Shell Oil Company*
    A. Brief Filed in *Nelson*
2. *Western Properties Service Corp. v. Shell Oil*
    A. Brief Filed in *Western Properties*
    B. Judge Paez Order Dismissing Cause of Action

VIII. Privacy Rights

1. *Sanchez-Scott v. Alza Pharmaceuticals*
    A. Letter from Judge Paul Turner
    B. Superior Court Order, No. BC214585
    C. Court of Appeal Opinion, 86 Cal. App. 4th 365 (2001)

IX. Dismissal of Rape Victim's Case

1. *American National Property and Casualty Co. v. Julie R.*
    A. 76 Cal. App. 4th 134 (1991)

X. Separation of Church and State

1. *Lynch v. Donnelly*
    A. 465 U.S. 668 (1984)
    B. Government's Brief

XI. "Public Interest" Litigation

1. *Brock v. United Auto Workers*
    A. 477 U.S. 274 (1986)
    B. Government's Brief

JUDGE CAROLYN KUHL
Nominee to U.S. Court of Appeals for the Ninth Circuit (California)
(Nominated June 22, 2001)

- Judge Carolyn Kuhl has served as a judge on the Superior Court of the State of California for the County of Los Angeles since 1995. She has served in both the civil and criminal divisions of the court, and is presently the Supervising Judge of Civil Division.

  - A bipartisan group of 23 women judges on the Superior Court who serve with Judge Kuhl have written to the Judiciary Committee, stating: "As sitting judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary."

    Democrat Senator Dianne Feinstein of California, who serves on the Senate Judiciary Committee, has stated that Judge Kuhl deserves a hearing.

  - The American Bar Association rated Judge Kuhl "Well Qualified" to serve on the Ninth Circuit.

  - Judge Kuhl has been nominated to a seat designated as a "judicial emergency" by the Judicial Conference of the United States.

- Throughout her career, Judge Kuhl has been dedicated to improving the law and the administration of justice. She was elected to the prestigious American Law Institute, reflecting the esteem in which she is held by her colleagues. Since joining the state bench, Judge Kuhl has served as Chair of the Superior Court's Research Attorney Committee and on the Superior Court's Committee on Alternative Dispute Resolution and Judicial Council Task Force on Jury Instructions. In addition, she has served as the supervising judge of the Complex Litigation Program and the Civil Division.

  - Judge Kuhl participates in court programs to introduce youth to the state court system. She is also on her court's Alternative Dispute Resolution Committee, and has assisted in the supervision of the program by which the Superior Court provides free mediation services to the public in civil and family law cases.

Judge Kuhl has an exemplary record of public service. From 1981 to 1986, she served in important positions in the United States Department of Justice. She served as Deputy Solicitor General, Deputy Assistant Attorney General in the Civil Division, and as Special Assistant to Attorney General William French Smith.

As Deputy Solicitor General of the United States, she argued cases before the United States Supreme Court and supervised the work of the other attorneys in the office. As Deputy Assistant Attorney General in the Civil Division, Judge Kuhl supervised all civil

appellate litigation handled by the Department nationwide. She also supervised civil trial litigation involving federal agency programs, in particular, high-impact cases challenging the legality or constitutionality of agencies' actions or regulations.

- Judge Kuhl has extensive appellate experience. As a partner in the Los Angeles law firm of Munger, Tolles & Olson, her practice focused on civil business litigation in both federal and state courts with a specialty in appellate litigation.

  Some interest groups have raised questions about Judge Kuhl's views on *Roe v. Wade* and her role in a brief filed by the United States in a 1985 case involving Pennsylvania's abortion laws. Judge Kuhl explained in a June 1, 2001, letter to Senators Feinstein and Boxer that this brief represented the public position of President Reagan and that the role of the Department of Justice in that case was to present the President's views to the Supreme Court. She added: "As a judge I am fully committed to following the precedent established by [*Roe v. Wade*] and would do so fairly and properly. . . . I am fully committed to following the state laws that protect a woman's right to have an abortion and Supreme Court precedent stating that a woman's right to choose to have an abortion is protected under the Constitution."

- Some interest groups have pointed to Judge Kuhl's role in a brief filed by the United States in a 1981 case involving Bob Jones University and the IRS's ability to deny tax-exempt status to educational institutions that engaged in discrimination. In her letter to Senators Feinstein and Boxer, Judge Kuhl stated: "The federal government has played, and should continue to play, an aggressive, vigorous role in fighting discrimination. . . . I now believe that the government's . . . position in the case was wrong. . . . [A]t the time I was 29 years old . . . . I was on the staff of the Attorney General [and] had no decisionmaking authority with respect to the government's position. The decision was made by the Attorney General and other high-level officials at the Department of Treasury and the White House. I conducted legal research on the issues involved in the case, primarily on the issue of the effect of legislative inaction subsequent to the IRS's adoption of the policy of denying tax exempt statutes to educational institutions that discriminated on the basis of race. Professor Laurence Tribe subsequently wrote the Attorney General a letter agreeing with the Justice Department's analysis of the issue of the effect of legislative inaction. . . . I was concerned that the IRS might deny tax-exempt status to all-girls or all-womens' schools on the ground that they discriminated on the basis of sex."

- Judge Kuhl is a 1977 graduate of Duke Law School where she was an editor of the Duke Law Journal, graduated with distinction, and was awarded membership in the Order of the Coif. In 1974, she received a B.A. in Chemistry from Princeton University, graduating cum laude. After law school, she clerked for Judge Anthony Kennedy, who was then a Judge on the U.S. Court of Appeals for the Ninth Circuit.

STATEMENTS BY SELECT SUPPORTERS OF JUDGE KUHL

Vilma S. Martinez, former Director of the Mexican American Legal Defense and Educational Fund

"I'm a lifelong Democrat. . . . Even though we don't share the same political views, necessarily, I consider her mainstream. . . . She's careful and she's thoughtful. She's been an excellent [state court] judge, and I think she will be an excellent 9th Circuit judge, one who will approach that job the way I think that job should be approached: with great care and deference." Los Angeles Daily Journal, May 24, 2001.

"She has the ability, temperament and dedication to do the job as well as she possibly can." Martinez added, "[s]he is a proven quantity as a fair judge, who has made her courtroom accessible to all." City News Service of Los Angeles, June 22, 2001.

23 Women Judges on the Superior Court of Los Angeles (February 22, 2002, Letter)

"Judge Kuhl is seen by us and by members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. She is conscientious, scholarly, courteous, and willing to listen with an open mind to the arguments of counsel. Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges who join our Court . . . . She has helped promote the judicial careers of women, both Republican and Democrat. She supported the Hon. Margaret Morrow when Judge Morrow was awaiting a hearing . . . . She also wrote in support of President Clinton's nomination of the Hon. Richard Paez . . . . She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend. As sitting judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary."

Leo James Terrell, an attorney for the NAACP who appeared before Judge Kuhl in *Iwekaogwu v. City of Los Angeles* (75 Cal. App. 4th 803 (1999))

"I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit." He went on to say that, "...I found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional." Excerpt from May 23, 2001, letter to Senator Boxer.

Judge James A. Bascue, Presiding Judge, Los Angeles Superior Court

". . . [Judge Kuhl] is one of the true "stars" of our Court, which is quite an honor since we have more than 500 judges and more than 200 commissioners. She is fair, open-minded and committed to providing equal justice under the law. Just as importantly, she is a very decent, kind and honest human being." Excerpt from May 10, 2001 letter to Senator Feinstein.

Justice Paul Boland, Court of Appeal, Second Appellate District, State of California and self-described Democrat

"Judge Kuhl is widely regarded as one of the most dedicated, knowledgeable, skillful and thoughtful judges sitting on the Los Angeles Superior Court. In criminal and civil judicial assignments, she has distinguished herself as a judge who is highly intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair." Excerpt from May 17, 2001 letter to Senator Feinstein.

Judge Terry B. Friedman, Presiding Judge, Los Angeles Superior Court, Juvenile Division

"I have known Judge Kuhl since her appointment to the Superior Court and, based on this experience, share the widespread view of my colleagues that she is one of the finest members of our bench." *Excerpt from May 3, 2001 letter to Senator Feinstein.*

Bruce Broillet, a noted plaintiff's attorney in Los Angeles

"I certainly didn't get all the rulings I wanted [in the cases I tried before Judge Kuhl], but I felt all of her rulings were reasonable. . . . She had an excellent judicial temperament. As you can tell, I hold her in high regard. A lot of consumer attorneys have very good things to say about Carolyn Kuhl; I'm not the only one." *Los Angeles Daily Journal, May 24, 2001.*

Ronald L. Olson, Judge Kuhl's former Partner at Munger, Tolles & Olson and self-described Democrat

Praised Judge Kuhl as "bright and hard-working. She has all the qualities to make a great judge." *Los Angeles Times, April 5, 2001.*

Joan Dempsey Klein, Presiding Justice, State of California Court of Appeal, Second Appellate District, Division Three

"If we could be assured that all President Bush's judicial picks would be of Judge Kuhl's high caliber, those of us with major concerns in this area could feel more secure." *Excerpt from letter to Senator Dianne Feinstein, April 12, 2001.*

Carolyn B. Kuhl

Biography

Carolyn B. Kuhl is Judge of the Superior Court of the State of California for the County of Los Angeles. Since her appointment by Governor Wilson in 1995, she has served in a criminal calendar court in the Criminal Courts Building for a year and one-half and in a fast-track civil assignment in the Civil Courthouse for three years. In 1999, she served for three months on assignment to the California Court of Appeal in Division 4 of the Second Appellate District. In April of 2000 she was selected to participate in the Complex Litigation Pilot Program and in January of 2001 she became the Supervising Judge of the Program.

Before her appointment to the bench, Judge Kuhl was a partner in the Los Angeles law firm of Munger, Tolles & Olson. Her practice consisted of civil business litigation in both federal and state court, with specialties in appellate litigation, representation of defense contractors in cases brought under the federal False Claims Act, and employment litigation.

From 1981 through 1986, Judge Kuhl served in the United States Department of Justice. As Deputy Solicitor General she argued cases before the United States Supreme Court and supervised other attorneys' work in cases before that Court. She also served as Deputy Assistant Attorney General in the Civil Division of the Justice Department, supervising all civil appellate litigation handled by the Department nationwide. As Deputy Assistant Attorney General she also supervised civil trial litigation involving federal agency programs, including high impact cases challenging the legality or constitutionality of agencies' actions or regulations. Judge Kuhl began her tenure at the Justice Department as Special Assistant to Attorney General William French Smith.

Judge Kuhl graduated from Princeton University in 1974 and from Duke University School of Law in 1977. At Duke Law School she was an Editor of the Duke Law Journal, graduated with distinction, and was awarded membership in the Order of the Coif. Following law school she clerked for the Honorable Anthony M. Kennedy, who at that time was a Judge of the United States Court of Appeals for the Ninth Circuit.

Judge Kuhl is a member of the American Law Institute. She is a past member of the Board of Visitors of Duke Law School. She previously served as Chair of the Superior Court's Research Attorney Committee and currently serves on the Superior Court's Committee on Alternative Dispute Resolution. She recently was appointed by the Chief Justice of the California Supreme Court to serve on the Judicial Council Task Force on Jury Instructions.

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April 23, 2001

The Honorable Dianne Feinstein
United States Senate
Hart Building, Room 331
Washington, DC 20510

Re: Possible Ninth Circuit Judgeship – Carolyn B. Kuhl

Dear Senator Feinstein:

I am advised that the Honorable Carolyn B. Kuhl is under consideration for nomination to the United States Court of Appeals for Ninth Circuit. Given the likelihood of your involvement in her potential nomination, I thought you might appreciate the view of a good Democrat who knows her well.

Carolyn started with our law firm in 1978. Justice Anthony Kennedy, then Judge Kennedy and one of her mentors, promised us that she would be outstanding. She lived up to that promise during the 11 years that she was with us (2 years before she went to Washington, DC, and 9 years thereafter as a partner).

In sum, Carolyn is balanced, bright and hard-working. During her time with us, she handled some of the most challenging litigation that we had. I personally worked alongside her in connection with several cases, including government antitrust cases against 3 television networks and several appellate matters involving Shell Oil Company. In those situations, I was able to observe her outstanding analytical and writing skills, her oral advocacy, her collegiality, and her dedication to her clients. She impressed me on all scores.

Our law firm includes individuals who range along the political spectrum from conservative to liberal and everything in-between. Carolyn communicated with and earned the respect of all of us, and never let personal political views interfere with her client judgments or her partnership responsibilities. In this firm, we depend heavily on each other as we share work and make compensation judgments. Carolyn was a good teammate and a generous, fair-minded partner.

In addition to her work with us, she also had an important role at the United States Department of Justice. And when she returned, it was obvious that she had learned from her experience and was able to reflect that experience in the judgments that she made. I am confident that her current role as a Superior Court judge has been an important learning experience and will add immeasurably to her judgmental base. I am told by a number of Superior Court judges that Carolyn has become one of the true leaders of the Court, mentoring other women, including a recent Democratic appointment who you at one time or another considered for appointment to the federal District Court bench. She is also an intellectual leader, as is evidenced by those colleagues on the bench who seek her judgment regarding the most difficult problems.

Finally, I want to note that these professional accomplishments have not compromised her family life. She is a wonderful mother and has, from all outward appearances, a balanced and rewarding relationship with her husband. Carolyn has the ability to laugh at herself and with her colleagues.

If I can be of any further assistance in assessing Carolyn, please let me know. Best wishes.

Sincerely yours,

Ronald L. Olson

RLO:des

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May 14, 2001

Honorable Barbara Boxer
U.S. SENATOR
Hart Senate Office Building
Suite 112
Washington, D.C. 20510-0505

Dear Senator Boxer:

I am writing this letter to recommend to you the Honorable Carolyn Kuhl who is being considered for a possible Federal Court appointment.

I had the pleasure of trying a case before Judge Kuhl in the Los Angeles Superior Court last year. I can tell you that she was an outstanding trial judge of the highest intellect and integrity. Moreover, she clearly enjoyed serving as a Judge, a trait which I believe to be essential for anyone serving in a judicial position.

In another case which I handled to the point of settlement before her, she was even-handed and understanding of the difficulties which both sides faced due to the numerous depositions and document productions which occurred in New York. I believe that my opponents in both of the cases which I have had before her would have the same glowing remarks about Carolyn Kuhl that I give to you in this letter.

Moreover, I can confirm to you that she has received excellent reviews from other fellow plaintiffs' attorneys who have handled cases before her. In my own experience, her rulings were balanced and well reasoned and her temperament was conducive of a fair and equitable trial. I have heard the same sentiments about her from other lawyers.

I would be happy to answer any questions you may have about Judge Kuhl.

Very truly yours,

GREENE, BROILLET, TAYLOR,
WHEELER & PANISH LLP

Bruce A. Broillet

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Court of Appeal
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

May 17, 2001

Honorable Dianne Feinstein
United States Senator
331 Hart Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Carolyn Kuhl for
Ninth Circuit Court of Appeal

Dear Senator Feinstein:

I am writing to encourage your support for my colleague, Judge Carolyn Kuhl, who is being considered for a position on the Ninth Circuit Court of Appeal. I would like to stress her impeccable qualifications and, at the same time, dispel any concerns about issues of judicial philosophy or political ideology.

Judge Kuhl and I came to the Superior Court bench from significantly different professional backgrounds. Governor Pete Wilson appointed her to the Superior Court bench following an impressive career in government service and private law practice. Governor Edmund Brown, Jr., appointed me 20 years ago after a career as a legal services attorney and law school professor and dean. Judge Kuhl is a Republican; I am a Democrat.

During her tenure on the Superior Court bench, Judge Kuhl has impressed both colleagues and litigants with her extensive knowledge of substantive and procedural law, her capacity to quickly grasp difficult legal concepts, her skillful management of large criminal and civil caseloads, and her unfailing courtesy to counsel, parties, witnesses and jurors.

Judge Kuhl is widely regarded as one of the most dedicated, knowledgeable, skillful and thoughtful judges sitting on the Los Angeles Superior Court. In criminal and civil judicial assignments, she has distinguished herself as a judge who is highly intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair. In criminal cases, prosecutors and criminal defense lawyers alike single her out for praise. In civil matters, the plaintiffs' bar and the defense bar universally respect her.

During our years of service together on the Superior Court, I never heard any criminal or civil lawyer express the view that Judge Kuhl issued a ruling or rendered decisions that were in any way influenced by a particular judicial philosophy or political ideology, or were motivated by a judicial or political agenda. As a member of the Superior Court, she has consistently strived to make decisions that are legally correct and devoid of bias.

As Supervising Judge of the Complex Civil Litigation Court, Judge Kuhl has been an outstanding judicial administrator. The policies, procedures and practices that she has implemented have ensured that litigants in complex civil cases–which by their nature are difficult, complicated and protracted–have their matters handled fairly, efficiently and competently. Neither Judge Kuhl's handling of her own caseload of complex civil matter nor her administration of those important courts has suggested anything other than a fair, even-handed approach to handling complex civil caseload.

In court committee assignments, Judge Kuhl has demonstrated uncommon diligence, competence and even-handedness in addressing a series of difficult court administration matters. Whether dealing with personnel issues or budgetary concerns, she has never demonstrated anything other than a total commitment to the fair administration of justice.

Beyond her abundant judicial and administrative skills, Judge Kuhl is an extraordinary judicial colleague. She extends to her colleagues the same fairness and courteousness that is evident in all facets of her professional relationships. In scores of dealings with her regarding legal issues and administrative matters, there has never there been the slightest indication that her positions were motivated by any consideration other than the best interests of the court, the litigants, and the public.

Judge Kuhl's distinguished tenure on the Superior Court bench persuades me, beyond any doubt, that she will be a skillful appellate jurist and thoroughly even-handed in the administration of justice in that position. I commend her to you with enthusiasm and without reservation.

Thank you very much for considering my views regarding this extraordinary applicant.

Sincerely,

Paul Boland

PB/cef

Los Angeles County
Bar Association

Litigation Section

Mailing address: P.O. Box 55020, Los Angeles, CA 90055-2020 (213) 627-2727 / Fax (213) 623-4336

May 18, 2001

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

Re: The Honorable Carolyn Kuhl

Dear Senator Feinstein:

We are the officers of the Litigation Section of the Los Angeles County Bar Association which, with over 3,000 members, is the largest voluntary Bar association in the United States. We understand that you will be meeting with Judge Carolyn Kuhl of the Los Angeles Superior Court on Tuesday, May 22, 2001. Given the shortness of time before your meeting, we have been unable to contact a quorum of our Executive Committee for a vote of that body and therefore write this letter in our individual capacities. We are confident, however, that it accurately reflects the feelings of most, if not all, of our Section members.

Collectively, we have known Judge Kuhl during her entire career in Los Angeles and, indeed, Alan Steinbrecher was her law school classmate at Duke. She presently serves with us on the Executive Committee of the Litigation Section. She is also the Supervising Judge of the pilot Complex Courts program that was implemented in 2000. By reputation and our personal experience, Judge Kuhl is extremely intelligent, hard working and thoughtful. She gained the prestigious appointment as Supervising Judge of the Complex Courts after only a few years on the bench because of those traits. In addition, she has a well-deserved reputation as being a fair minded judge who follows legal precedent. Her legal acumen is well-demonstrated by the scope of her career, including the fact that she has argued on multiple occasions before the United States Supreme Court. On a personal level, we have come to know her as a warm, witty and deeply caring person. We could not recommend her more highly for nomination to the Ninth Circuit Court of Appeals.

We know that you will be as impressed with Judge Kuhl as we are, and we urge that you support her nomination to the Court. Thank you in advance for your attention to her candidacy.

Very truly yours,

Alan K. Steinbrecher,
Chair, Litigation Section

Dean Ziehl,
Chair-Elect Litigation Section

Gretchen Nelson,
Treasurer

Steve English,
Secretary

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Secretary-Elect

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Jessica M. Weisel
Edward A. Xanders
Jennifer C. Yang

Of Counsel
Barbara Springer Perry
Barry M. West

Alan S. Martin
(1948 - 1990)

May 18, 2001

Writer's e-mail address
rheinke@gmsr.com

VIA TELECOPIER

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Re: **Hon. Carolyn B. Kuhl - 9th Circuit Nominee**

Dear Senator Feinstein:

I am writing to strongly support the nomination of Los Angeles Superior Court Judge Carolyn B. Kuhl to the United States Ninth Circuit Court of Appeals.

I am very familiar with Judge Kuhl's reputation and work as a lawyer and a judge. This is because I have been doing litigation in Los Angeles since 1976 and because I am very active in bar and related matters, including currently serving as the President of the Los Angeles County Bar Association. I also have been a close friend of her husband since we were in law school together. She is a very principled person and has strong moral character. While I could repeat her many accomplishments, which I am sure are reflected on her resume, I would like to emphasize the excellent reputation she has established as a Los Angeles Superior Court Judge.

Frankly, I have been surprised and impressed by the wide variety of lawyers from very diverse backgrounds, with clients with often opposing interests, who all hold a very high opinion of Judge Kuhl, her temperament, her hard work, her intelligence, and her genuine concern for achieving a just and proper result in the cases before her.

That high opinion is held not only by members of the bar but by members of her own court. She has rapidly advanced through the ranks of the Los Angeles Superior Court and now heads what is one of its most important divisions, as Supervising Judge for complex civil litigation. Her appointment to that position reflects the confidence that her colleagues have in her abilities as both an administrator and as a judge who is able to handle the most sophisticated and complex legal issues.

In addition, I have personally worked with her on a project to conduct a survey of what litigants, lawyers, and other people appearing in her court and the other complex litigation courts think about how those courts are working. I have been quite impressed by Judge Kuhl's keen interest in finding out what the complex litigation courts are doing right and what they are doing wrong. She is dedicated to making sure that those courts are responsive to the litigants, lawyers and other people that appear in them. This is a refreshing attitude not always shared by all judges, some of whom are not sensitive to the fact that ultimately courts provide a service and have to be responsive to the public.

In short, Judge Kuhl is well regarded by both bench and bar. If she is appointed to the Ninth Circuit, I think you will be proud of how she will perform her duties. If there is any other information I can provide, please do not hesitate to call on me.

Sincerely yours,

Rex Heinke

Rex S. Heinke

RSH:lbw

Law Offices

LEO JAMES TERRELL

8383 WILSHIRE BLVD., SUITE 920 • BEVERLY HILLS, CA 90211 • TEL: (323) 655-6805 • FAX: (323) 655-5104

May 23,2001

Senator Dianne Feinstein
Hart Senate Building, Ste. 331
Washington, D.C. 20510

By FAX (202) 228-3954
and U.S. Mail

Re: Judicial Appointment of Judge Carolyn B. Kuhl
to the 9th Circuit Court of Appeals

Honorable Senator Feinstein,

I am writing this letter to voice my support for the judicial appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.

I have been a lawyer in California for over 13 years. My office is located in Beverly Hills, California. My practice specializes in Civil Rights litigation and Employment Law, particularly discrimination and sexual harassment in the workplace. I also specialize in Police Misconduct litigation.

I am an attorney for the NAACP. I have a weekly radio program in Los Angeles, California. I also do local and national TV and Radio commentary on various social, civil and political issues.

I am a lifelong Democrat. I have contributed to your Senate campaigns and the Senate campaigns of Senator Boxer as well.

I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.

I became aware of Judge Kuhl through my law practice, and have always found her to be a fair and competent Judge. I litigated a case before Judge Kuhl entitled Francis Iwekaogwu vs. City of Los Angeles (1999) 75 Cal. App. 4th 803, 89 Cal. Rptr. 2d 505 in which Judge Kuhl was a major factor in the successful resolution of that case.

The Iwekaogwu case was an employment discrimination and retaliation case, where my client was discriminated because of his race (African-American) and ethnic background (Nigerian). During the lengthy litigation process I found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional.

I personally have no problem with the appointment of a Republican Judge to the 9th Circuit bench, as long as that Judge is fair and impartial. Judge Kuhl is just that person.

If asked, I would be willing to speak on behalf of Judge Kuhl before any Congressional or Judiciary hearings.

I submit that your decision regarding the appointment should be based solely on the competency of the judicial candidate, not on politics. I will do everything in my power to ensure that Judge Kuhl receives the nomination, and to see that this nomination obtains the advice and consent of the Senate, as well as the public.

If you have any questions or require more information, please do not hesitate to contact me at your convenience.

Thank you for your consideration.

Very truly yours,

Leo James Terrell
Attorney at Law

LJT/mr

cc: Honorable Carolyn B. Kuhl
Los Angeles Superior Court

STATE OF CALIFORNIA
Court of Appeal
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013

NORMAN L. EPSTEIN
ASSOCIATE JUSTICE

TELEPHONE
(213) 830-7438

May 24, 2001

The Honorable Barbara Boxer
United States Senate
112 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Boxer:

I am writing to support the candidacy of Judge Carolyn Kuhl for the United States Court of Appeals for the Ninth Circuit. I hope the President will soon nominate Judge Kuhl to the Senate for confirmation to that position.

Judge Kuhl served as a justice pro tempore on the appellate panel on which I serve, Division Four of the Second District Court of Appeal. It was during that service that I came to know her and her work. She is a solid and independent judge who is dedicated to and follows the law. She also is a very intelligent and hardworking judge, and a gifted writer. If confirmed, her opinions will, I am confident, present thoughtful, well written, and convincing analyses. She will reason to a conclusion based on our Constitution, statute, and established precedent, rather than reason backward from some predetermined result. Judge Kuhl also is personable, understands the principle of collegiality, and is able to work well and effectively with colleagues on panels of judges.

These qualities have earned her the admiration of all members of our court, as they have of her colleagues on the Los Angeles Superior Court, on which she now sits, and of members of the Bar.

I hope that she will have your support for the nomination and confirmation. If I can provide any further information or amplification to you or members of your staff, please do not hesitate to let me know; I will be pleased to respond.

Sincerely,

Norman L. Epstein

NLE:bw

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GERALD L MCMAHON
REGINALD A VITEK
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SELTZER | CAPLAN | MCMAHON | VITEK

A LAW CORPORATION

August 21, 2001

Hon. Dianne Feinstein
U.S. Senate
Washington, D.C. 20510

Re: Nomination of California Superior Court Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit

Dear Senator Feinstein:

I am writing in strong support of the nomination of California Superior Court Judge Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit.

I first met Judge Kuhl in 1987 when I was a second year law student at Harvard interviewing for a summer associate position at the Los Angeles law firm where she was a partner, Munger Tolles & Olson. I later worked with her that summer when I accepted a summer associate position there.

I vividly recall one particular lunch another summer associate and I had with Carolyn and another partner Peter Taft where we discussed a wide range of legal matters. I found her comments very thoughtful. She did not analyze the many different legal issues raised at the lunch with anything approaching a rigid ideological agenda. As an African-American, I was sensitive to that.

Judge Kuhl is exceptionally well-qualified for the Ninth Circuit by experience and by temperament. She has demonstrated excellence as an advocate in both the U.S. Solicitor General's office and at Munger Tolles & Olson. She has demonstrated her abilities and evenhandedness as a Superior Court judge in both criminal and civil matters and currently oversees complex civil matters.

SELTZER | CAPLAN | MCMAHON | VITEK

As a former president of the Earl B. Gilliam Bar Association in San Diego, the local organization of African-American attorneys, I believe it is important to attract to the federal judiciary the finest and fairest minds to what is, for virtually all federal litigants in California, the court of last resort. Judge Carolyn Kuhl would be an excellent addition to the critically important Ninth Circuit bench. I urge you to support her nomination.

Sincerely,

Daniel E. Eaton, Esq.

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
DZINTRA I. JANAVS, JUDGE

TELEPHONE
(213) 974-1234

February 22, 2002

The Hon. Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Hon. Orrin G. Hatch
Ranking Minority Member, Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

The Hon. Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

The Hon. Barbara Boxer
112 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of Judge Carolyn B. Kuhl to U.S. Court of Appeals for the 9th Circuit

Dear Senators:

We are all colleagues of Judge Carolyn B. Kuhl on the Superior Court of the State of California for Los Angeles County. We write in support of her being given a prompt and fair hearing on her nomination to be a Judge of the United States Court of Appeals for the Ninth Circuit. We have served with her variously in the criminal felony courts, the general jurisdiction civil courts, the pilot program for complex litigation, and on committees and special projects.

Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs' and defense bar. She is conscientious, scholarly, courteous and willing to listen with an open mind to the arguments of counsel. Judge Kuhl approaches her job with respect for the law and not a political "agenda."

Judge Kuhl has been a mentor to new women judges who join our Court to help them navigate the unfamiliar waters of judicial service. She has helped promote the judicial careers of women, both Republican and Democrat. She supported the Hon. Margaret Morrow when Judge Morrow was awaiting a hearing before the Senate Judiciary Committee on her nomination by President Clinton to the United States District Court in Los Angeles. She also wrote in support of President Clinton's nomination of the Hon. Richard Paez to the Ninth Circuit when he likewise awaited his confirmation after his nomination by President Clinton. This shows both Judge Kuhl's open-mindedness and the continuing importance of affording all Presidents' judicial nominees a hearing. We would hope that equal consideration would now be given to allowing Judge Kuhl to have a timely hearing and vote.

As you know, the evaluation of Judge Kuhl, her professional work, credentials and competence by the American Bar Association's Standing Committee On The Federal Judiciary was completed last August. We understand that Judge Kuhl was rated Well Qualified by a substantial majority of that Committee and rated Qualified by the other members of that Committee. This high rating of Judge Kuhl for such an important appellate position is entirely consistent with our observations and her well deserved, excellent reputation among her colleagues and the bar. She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend.

As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary. Under the Constitution it is ultimately for each member of your Committee and eventually each member of the Senate to determine whether or not to confirm Judge Kuhl, but we urge you to deal with the question on the merits and not by denying her a hearing.

Sincerely yours,

The Hon. Dzintra Janavs

The Hon. Mary Ann Murphy

The Hon. Emilie H. Elias

The Hon. Judith C. Chirlin

The Hon. Ann Kough

The Hon. Victoria Chaney

The Hon. Ann I. Jones

The Hon. Helen I. Bendix

The Hon. Linda K. Lefkowitz

The Hon. Lorna Parnell

The Hon. Patricia L. Collins

The Hon. Elizabeth A. Grimes

The Hon. Rita Miller

The Hon. Lee Edmon

The Hon. Fumiko H. Wasserman

The Hon. Mary Thornton House

The Hon. Ruth Ann Kwan

The Hon. Kathleen Kennedy-Powell

The Hon. Tricia Ann Bigelow

The Hon. Judith L. Champagne

The Hon. Maureen Duffy-Lewis

The Hon. Jacqueline Connor

The Hon. Marsha N. Revel

ANNE H. EGERTON
455 NORTH LAS PALMAS AVENUE
LOS ANGELES, CALIFORNIA 90004-1015
(323) 936-1804

March 17, 2002

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510

Re: **Nomination of Judge Carolyn B. Kuhl to the United States Court of Appeals for the Ninth Circuit**

Dear Senator Feinstein,

I write in support of the nomination of Los Angeles Superior Court Judge Carolyn B. Kuhl to the United States Court of Appeals for the Ninth Circuit. I am a Democrat who has been a strong supporter of gender equality and reproductive freedom all my life. In my view, Judge Kuhl is a fair, smart, hardworking judge who is truly committed to the rule of law and who would do a fine job as a federal appellate judge.

I first met Carolyn Kuhl when we were law partners at the Los Angeles firm of Munger, Tolles & Olson in the 1980's. Carolyn was well regarded by her fellow partners as well as by clients, associates, and staff at the firm. Carolyn served as a mentor to me in those years. Having her guidance and support made a real difference to a young woman learning to navigate the world of male-dominated major corporate firms. At Munger Tolles, Carolyn also helped to organize and actively participated in lunches and other activities of the women attorneys at the firm. We joined together from time to time to discuss issues of common concern to us as lawyers, mothers, and colleagues. Those gatherings built solidarity and helped to further gender equality at the firm.

Carolyn and I now are fellow judges. During my application process for the bench, Carolyn again took the time to answer my questions and to act

as a mentor. As someone who has practiced law in Los Angeles for nearly twenty years and now as a fellow bench officer, I can tell you that Judge Carolyn Kuhl is highly respected by other judges as well as by lawyers who appear before her. She is recognized as a very able and fair judge, with an excellent temperament for judging and with no personal agenda. Her colleagues' regard for her abilities – analytical and managerial – and her work ethic shows in the presiding judges' assignment of Judge Kuhl to supervise the complex litigation court, which handles the largest and most complicated civil cases in Los Angeles County.

I understand that some have raised concerns about Judge Kuhl's commitment to gender equality and reproductive rights. I do not share those concerns. I have been active in feminist and pro-choice organizations since I first joined the nascent Arizona Women's Political Caucus in 1971. While I was an associate at Wilmer, Cutler & Pickering in Washington, D.C. in 1982, I co-authored a brief filed in the United States Supreme Court in *City of Akron v. Akron Center for Reproductive Health, Inc.* on behalf of amici the American College of Obstetricians and Gynecologists, the American Medical Association, and the American Academy of Pediatrics. The *Akron* decision – in which the Court cited our amicus brief – helped to expand access to safe and legal abortion. While I was at Munger, Tolles & Olson, I provided legal services on a *pro bono publico* basis for Planned Parenthood Los Angeles, serving as their outside general counsel for about two years in the late 1980s. While at Munger and later, I also was active in the Women Lawyers Association of Los Angeles Prochoice and Reproductive Rights Committee, and I co-chaired the committee for two years in the early 1990s. (I write this letter on a personal basis and of course do not purport to speak for any of these organizations.) I have spoken on a number of occasions in support of reproductive freedom and abortion rights. I have been a registered Democrat for thirty years, and I have supported – financially and otherwise – you, Senator Boxer, and other Democratic legislators and candidates.

I have no reservations in recommending Judge Carolyn Kuhl to you for appointment to the Ninth Circuit Court of Appeals. I know Judge Kuhl to be committed to the rule of law and to the application of governing precedent. In the area of reproductive freedom, that precedent of course includes *Roe v. Wade* and the many cases such as *Akron* that have applied its landmark holding. Some people talk about mentoring and supporting women: Carolyn Kuhl is someone who does it, generously and consistently.

Judge Kuhl has the analytical ability, the personal integrity, the demeanor, and the commitment to justice and the rule of law to distinguish herself on the Ninth Circuit. I urge you to support her nomination.

Sincerely yours,

Anne Egerton

Anne H. Egerton

cc: The Honorable Patrick Leahy
The Honorable Orrin G. Hatch
bcc: The Honorable Carolyn B. Kuhl

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
ELIZABETH A. GRIMES, JUDGE

TELEPHONE
(213) 974-1234

February 28, 2003

The Hon. Orrin G. Hatch
Chairman, Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

The Hon. Patrick J. Leahy
Ranking Minority Member, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Hon. Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

The Hon. Barbara Boxer
112 Hart Senate Office Building
Washington, DC 20510

Re: Nomination of Judge Carolyn B. Kuhl to U.S. Court of Appeals for the 9th Circuit

Dear Senators:

We are all colleagues of Judge Carolyn B. Kuhl on the Superior Court of the State of California for Los Angeles County. We enthusiastically endorse her for appointment to the United States Court of Appeals for the Ninth Circuit. We are Republicans, Democrats, and Independents and have all had the opportunity to observe the leadership and demeanor of Judge Kuhl.

We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.

We urge the 108th Congress to proceed promptly to take all necessary steps to confirm Judge Kuhl as a Circuit Court Judge. Thank you for your consideration of this letter.

Sincerely yours,

Elizabeth A. Grimes

Listed below are the names of the Superior Court Judges who join in sending this letter. The original signature pages are included with the letter addressed to the Honorable Orrin G. Hatch.

Hon. Haley J. Fromholz

Hon. Warren L. Ettinger

Hon. Wendell Mortimer, Jr.

Hon. Roy L. Paul

Hon. Thomas L. Willhite, Jr.

Hon. Morris B. Jones

Hon. Rodney E. Nelson

Hon. H. Ronald Hauptman

Hon. Paul Gutman

Hon. Emilie H. Elias

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Hon. James C. Chalfant

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Hon. Helen I. Bendix

Hon. Fumiko Hachiya Wasserman

Hon. Dzintra Janavs

Hon. Ronald M. Sohigian

Hon. David P. Yaffe

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Hon. Hugh C. Gardner III

Hon. David L. Minning

Hon. Malcolm Mackey

Hon. Victor Person

Hon. Rolf Treu

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Hon. Maureen Duffy-Lewis

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Hon. Maral Injejikian

Hon. Alice E. Altoon

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Hon. Lorna Parnell

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Hon. Mary Ann Murphy

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Hon. Terry B. Friedman

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Hon. Michael M. Johnson

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PAUL TURNER
PRESIDING JUSTICE

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JUDICIAL ASSISTANT
TERRI MEADOWS

March 17, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Judge Carolyn Kuhl to serve on the Ninth Circuit Court of Appeals

Dear Mr. Chairman:

The Senate Committee on Judiciary has pending before it the nomination by President George W. Bush of Los Angeles Superior Court Judge Carolyn Kuhl to serve on the Ninth Circuit Court of Appeals. As you may know, she has been criticized by certain advocacy groups because an order she entered was reversed by the California Court of Appeal in the case of *Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal.App.4th 365. That case involved the question of whether tort liability could arise because a drug salesperson was being trained by a physician during the breast examination of a cancer patient. Judge Kuhl's critics have asserted that the reversal of her order sustaining the demurrer without leave to amend is evidence of her bias and prejudice against women.

On appeal, I was the author of the *Sanchez-Scott* opinion. I have been a member of the California judiciary since 1983 and a Court of Appeal Justice since November, 1989. I can tell the difference between a trial judge making a tough call in the context of competing legal interests, on one hand, and bias or prejudice, on the other hand. Judge Kuhl's order sustaining the demurrer without leave to amend was not an act of bias or insensitivity. Several points warrant comment.

First, there was no issue in the *Sanchez-Scott* case involving the constitutional right of privacy. Footnote 1 of the opinion expressly states that there was no issue of the constitutional privacy right before our court when we considered the *Sanchez-Scott* case.

Second, the plaintiff's tort claim against the doctor himself for failing to obtain his patient's fully informed consent was not at issue before Judge Kuhl and this court. Ms. Sanchez-Scott's claim against the physician was to be litigated in any case even if the drug salesperson and his employer did not remain in the case.

Third, the *Sanchez-Scott* case involved some issues of first impression under California law involving the tort of intrusion as defined in the Restatement Second of Torts, section 652B which even as of this date have not been clearly defined with identifiable bright line rules by California courts. The California Supreme Court has described the tort of intrusion as involving "degrees and nuances to societal recognition of our expectations of privacy" and "relative" concepts. Much of the analysis in our decision was premised upon the 1881 Michigan Supreme Court decision of the *DeMay v. Roberts* (1881) 46 Mich. 160. In ruling on the demurrer, Judge Kuhl was required to apply what the California Supreme Court has characterized as degreed and nuanced rules of law involving relative concepts.

Fourth, attached to complaint filed in superior court was a letter explaining why the drug salesperson was in the examining room during the breast examination. That letter explained that he was present because he was participating in an oncology mentorship program. The purpose of the program was to allow the salesperson to "better learn how an oncologist attends to patients, manages medications, and generally oversees administrative functions of the office." In other words, the purpose of the mentorship program was to ensure better delivery of health care services to breast cancer patients. Under California law, in evaluating whether the tort of intrusion has occurred, a court must weigh the reasons for the intrusive conduct. When Judge Kuhl concluded that the mentorship program, which was designed to improve treatment for breast cancer patients, was a sufficient justification for allowing the drug salesperson to be present during the examination, she did not demonstrate bias or insensitivity. In fact, a strong argument can be made that she correctly assessed the competing societal interests the California

Supreme Court requires all jurists in this state to weigh in determining whether the tort of intrusion has occurred.

With all respect to those who have criticized Judge Kuhl as being insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect.

If either you or staff member have any questions, please do not hesitate to contact me. If you wish to have a copy of the *Sanchez-Scott* opinion sent to you or a staff member, please let my office know and I will insure that one is e-mailed or faxed to you immediately.

Very truly yours,

Paul Turner
Presiding Justice

PT:tm

Judge Carolyn Kuhl's Responses to Senator Boxer's Questions

Question:

1.(a) On a number of occasions while at the Justice Department you advocated overturning Roe vs. Wade and a woman's right to choose. Please explain to me how you became involved in these cases and what your views are on a woman's right to control what happens to her body and, specifically, on the issue of a woman's right to choose whether to have an abortion.

Response:

When I took the oath of office as a judge of the California Superior Court, I said that my model for the judicial role is summarized in the following quotation from Justice Felix Frankfurter: "The highest exercise of judicial duty is to subordinate one's personal will and one's private views to the law." I have tried in each case to exercise this highest goal of judicial duty. I believe that lawyers from all segments of the bar who have appeared before me would affirm that I do my best to apply the law without reference to my personal views.

The constitutional right of a woman to make her own choices regarding personal medical issues, including choices regarding issues of reproductive freedom, has been established by both *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As a judge I am fully committed to following the precedent established by these cases and would do so fairly and properly.

As I told you in our meeting and told Senator Feinstein in my meeting with her, as I judge I am and would be pro-choice in the sense that I am fully committed to following the state laws that protect a woman's right to have an abortion and Supreme Court precedent stating that a woman's right to choose to have an abortion is protected under the Constitution. (I did not address my own personal moral views or personal policy views concerning abortion either in my meeting with you or in my meeting with Senator Feinstein. As the quotation from Justice Frankfurter affirms, a judge's personal views on any issue of social or public policy are irrelevant to the task of judging.)

At our meeting, we discussed three briefs I filed on behalf of clients that bore on issues involving contraception and family planning. Two of those briefs are discussed in my responses to subparts b and c of this question (below). The third brief was filed in *Planned Parenthood of America, Inc. v. Heckler*, 712 F.2d 650

(D.C. Cir. 1983), when I was a lawyer for the Department of Justice.

The traditional role of the Department of Justice is to defend regulations issued by executive branch agencies when the regulations are challenged in litigation. The brief in *Heckler* defended a regulation of the Department of Health and Human Services that required parents to be notified when contraceptives were provided to minors in a federally funded program. I did not have any role in developing the agency's policy. The brief argued that the HHS regulation was permitted under the agency's statutory mandate. The brief did not discuss *Roe v. Wade*, except for one reference in the context of discussing another case.

Question:

1.(b) In the cases of *Thornburgh* and *Diamond*, the amicus brief you submitted not only urged the Supreme Court to deem the state laws constitutional, but urged the wholesale reversal of *Roe v. Wade*. What role did you play in getting the Solicitor General to go beyond the circumstances of the cases and instead appeal the Roe decision?

Answer:

In 1992, *Planned Parenthood v. Casey* reaffirmed the continuing validity of *Roe v. Wade* and a woman's constitutional right to make choices regarding reproductive freedom. I am fully committed to following these precedents and to applying the law established by those cases.

The *amicus* brief in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), was filed by the Department of Justice in 1985, before *Casey* was decided in 1992. At the time the *Thornburgh* brief was filed, Ronald Reagan was President and he had repeatedly stated his position that *Roe v. Wade* was wrong and should be overruled. The Justice Department presented the views of the President to the Supreme Court in the *Thornburgh amicus* brief, just as the Department of Justice presented the views of the President concerning abortion and *Roe v. Wade* to the Supreme Court during the administration of President Clinton. As a lawyer for the President, I expressed the view that the Justice Department had an obligation to be honest with the Supreme Court with respect to the President's view of the law, rather than to seek to weaken *Roe v. Wade* without being candid with the Supreme Court about the administration's position on that constitutional question.

With respect to the drafting of the government's brief in *Thornburgh*, at the time the brief was filed I was Deputy Assistant Attorney General in charge of the

Appellate Staff of the Civil Division. A draft of the *amicus* brief was prepared by career lawyers of the Appellate Staff of the Civil Division. In accordance with the Justice Department's usual practice, I reviewed the draft brief before it was sent to the Solicitor General's office. I do not recall in what respect I edited the draft. I do recall that the section of the brief discussing whether *Roe v. Wade* should be overruled was thoroughly rewritten by the Solicitor General's Office.

Question:

1.(c) After you entered private practice, you represented the American Academy of Medical Ethics — a fundamentalist, anti-choice organization — in arguing in favor of upholding a gag rule on Title X funding. What were and are your views on this issue, and why did you take this particular case?

Answer:

As you know, an attorney who represents a client does not by that act vouch for or adopt the views or positions of the client. Rather, the attorney's role is to represent the client in the particular matter and to vigorously advocate legal positions that favor the client in that matter. This is true whether the lawyer is representing a defendant accused in a criminal case or a corporate client. Moreover, a judge certainly may not decide a legal issue based on the position the judge took on that issue as a lawyer for a client.

This client was referred to me as a potential client for appellate work, *i.e.*, the filing of an *amicus* brief in *Rust v. Sullivan*, 500 U.S. 173 (1991). At that time, I was attempting to develop an appellate practice specialization as part of my work at my private law firm. Work on matters pending in the United States Supreme Court is an important part of developing an appellate practice, and work on First Amendment issues is considered particularly prestigious.

The *amicus* brief in *Rust v. Sullivan* addressed a First Amendment issue; specifically, whether then-current Title X restrictions on abortion counseling and referral in programs receiving federal funds violated the free speech clause of the First Amendment. In *Rust v. Sullivan* the United States Supreme Court held that such restrictions did not violate the free speech rights of participants in Title X programs, agreeing with the position taken in the brief I filed.

I do not know whether or not restrictions on abortion counseling still are part of Title X programs. If there are no such restrictions I certainly would not impose them as a judge. If there are such restrictions, I would be bound to follow the Supreme Court's ruling in *Rust v. Sullivan*.

Question:

2. In *Sanchez-Scott v. Alza Pharmaceuticals*, a breast cancer patient went in for a check up. An unidentified person accompanied her doctor, watched, and even laughed at her during the examination, in which she was nude from the waist up. Only afterwards was she told that this man was drug salesman. She sued the company, claiming an invasion of privacy. You ruled against the patient, saying her privacy had not been invaded. Moreover, in the motion to dismiss, she was charged $401. Your decision was reversed on appeal. How do you explain your decision, given the facts of the case and the appellate court's action.

Answer:

The appellate court's opinion in this case is recent, and it revived the plaintiff's claim. Therefore it is likely that the case still is pending. Ethics rules governing California judges preclude them from commenting on pending litigation, even with respect to cases that are pending before other judicial officers.

Within those constraints, however, I can say that my reasons for granting the demurrer (the motion to dismiss the case) were stated on the record at the hearing on the motion brought before me. The facts alleged in the complaint were that the doctor introduced the third person to the patient as being someone who was there to observe his work. I stated on the record essentially that the complaint did not state a claim because the patient was in a position to make further inquiry about why the third person was present but did not do so and did not object to the third person's presence.

The defendant was awarded $401 in costs to be paid by the plaintiff. An award of costs (incidental litigation expenses such as filing fees, service of process, deposition transcripts and the like) to a prevailing party is automatic under California Code of Civil Procedure section 1032(b) and ordinarily is handled as a clerical matter by the clerk of the court unless there is an objection.

Question:

3. In a highly publicized case involving the tax exempt status of Bob Jones University during the Reagan Administration, The New York Times described you as one of "a band of young zealots" who urged President Reagan to change his position and support tax exemptions for the University. What were the circumstances surrounding this case and the details of your involvement? Why did you disagree with the apparently overwhelming and deeply held view of others in the Department?

What are your views on the Federal Government's appropriate role in fighting discrimination? Should it be a force for change where discrimination exists?

Answer:

The federal government has played, and should continue to play, an aggressive, vigorous role in fighting discrimination. The civil rights laws have had a major impact in changing our society for the better, including by giving the executive branch the power to punish unlawful discriminatory conduct in employment, housing, government contracting and federal programs. The government should continue to be a force for change by vigorously enforcing the civil rights laws.

I do not think there is anyone who would question my personal commitment to fair treatment of all persons, to non-discrimination and to enforcement of the civil rights laws. As an example of the latter, I point to my decision in *Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803 (1999), and to the attached letter from Leo James Terrell, Esq., who was counsel for the plaintiff in that case.

I now believe that the government's decision to reverse position in the *Bob Jones* case was wrong. The government's decision was wrong in part because it appeared insensitive to minorities, regardless of the nondiscriminatory motives of those involved in the decision. The government's decision also was wrong from a legal standpoint, because the IRS, the Justice Department's client, had a defensible legal position, and the Justice Department should have defended that position in line with its traditional role as lawyer for executive branch agencies.

With respect to my role in the *Bob Jones* case, at the time I was 29 years old and had been at the Justice Department only a few months. I was on the staff of the Attorney General and performed staff work for him and other presidentially appointed Justice Department officials in connection with this matter. I had no decisionmaking authority with respect to the government's position. The decision was made by the Attorney General and other high-level officials at the Department of Treasury and the White House.

I conducted legal research on the issues involved in the case, primarily on the issue of the effect of legislative inaction subsequent to the IRS's adoption of the policy of denying tax exempt status to educational institutions that discriminated on the basis of race. Professor Laurence Tribe subsequently wrote the Attorney General a letter agreeing with the Justice Department's analysis of the issue of the effect of legislative inaction. A copy of Professor Tribe's letter is attached to these answers.

In internal Justice Department discussions, I also expressed the view that the governing statute did not give the IRS the authority to define when an organization was violating public policy and to deny tax exemptions on that basis. I focused on the problems that could arise from the IRS's potential unfettered discretion to define what was "public policy" in any number of situations for purposes of tax-exempt status and, in particular, I was concerned that the IRS might deny tax-exempt status to all-girls' or all-womens' schools on the ground that they discriminated on the basis of sex. (I had attended an all-girls' high school and attributed to that experience important preparation for the professional world.)

Question:

4. In my experience with defense procurement reform, I have found it very helpful for private parties to be able to file whistleblower suits against defense contractors. In many cases, this is the only way that taxpayers are protected from waste, fraud and abuse. You filed an amicus brief on behalf of Rockwell and others in the case of *Madden v. General Dynamics Corporation*, in which a number of defense contractors argued that the qui tam statute was unconstitutional. What is your view about statutes such as qui tam which allow private citizens to file lawsuits protecting the public interest?

Answer:

With respect to the federal qui tam statute, I understand that it has been effective in substantially increasing the government's recovery for fraud, waste and abuse. The Ninth Circuit held that the qui tam statute is constitutional in *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993). If nominated and confirmed as judge of the Ninth Circuit I would respect and follow circuit precedent. I could not be (and would not be) influenced in my judicial decisions by positions I took as a lawyer for a client.

The arguments I made on behalf of clients concerning the constitutionality of the qui tam statute were commonly made at that time by defense contractors faced with suits brought by private citizens seeking to recover for injury to the government. For example, the Honorable Margaret McKeown, who now is a judge of the Ninth Circuit Court of Appeals (appointed by President Clinton), presented similar constitutional arguments to the Ninth Circuit as counsel for Boeing Co. in *United States ex rel. Kelly v. Boeing Co.*.

Question:

5.(a) While in private practice, you were involved in *Western Properties Service Corporation v. Shell Oil*, and *The State of Minnesota v. Philip Morris*. In both of these cases, you represented big business in opposition to the rights of consumers. In both cases, the Courts ruled against your clients. These cases are representative of dozens of others you have taken as a private attorney. How can I have confidence, given your long history of representing major corporations against consumers, that as a judge you will not continue to tip toward the rich and the powerful?

Answer:

My goal as a judge is to render equal justice under law. Both parts of this statement are important to my concept of the proper role of a judge. A judge must administer justice equally, to rich and poor alike, without regard for the status of the litigant in society. At the same time, the judge must take definition of the justice he or she renders from the law as embodied in the constitution and the laws passed by the legislative branch.

My record as a judge makes clear that when I assumed the bench I left advocacy behind and did my best to apply the law equally to all parties. For example, during three months of service sitting by designation as a judge of the California Court of Appeal, I wrote an opinion upholding a substantial award in favor of a victim of race discrimination (*Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803 (1999)), an opinion holding that an alleged victim of fraud by a trustee could bring a lawsuit against the large law firm that was counsel to the trustee (*Wolf v. Mitchell, Silberberg & Knupp*, 76 Cal.App.4th 1030 (1999)), and an opinion holding that a foreign business entity was subject to being sued in California (*Signal Treating Service, Inc. v. Lonrho, PLC*, Cal.Ct.App. No. B124370 (filed Aug. 5, 1999)).

The attached letter from Bruce A. Broillet, Esq., who currently is President of the Consumer Attorneys of California, states that I have received "excellent reviews" from plaintiffs' attorneys who have handled cases before me.

Question:

5.(b) I know lawyers in big firms represent big corporations such as you have in the cases of Shell, Rockwell, Fairchild, and others. But why did you choose to represent Phillip Morris against public health claims? Did that case cause you any

personal ethical concerns? Couldn't you have asked your firm to excuse you from the case?

Answer:

A lawyer who performs legal services on behalf of a client does not vouch for the views or conduct of that client but only undertakes to make legally supportable arguments for the client's position. That was true of my representation of Phillip Morris. The client was an important one for my law firm, and my senior partners specifically asked me to work on certain matters for that client (approximately during the last year I was at the law firm). While I could have asked to be excused from working on these matters, I did not do so out of loyalty to my partners who needed my help.

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May 23,2001

Senator Barbara Boxer
Hart Senate Building, Ste. 112
Washington, D.C. 20510

By Fax (202) 228-1338
and U.S. Mail

Re: Judicial Appointment of Judge Carolyn B. Kuhl
to the 9th Circuit Court of Appeals

Honorable Senator Boxer,

I am writing this letter to voice my support for the judicial appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.

I have been a lawyer in California for over 13 years. My office is located in Beverly Hills, California. My practice specializes in Civil Rights litigation and Employment Law, particularly discrimination and sexual harassment in the workplace. I also specialize in Police Misconduct litigation.

I am an attorney for the NAACP. I have a weekly radio program in Los Angeles, California. I also do local and national TV and Radio commentary on various social, civil and political issues.

I am a lifelong Democrat. I have contributed to your Senate campaigns and the Senate campaigns of Senator Feinstein as well.

I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.

I became aware of Judge Kuhl through my law practice, and have always found her to be a fair and competent Judge. I litigated a case before Judge Kuhl entitled Francis Iwekaogwu vs. City of Los Angeles (1999) 75 Cal. App. 4th 803, 89 Cal. Rptr. 2d 505 in which Judge Kuhl was a major factor in the successful resolution of that case.

The Iwekaogwu case was an employment discrimination and retaliation case, where my client was discriminated because of his race (African-American) and ethnic background (Nigerian). During the lengthy litigation process I found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional.

I personally have no problem with the appointment of a Republican Judge to the 9th Circuit bench, as long as that Judge is fair and impartial. Judge Kuhl is just that person.

If asked, I would be willing to speak on behalf of Judge Kuhl before any Congressional or Judiciary hearings.

I submit that your decision regarding the appointment should be based solely on the competency of the judicial candidate, not on politics. I will do everything in my power to ensure that Judge Kuhl receives the nomination, and to see that this nomination obtains the advice and consent of the Senate, as well as the public.

If you have any questions or require more information, please do not hesitate to contact me at your convenience.

Thank you for your consideration.

Very truly yours,

Leo James Terrell
Attorney at Law

LJT/mr

cc: Honorable Carolyn B. Kuhl
Los Angeles Superior Court

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Tyler Professor of Constitutional Law

GRISWOLD HALL 307
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February 10, 1984

Honorable William French Smith
Attorney General of the United States
Department of Justice
10th and Constitution Ave., N.W.
Room 5111
Washington, D.C. 20530

Dear Mr. Attorney General:

I am writing to tell you something that I told Chuck Cooper some time ago: that I have the highest regard for the quality of the brief finally submitted to the Supreme Court by the Department of Justice in the Bob Jones case. I thought it was a powerful and, in most respects, entirely compelling legal document. As I told Chuck, I continue to think that the Fifth Amendment itself may well prevent all Federal subsidies, even by way of tax-deductible status, of racially discriminatory private schools. But I do not think that the Supreme Court's use of congressional inaction to support the legality of the IRS policy was at all legitimate. If Congress wishes to legislate a tax rule, it must do so by action -- not by silence. In this regard, you might find it interesting to glance at my enclosed article on the sounds of congressional silence. I mention the Bob Jones decision in a disapproving way at page 531, footnote 91.

Yours truly,

Laurence Tribe

Laurence H. Tribe
Tyler Professor of
Constitutional Law

LHT:lks
enclosure
cc: Edwin Meese, III

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GEOFFREY S. WELLS

May 14, 2001

Honorable Barbara Boxer
U.S. SENATOR
Hart Senate Office Building
Suite 112
Washington, D.C. 20510-0505

Dear Senator Boxer:

I am writing this letter to recommend to you the Honorable Carolyn Kuhl who is being considered for a possible Federal Court appointment.

I had the pleasure of trying a case before Judge Kuhl in the Los Angeles Superior Court last year. I can tell you that she was an outstanding trial judge of the highest intellect and integrity. Moreover, she clearly enjoyed serving as a Judge, a trait which I believe to be essential for anyone serving in a judicial position.

In another case which I handled to the point of settlement before her, she was even-handed and understanding of the difficulties which both sides faced due to the numerous depositions and document productions which occurred in New York. I believe that my opponents in both of the cases which I have had before her would have the same glowing remarks about Carolyn Kuhl that I give to you in this letter.

Moreover, I can confirm to you that she has received excellent reviews from other fellow plaintiffs' attorneys who have handled cases before her. In my own experience, her rulings were balanced and well reasoned and her temperament was conducive of a fair and equitable trial. I have heard the same sentiments about her from other lawyers.

I would be happy to answer any questions you may have about Judge Kuhl.

Very truly yours,

GREENE, BROILLET, TAYLOR,
WHEELER & PANISH LLP

B. A. Broillet

Bruce A. Broillet

BAB:sld
ltrboxer.wpd

SUMMARIES OF OPPOSITION: CAROLYN KUHL

Abortion

NARAL

Urged the U.S. Supreme Court to overturn Roe v. Wade, arguing that "the textual, historical and doctrinal basis of that decision is so far flawed . . that this Court should overrule it and return the law to the condition in which it was before that case was decided." (Brief for the United States as Amicus Curiae in Support of Appellants, *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 474 (1986) (Nos. 84-495, 84-1379).)

"A decision as flawed as we believe Roe v. Wade to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine [of stare decisis] from criticism and abandonment. " (*Id.*)

"There can be no doubt of the strength of the conviction held by some that free access to abortion is a fundamental expression of individual freedom . . . . Yet this conviction does not constitute constitutional argument." (*Id.*)

Urged the Supreme Court to uphold Pennsylvania statutes that required, among other things, the reporting of detailed information available to the public, including personal information about the woman obtaining an abortion, "informed consent" by providing anti-choice information, and the presence of a second physician when viability is possible without providing an exception for a medical emergency. (*Id.*) The Court found the provisions of the Pennsylvania Abortion Control Act to be unconstitutional. (*Thornburgh,* 476 U.S. at 772.)

Argued for the reinstatement of regulations issued by the Secretary of Health and Human Services requiring reproductive health care clinics receiving Title X family planning funds to notify the parents of young women and men seeking contraception. (*Planned Parenthood Federation of America, Inc. v. Heckler,* 712 F.2d 650 (D.C. Cir. 1983); Barbara Rosenwicz, *A Federal Appeals Court Is Being Asked to Choose Between Keeping Teenagers' Requests for Birth Control Aids Confidential or Exposing Them to Their Parents*, UPI, May 10, 1983.) The Court of Appeals recognized the importance of patient confidentiality and rejected the regulations as unlawful for exceeding the statutory authority of the Department of Health and Human Services. (*Heckler,* 712 F.2d at 651, 660.)

Argued in support of federal regulations prohibiting health care professionals at family planning clinics that receive Title X funds from counseling women regarding abortion or even informing them that abortion is a legal option. (Brief of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondent, *Rust v. Sullivan,* 550 U.S. 173 (1991) (Nos. 89-1391, 89-1392).) The Court upheld these restrictions in a 5-4 decision. (500 U.S. at 203.)

ALLIANCE FOR JUSTICE

Also while in the Reagan administration, Kuhl worked on several high-profile reproductive rights cases. In one case, the Administration urged the Supreme Court to overrule Roe v. Wade, even though the constitutionality of Roe was not at issue. (Brief for the United States as Amicus Curiae in support of Appellants, *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 US 474 (1986).) Former

Solicitor General Charles Fried wrote that "the most aggressive memo" urging a reversal of Roe in the case came from Civil Division Deputy Kuhl and another Justice Department attorney. (Charles Fried, *Order and Law: Arguing the Reagan Revolution – a Firsthand Account,* 33 (1991).) In another case, she argued unsuccessfully in support of a Reagan Administration rule requiring federally-funded family planning providers to notify parents within ten days of prescribing contraceptives to minors.

Judge Kuhl continued her anti-choice activity after leaving the federal government. While in private practice, she represented a group of doctors who were opposed to abortion; she wrote an amicus brief for the Supreme Court case of Rust v. Sullivan, arguing that the restrictions on discussing abortion imposed on doctors receiving government funds did not violate the First Amendment.

CARAL – California Abortion & Reproductive Rights Action League

Carolyn Kuhl's extreme anti-choice history puts her in opposition to the views of California's pro-choice majority in California, and in opposition to the pro-choice positions that you have taken in the past. Please continue to protect your pro-choice constituents, and the generations of California women to come, by voting against Carolyn Kuhl's nomination.

TALK LEFT.COM

"Kuhl has been criticized for work she did while a Justice Department lawyer, including arguing for a return to nonprofit status for segregationist Bob Jones University and signing a brief that questioned Roe v. Wade. She was also criticized Friday as being against whistleblower laws and for having represented Shell Oil in a dispute for which Shell was ordered to pay $5 million to clean contaminated land."

"Judge Kuhl's record on women's health and Roe v. Wade are out of step with commonly held views and well-established legal principles," said Carole Joffe of the Center for Reproductive Health Research and Policy in San Francisco. "

PEOPLE FOR THE AMERICAN WAY

Ninth Circuit Court of Appeals – Judge Carolyn Kuhl is a Federalist Society member and currently is a California state trial court judge. While in the Justice Department under the Reagan Administration, Kuhl urged the Supreme Court to overturn Roe v. Wade as "flawed."

NOW

Co-authored the government's brief in Thornburgh v. American College of Obstetricians and Gynecologists which fought for the "outright reversal of Roe." She argued that the Roe decision was "flawed."

Fought for the gag rule and parental notification for young women. She has also fought for detailed intrusive reporting requirements which forced women to disclose personal information such as the date of their last menstrual cycle, their race, marital status and where they lived.

Wrote a brief in 1990 on behalf of the American Academy of Medical Ethics in which she argued that prohibiting doctors who receive federal funds from discussing abortion did not violate First Amendment guarantees of free speech.

WCLA Online (Westchester Coalition for Legal Abortion)

Kuhl urged the U.S. Supreme Court to overturn Roe v. Wade, arguing that "the textual, historical and doctrinal basis of that decision is so far flawed . . . that this Court should overrule it and return the law to the condition in which it was before that case was decided." She argued in support of the domestic gag rule, which prohibited health care clinics receiving Title X funds from providing women with full information about their reproductive health options, banning any mention that abortion was a legal option! She also supported parental notification for contraception.

The U.S. Supreme Court chooses to hear fewer than 100 cases a year, and the Supreme Court went eight years between abortion rights cases in the 1990's. That means the Circuit Courts have the final word in most cases in the federal court system. Meanwhile, states enacted 262 anti-choice laws from 1995-2000. Thus, we cannot afford to have activist, anti-choice judges sitting on the federal bench.

NATIONAL COUNCIL OF JEWISH WOMEN

NCJW's first effort in this campaign will challenge the pending nomination of Judge Carolyn Kuhl of Los Angeles to the Ninth Circuit Court of Appeals. Judge Kuhl has made clear her opposition to the Supreme Court's decision in Roe v. Wade, calling for its "abandonment." NCJW's opposition to Judge Kuhl marks the first time the organization has taken a stand on a judicial nominee below the Supreme Court level.

Adaction.org

Re-nominated to the Ninth Circuit, urged the Supreme Court to overturn Roe v. Wade as a Deputy Solicitor General in the Reagan Department of Justice. She argued that "the textual, historical and doctrinal basis of that decision is so far flawed . . . that this Court should overrule it . . . "

Civil Rights

NARAL

As a special assistant to then-Attorney General William French Smith, convinced Smith to support a policy that would have allowed Bob Jones University tax-exempt status despite its racially discriminatory policies. 10 (*David Houston, "Judge's Past May Prove Prologue: 'Bob Jones' Case Preceded Career As Noted Jurist, Law Firm Partner," Daily Journal, May 24, 2001*) The U.S. Supreme Court overwhelmingly rejected this approach and denied the school tax-exempt status. 11 (*Bob Jones University v. U.S., 461 U.S. 574 (1983).*)

ALLIANCE FOR JUSTICE

As a member of the Reagan administration, Judge Kuhl was one of two Justice Department officials who persuaded the Attorney General to reverse an 11-year Internal Revenue Service policy and reinstate the tax-exempt status of Bob Jones University and other racially discriminatory schools. More than two hundred lawyers in the Justice Department's civil rights division signed a letter at the time expressing their concerns about the decision. Indeed, current Solicitor General Ted Olson, who was then head of the Office of Legal Counsel at the Justice Department, was among those who opposed Kuhl's position. The Supreme Court disagreed with the position advocated by Kuhl and, by an 8-1 vote, denied Bob Jones and other racially segregated schools tax-exempt status.

Kuhl's conduct was not that of a young employee acting at the behest of her boss; she persuaded him to change his position, over the objections of the head of the IRS, the Department of the Treasury's General Counsel, and over 200 Justice Department lawyers.

Adaction.org

Re-nominated to the Ninth Circuit, was one of two Reagan Justice Department officials who persuaded the Attorney General to reverse prior policy and support the granting of tax-exempt status to Bob Jones University despite its racially discriminatory policies, over the protests of more than 200 Justice Department lawyers. By an 8-1 vote, the Supreme Court rejected Kuhl's position and upheld the IRS denial of tax-exempt status to Bob Jones University.

PEOPLE FOR THE AMERICAN WAY

She also reportedly played a key role in convincing then-Attorney General Smith to reverse prior policy and support the granting of tax-exempt status to Bob Jones University despite its racially discriminatory practices. A Supreme Court decision later rejected that policy by an 8-1 vote.

Environment

NOW

Kuhl also represented Shell Oil, defending the company against having to pay for cleanup of contaminated land.

Adaction.org

Re-nominated to the Ninth Circuit, in her position as Deputy Solicitor General in the Reagan Administration, urged the Supreme Court to overrule its precedent on "associational standing," which allows environmental and other groups to protect the rights of their members in court. The Court rejected her argument without dissent.

Consumer Protections

NOW

She refused to hear a case filed by a whistleblower about falsification of documents and destruction of medical records in Moore v. Hong Liu, ignoring California's free-speech laws.

The FOUNDATION for TAXPAYER and CONSUMER RIGHTS

Judge Kuhl's views on whistleblower protections don't mesh with the newly appreciated importance of insiders who speak out against corporate fraud. In a "friend of the court" brief filed in a case involving Boeing, Kuhl argued that suits brought by whistleblowers on behalf of the U.S. government are unconstitutional--a view that served Kuhl's defense contractor clients, but which is out of step with the legal community. As a judge presiding over a case in which a perpetrator of Medicare billing fraud attacked a whistleblower with a costly, frivolous countersuit, Kuhl allowed the Medicare cheat to weasel out of his statutory responsibility to pay the whistleblower's attorney's fees. Judge Kuhl's arbitrary ruling was blocked on appeal and Senators should now block Kuhl's appointment.

Adaction.org

Re-nominated to the Ninth Circuit, argued as a lawyer in private practice on behalf of two major defense contractors that the qui tam provision of the False Claims Act, which allows private individuals to sue corporations that committed fraud against federal government programs, was unconstitutional. As a judge, Kuhl dismissed a case brought under a California law enacted to prevent suits against whistleblowers and others acting in the public interest. The California appellate court reversed Kuhl's decision in unusually strong terms, calling it "a nullification of an important part of California's anti-[abusive lawsuit] legislation." Kuhl also dismissed a claim brought by a breast cancer patient whose privacy was invaded when a drug salesman who misrepresented his identity participated in her doctor's examination of her breasts.

Privacy Record

ALLIANCE FOR JUSTICE

As a California state trial court judge, Judge Kuhl has not generally written published opinions. However, several cases in which she has been overruled on appeal cause concern regarding her willingness to protect individuals' basic rights.

In one case, Judge Kuhl dismissed a breast cancer patient's claim of invasion of privacy, after her doctor brought a drug company representative into the room during a breast exam. 3 According to the plaintiff, Ms. Sanchez-Scott, the unidentified man who came in with her doctor was "introduced as 'a person… who was looking at Dr. Polonsky's work.'" The doctor took Ms. Sanchez's fan from her hand during the exam and asked the man to fan her, after which they both laughed and refused when she asked to have it back. After the examination ended, the patient asked who the other man was and, when the receptionist told her that he was a "drug salesman," she "began to cry from shame and anger." The appellate court found the doctor's behavior to be a serious invasion of the patient's privacy.

In another case, Judge Kuhl dismissed a case brought under a California law enacted to prevent suits against whistleblowers and others acting in the public interest. 4 The California appellate court reversed Judge Kuhl's decision in unusually strong terms, calling her decision "a nullification of an important part of California's anti-[abusive lawsuit] legislation."

NOW

Kuhl dismissed a patient's argument that a doctor had violated her privacy by allowing a pharmaceutical salesman to be in the room while conducting a breast cancer evaluation in Sanchez-Scott v. Alza Pharmaceuticals, a decision that was immediately overturned on appeal.

NARAL
Reproductive Freedom & Choice

Judge Carolyn Kuhl

Career

- Los Angeles County Superior Court Judge (appointed by then-Gov. Pete Wilson), 1995-present.
- Partner, Munger, Tolles & Olson, 1986-95; Associate, 1978-81.
- U.S. Deputy Solicitor General, 1985-86.
- U.S. Deputy Assistant Attorney General, Civil Division, 1982-85.
- Special Assistant to Attorney General William French Smith, 1981-82.
- Clerk to then-Judge Anthony Kennedy, U.S. Court of Appeals for the 9th Circuit, 1977-78.
- Member of the Federalist Society.

Hostility to Reproductive Rights

Overturn *Roe v. Wade*

- Urged the U.S. Supreme Court to overturn *Roe v. Wade*, arguing that "the textual, historical and doctrinal basis of that decision is so far flawed . . . that this Court should overrule it and return the law to the condition in which it was before that case was decided."[1]

  - "A decision as flawed as we believe *Roe v. Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine [of *stare decisis*] from criticism and abandonment."[2]

  - "There can be no doubt of the strength of the conviction held by some that free access to abortion is a fundamental expression of individual freedom . . . . Yet this conviction does not constitute constitutional argument."[3]

Onerous State Regulations

- Urged the Supreme Court to uphold Pennsylvania statutes that required, among other things, the reporting of detailed information available to the public, including personal information about the woman obtaining an abortion, "informed consent" by providing anti-choice information, and the presence of a second physician when viability is possible without providing an exception for a medical emergency.[4] The Court found the provisions of the Pennsylvania Abortion Control Act to be unconstitutional.[5]

Parental Notification for Contraception

- Argued for the reinstatement of regulations issued by the Secretary of Health and Human Services requiring reproductive health care clinics receiving Title X family planning funds to notify the parents of young women and men seeking contraception.[6] The Court of Appeals recognized the importance of patient confidentiality and rejected the regulations as unlawful for exceeding the statutory authority of the Department of Health and Human Services.[7]

Gag Rule

- As an attorney in private practice, argued in support of federal regulations prohibiting health care professionals at family planning clinics that receive Title X funds from counseling women regarding abortion or even informing them that abortion is a legal option.[8] The Court upheld these restrictions in a 5-4 decision.[9]

Civil Rights

- As a special assistant to then-Attorney General William French Smith, convinced Smith to support a policy that would have allowed Bob Jones University tax-exempt status despite its racially discriminatory policies.[10] The U.S. Supreme Court overwhelmingly rejected this approach and denied the school tax-exempt status.[11]

[1] Brief for the United States as Amicus Curiae in Support of Appellants, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 474 (1986) (Nos. 84-495, 84-1379).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Thornburgh*, 476 U.S. at 772.
[6] *Planned Parenthood Federation of America, Inc. v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983); Barbara Rosenwicz, "A Federal Appeals Court Is Being Asked to Choose Between Keeping Teenagers' Requests for Birth Control Aids Confidential or Exposing Them to Their Parents," *UPI*, May 10, 1983.
[7] *Heckler*, 712 F.2d at 651, 660.
[8] Brief of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondent, *Rust v. Sullivan*, 550 U.S. 173 (1991) (Nos. 89-1391, 89-1392).
[9] 500 U.S. at 203.
[10] David Houston, "Judge's Past May Prove Prologue: 'Bob Jones' Case Preceded Career As Noted Jurist, Law Firm Partner," *Daily Journal*, May 24, 2001.
[11] *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).



CARAL
California Abortion & Reproductive Rights Action League

Promoting Reproductive Choices Throughout California Sign-up now! Don

Tell Senator Feinstein to Oppose Carolyn Kuhl!

Learn more about this issue

Take Action: Tell a Friend!

Help support CARAL's efforts to protect women's reproductive rights

The nomination of anti-choice judge Carolyn Kuhl to the Ninth Circuit Court of Appeals is moving toward confirmation hearings - and Senator Feinstein hasn't committed to opposing her!

ACTION: CONTACT CALIFORNIA SENATOR DIANNE FEINSTEIN

Please contact Senator Feinstein as soon as possible and tell her to vote "No" when Carolyn Kuhl's nomination comes before the Senate Judiciary Committee. Senator Feinstein needs to hear from pro-choice Californians now, before hearings start and we still have time to make our voices heard.

We strongly urge you to mail or fax a letter and/or make phone calls, because these have the most impact on the Senators. Feel free to use our sample letter, or you can use your own words. If these are not options for you, an email option is provided below.

Contact information for Senator Feinstein:
Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510
Phone: (415) 393-0707
Fax: (202) 228-3954
senator@feinstein.senate.gov

Here is a letter you can use:

Dear Senator Feinstein,

I am writing to strongly urge you to vote "No" when the nomination of Carolyn B. Kuhl to the Ninth Circuit Court of Appeals comes before the Senate Judiciary Committee.

Carolyn Kuhl's extreme anti-choice history puts her in opposition to the views of California's pro-choice majority in California, and in opposition to the pro-choice positions that you have

taken in the past. Please continue to protect your pro-choice constituents, and the generations of California women to come, by voting against Carolyn Kuhl's nomination.

Sincerely,
YOUR NAME
ADDRESS
ZIP

BACKGROUND

CARAL has learned that Senator Dianne Feinstein has returned her "blue slip" on Carolyn Kuhl to the Judiciary Committee with the notation "I'm reserving judgment on the nominee until after the hearing." The "blue slip" is the procedure by which senators can approve or disapprove judicial nominees from their home state. The "blue slip" has been used to allow senators to prevent a judicial nomination from going forward. If a senator returns the blue slip without disapproving of the nominee, the nomination can proceed to hearings in front of the Senate Judiciary Committee; and, if the Judiciary Committee votes to approve the nominee, to a vote by the full Senate.

Carolyn Kuhl has an astonishing record of anti-choice activism. Senator Feinstein's return of her "blue slip" does not necessarily mean that she will support Kuhl's nomination; however, it also doesn't give us reassurance that she will oppose it.

We need your help NOW to make sure that Carolyn Kuhl, an anti-choice extremist, has no chance of becoming a highly influential federal judge with lifetime tenure. Hearings on judicial nominees are proceeding quickly; it is crucial that Senator Feinstein hear from us before Kuhl's hearing starts, while we still have the chance to make our voices heard.

For more information about Carolyn Kuhl's background:
http://www.naral.org/mediaresources/fact/kuhl_facts.html

The following form will automatically email its contents to the Senator, just enter your information below.

```
Dear Senator Feinstein,

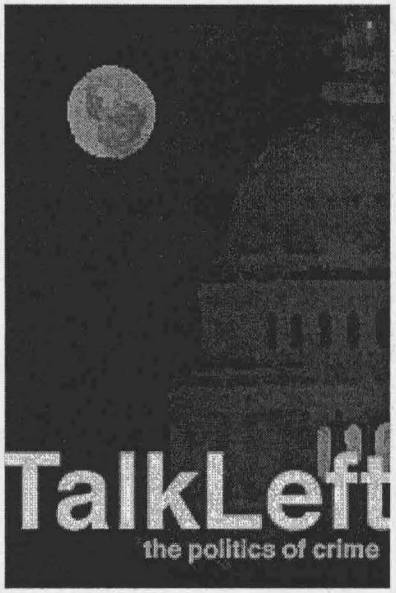
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to the pro-choice positions that you have taken in the past.   Please
continue to protect your pro-choice constituents, and the generations of
California women to come, by voting against Carolyn Kuhl's nomination.
```

Full Name:

Zip Code:

E-mail Address:



« Previous | Main | Next »

Monday :: January 27, 2003

Opposition Mounts To Judicial Nominee Carolyn Kuhl

Left-leaning groups are opposing Bush's nomination of **Carolyn Kuhl** to the 9th Circuit Court of Appeals.

"On Friday, a coalition of left-leaning groups met to urge public opposition to Kuhl....saying she was among President Bush's most

"Kuhl has been criticized for work she did while a Justice Department lawyer, including arguing for a return to nonprofit status for s in a dispute for which Shell was ordered to pay $5 million to clean contaminated land."

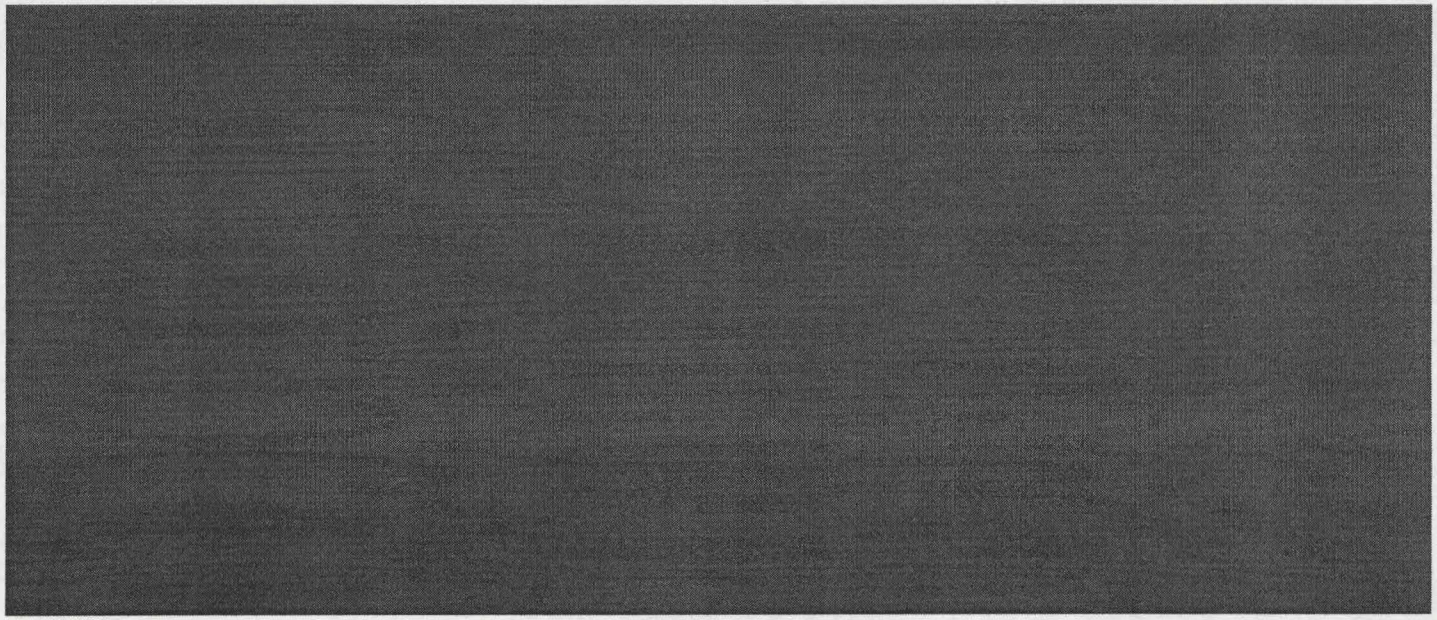
"Judge Kuhl's record on women's health and Roe v. Wade are out of step with commonly held views and well-established legal prin

"Meanwhile, in Washington, D.C., Sen. Orrin Hatch, R-Utah, prefaced the first meeting of this Congress' Senate Judiciary Committe Sen. Barbara Boxer, D-Calif., declines to return her blue slip, a signal of opposition."

Posted Monday :: January 27, 2003 | **TrackBack**

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Concerned Women for America *Federalist Society* Free Congress Foundation
CHRISTIAN COALITION FOCUS ON THE FAMILY
RIGHT WING WATCH *Heritage Foundation*

The Right-Wing Affiliations of Bush Administration Officials

Judicial Nominations

Fifth Circuit Court of Appeals – Justice Priscilla Owen is a member of the Houston Chapter of the Federalist Society. She is considered to be on "the far right wing" of the Texas court. In one case, concerning a state law relating to the ability of minors to obtain an abortion without parental consent, then-Texas Supreme Court Justice Alberto Gonzales, now chief White House counsel, warned that adopting the position of the dissenters, including Owen, "would be an unconscionable act of judicial activism." In September 2002, the Senate Judiciary Committee rejected Owen's nomination.

Sixth Circuit Court of Appeals – Jeffrey Sutton is an officer in the Federalist Society's Separation of Powers and Federalism practice group and formerly clerked for Justice Antonin Scalia. Sutton is well known for his efforts as a lawyer to severely limit federal protections against discrimination and injury based on disability, race, age, sex, and religion.

Ninth Circuit Court of Appeals – Judge Carolyn Kuhl is a Federalist Society member and currently is a California state trial court judge. While in the Justice Department under the Reagan Administration, Kuhl urged the Supreme Court to overturn *Roe v. Wade* as "flawed." She also reportedly played a key role in convincing then-Attorney General Smith to reverse prior policy and support the granting of tax-exempt status to Bob Jones University despite its racially discriminatory practices. A Supreme Court decision later rejected that policy by an 8-1 vote.

Tenth Circuit Court of Appeals – Michael McConnell is a Federalist Society member who has generated significant criticism for his views on reproductive choice, privacy, and church-state separation. McConnell criticized the Supreme Court decision that took federal tax deductions away from Bob Jones University over its policy against interracial dating. McConnell has also called the Supreme Court ruling in *Roe v. Wade* "illegitimate" and "an embarrassment," and signed a 1996 "pro-life" statement that asserted that abortion "kills 1.5 million innocent human beings in America every year" and called for a constitutional amendment to ban abortion.

DC Circuit Court of Appeals – Miguel Estrada is a Federalist Society member and former clerk for Justice Anthony Kennedy. He is also a partner in the law firm that represented President Bush before the Supreme Court during his post-election legal fight with Al Gore. Estrada is a strong supporter of capital punishment whose judicial philosophy has been compared to that of Supreme Court Justice Antonin Scalia.

Third Circuit Court of Appeals (confirmed) – Judge D. Brooks Smith gave a speech to the Federalist Society's Pittsburgh chapter in 1993 in which he argued that the Violence Against Women Act was unconstitutional because the issue of domestic violence lacked "substantial national consequences." During his 1988 district court nomination hearing, Judge Smith promised the Senate Judiciary Committee that he would withdraw from the Spruce Creek Rod and Gun Club if the club did not change its discriminatory policy toward women. Despite this promise, Judge Smith did not withdraw until 1999. Smith was confirmed by a 64-35 Senate vote in July 2002.

U.S. District Court for the District of Utah (confirmed) – Paul G. Cassell is a

Carolyn Kuhl

Nominated to the United States Court of Appeals, 9th Circuit. Currently a Los Angeles Superior Court judge.

- While at the Justice Department, Kuhl was instrumental in persuading the Reagan administration to support the tax exempt status of Bob Jones University which had been revoked because of racially discriminatory policies.
- Co-authored the government's brief in *Thornburgh v. American College of Obstetricians and Gynecologists* which fought for the "outright reversal of Roe." She argued that the Roe decision was "flawed."
- Fought for the gag rule and parental notification for young women. She has also fought for detailed intrusive reporting requirements which forced women to disclose personal information such as the date of their last menstrual cycle, their race, marital status and where they lived.
- Member of the Federalist Society, an ultra-conservative legal organization.
- Wrote a brief in 1990 on behalf of the American Academy of Medical Ethics in which she argued that prohibiting doctors who receive federal funds from discussing abortion did not violate First Amendment guarantees of free speech.
- Kuhl dismissed a patient's argument that a doctor had violated her privacy by allowing a pharmaceutical salesman to be in the room while conducting a breast cancer evaluation in *Sanchez-Scott v. Alza Pharmaceuticals*, a decision that was immediately overturned on appeal.
- She refused to hear a case filed by a whistleblower about falsification of documents and destruction of medical records in *Moore v. Hong Liu*, ignoring California's free-speech laws.
- Kuhl also represented Shell Oil, defending the company against having to pay for cleanup of contaminated land.

Sources: *New York Times*, NARAL, Women's eNews, Sen.

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Oppose Confirmation of Miguel Estrada
Speak Out Against Efforts to Weaken the Violence Against Women Office
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Westchester Coalition for Legal Abortion, Inc.

Kuhl Is Not Qualified for 9th Circuit Court of Appeals

President Bush has nominated for the U.S. Court of Appeals for the Ninth Circuit California state Judge Caroyn B. Kuhl, who is forthright in her opposition to reproductive rights in general and Roe v. Wade in specific.

We learn from NARAL

> Kuhl urged the U.S. Supreme Court to overturn Roe v. Wade, arguing that "the textual, historical and doctrinal basis of that decision is so far flawed . . . that this Court should overrule it and return the law to the condition in which it was before that case was decided." She argued in support of the domestic gag rule, which prohibited health care clinics receiving Title X funds from providing women with full information about their reproductive health options, banning any mention that abortion was a legal option! She also supported parental notification for contraception.
>
> The U.S. Supreme Court chooses to hear fewer than 100 cases a year, and the Supreme Court went eight years between abortion rights cases in the 1990's. That means the Circuit Courts have the final word in most cases in the federal court system. Meanwhile, states enacted 262 anti-choice laws from 1995-2000. Thus, we cannot afford to have activist, anti-choice judges sitting on the federal bench.
>
> Federal judges have their jobs for life, and Carolyn Kuhl is only 48. Our nation deserves a federal court pledged to upholding the hard fought constitutional rights secured through Supreme Court precedents such as Roe.

Appropriate action at this time: Write to your U. S. Senators them to oppose the nomination of Judge Caroyn B. Kuhl. They may be reached at:
U.S. Senate
Washington, DC 20510

Back To Table of Contents

Home *Newsletter* *Articles* *Links* *What's New* *Feedback*



PRESS RELEASE

NCJW Launches Reproductive Rights Campaign with Challenge to Nomination of Judge Kuhl

July 10, 2001, Washington, DC - The National Council of Jewish Women (NCJW), long active in support of women's reproductive rights, has announced its commitment to examine all U.S. Supreme Court and federal appellate court nominees, and to challenge those who oppose reproductive rights as embodied in *Roe v. Wade*, the landmark case decided in 1973. NCJW has launched a campaign to educate and mobilize its membership and the larger Jewish community to advocate for a judiciary that will protect a woman's right to choose.

"For over 100 years, NCJW has protected the rights of women - as a resource to those in need, as a pioneer in family planning, and today, as the leading pro-choice Jewish organization fighting to preserve reproductive rights. Now, NCJW plans to reach out to the Jewish community nationwide to educate and activate its allies to preserve a woman's right to choose through monitoring court appointments and challenging anti-choice nominees," said NCJW President Jan Schneiderman.

NCJW's first effort in this campaign will challenge the pending nomination of Judge Carolyn Kuhl of Los Angeles to the Ninth Circuit Court of Appeals. Judge Kuhl has made clear her opposition to the Supreme Court's decision in *Roe v. Wade*, calling for its "abandonment." NCJW's opposition to Judge Kuhl marks the first time the organization has taken a stand on a judicial nominee below the Supreme Court level.

"Our scrutiny and advocacy regarding judicial nominees must extend to the entire federal appellate judicial system. Too often in the past, women's reproductive rights have been curtailed by the federal appellate courts, whose decisions have been endorsed by the Supreme Court or been allowed to stand unreviewed, with restrictive provisions intact," Schneiderman added. "Furthermore, recent Supreme Court Justices have been drawn from the federal appellate bench, where judges have acquired the credentials they need to be considered for the high court. The situation is urgent and the statistics are dramatic."

From 1993 to 2001, conservatives blocked 36 nominations made by President Clinton. During the eight years of the Reagan presidency, only 9 nominations were blocked. Currently, 32 of 179 total authorized federal appellate court judgeships are vacant, or nearly 20% of the federal appellate judiciary. In the next four years, 18 additional vacancies may be created when sitting judges assume senior status. In this term, President Bush may have the opportunity to appoint nearly 30% of the federal appellate judiciary.

"Conservatives in Congress have stymied mainstream judicial nominees during the '90s in the hope that winning back the White House would enable them to control the federal judiciary. NCJW will join with others in this campaign to see that the judicial nomination process proceeds fairly," said President Schneiderman. "Opposing Judge Kuhl's nomination to the appellate bench is the first step in our effort to safeguard the constitutional rights of the majority who support the *Roe v. Wade* decision and a woman's right to choose."

NCJW is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children and families and to ensure individual rights and freedoms through research, education, advocacy and community service programs initiated by its network of 90,000 volunteers, supporters and members nationwide.

What's At Stake - Bush's Nominations to the U.S. Court of Appeals

"We're going to see a philosophical revolution in the courts . . . It will be almost as profound as if Bork had been confirmed." Conservative commentator Bruce Fein on the Republican capture of the Senate in November 2002.

"The Administration has handed judicial selection over to the Republican Party's right wing." New York Times editorial, December 2002

The Right-Wing Threat to Civil Rights

A revolution is indeed underway in the federal courts. A 20-year campaign by the radical right to fill the courts with conservative ideologues has already done severe damage to 50 years of civil rights progress. Already a number of rights and laws protecting minorities, women, workers, the disabled and the environment have been rolled back, and more are at risk. The stakes are very high. The courts have narrowed or struck down anti-discrimination laws, the Violence Against Women Act, affirmative action programs, and other guarantees of equal opportunity. And the courts are allowing more and more restrictions on a woman's legal right to choose and are taking aim at workers' rights and environmental protections.

Much of this is happening outside of public view. While most people know about the role of the Supreme Court and the importance of a Supreme Court nomination, far fewer pay attention to the lower federal courts. Yet these courts can have an even greater effect on the law than the Supreme Court. While the Supreme Court typically hears fewer than 100 cases a year, the federal courts of appeal, which are the courts that are immediately below the Supreme Court, decide almost 30,000 cases a year. Thus, the courts of appeal are the courts of last resort for most people.

The radical right, recognizing the importance of lower court judges, set out 20 years ago on a relentless political effort to capture the courts. During the Reagan and first Bush administrations, the right-wing began their efforts to pack the federal courts with conservative ideologues. The Clinton Administration nominated centrist judges rather than continue the politicization of the courts. But Senate Republicans responded by blocking votes on numerous qualified, moderate judges in order to keep those seats open in the hopes that a Republican president would fill them with conservative ideologues. Now President Bush is poised to complete this right-wing court-packing plan. And because federal judges are appointed for life, these right-wing judges have the power to change the nation for decades to come.

What is at stake in the fight over judicial nominations is the continued ability of Congress to protect our civil rights and fundamental freedoms: the right to be free from discrimination based on race, national origin, religion, gender, sexual orientation, or disability; the right to organize in a union and be protected by national labor standards; the right to choose; the right to clean air and water; and the right to equal opportunity in employment and education for all Americans. While many have fought for years to secure these rights, they are not secure without a federal judiciary ready to stand vigilant to protect them.

Americans who care about civil rights, worker rights, consumer and environmental protections, and the right to choose must wake up to the danger posed by allowing the radical right to control the Third

Branch of government. They must demand that the Bush administration nominate and that their senators only confirm judges who are committed to protect our basic rights and freedoms.

The following are examples of just some of the fundamental rights at stake in President Bush's nominations to the federal circuit courts of appeals.

Undermining Civil Rights and Equal Opportunity

Over the past several years, some of our nation's most conservative courts of appeals, which have jurisdiction over regions of the country with very large minority populations, have not only limited the reach of affirmative action programs, but have put their very existence in jeopardy. Also, numerous courts of appeals have become increasingly hostile to claims of employment discrimination, including sexual harassment. These decisions significantly impact the economic and educational opportunities of thousands of women and minorities.

Restricting A Woman's Right to Choose

Roe v. Wade, the landmark Supreme Court decision that guaranteed a woman's right to choose, hangs by a thread. Aside from the threat of a new anti-choice Supreme Court justice, the 1992 Supreme Court decision, Planned Parenthood of Southeastern Pennsylvania v. Casey, has already dramatically reduced protection for the fundamental right to choose. Casey stopped short of overturning Roe, but it gave the lower courts enormous discretion to decide whether a restriction on the right to choose is constitutional. As a result, many lower court judges are upholding state laws intended to regulate legal abortion out of existence. Circuit court judges are deciding whether the right to choose is real or illusory.

Attacking The Rights of Workers

The decisions of federal appellate judges have a tremendous impact on the ability of workers to exercise their rights under laws providing critically important workplace protections. These include the right to the minimum wage and overtime compensation provided by the Fair Labor Standards Act; the right to unpaid leave for a serious illness of the worker or family member, or the birth or adoption of a child, provided by the Family and Medical Leave Act; the right to a safe workplace provided by the Occupational Safety and Health Act; and the right to organize a union and bargain over terms and conditions of employment, provided by the National Labor Relations Act. All these rights are in jeopardy.

Overturning Environmental Protections

Federal judges in recent years have slammed the courthouse doors in the face of citizens seeking to protect the environment and promoted legal theories that favor polluters and developers at the expense of communities, clean air, clean water, and land conservation. Decisions by the courts of appeals now allow states to place a disproportionate number of polluting factories in minority communities and to ignore Clean Water Act protections that prohibit "mountain-top removal" coal mining, one of the most environmentally devastating practices imaginable.

Assaulting Equal Justice for All in the Name of "State's Rights"

Starting in the 1980s, conservative federal courts across the nation have, in the name of "state's rights,"

pursued the right-wing agenda of undermining Congress's power to enact protective legislation. In a series of 5-4 decisions, the Rehnquist-led Supreme Court has severely limited Congress' ability to pass laws to enforce the Fourteenth Amendment, to protect women against gender-based violence, and to allow private plaintiffs to sue states for civil rights violations. Some right-wing advocates and lower court judges are threatening to limit Congress even further. This transformation of the legal landscape regarding the ability of Congress to provide effective remedies for civil rights and other violations puts in jeopardy 40 years of progress toward achieving equal justice for all.

EXPOSING THE BUSH COURT-PACKING PLAN

President Bush has stated that his models for appointments to the federal judiciary are Justices Antonin Scalia and Clarence Thomas, the two most extreme right-wing members of the Supreme Court. An unprecedented coalition of organizations representing millions of Americans has come together to express concern about the Bush Administration's plans to pack the courts with lifetime judicial appointments who will reverse decades of progress in protecting Americans' rights. This concern goes far beyond the outrageous re-nomination of rejected nominees Charles Pickering and Priscilla Owen. Many of the Administration's nominees to the federal appellate courts so far have extremely troubling records on crucial issues for all Americans, and it is critical that the Senate and the public focus on these concerns. These issues include civil rights, reproductive choice and health, environmental health and safety, workers' rights, and consumer protection and corporate responsibility.

Civil Rights

Despite the Trent Lott controversy, the Bush Administration has persisted in re-nominating a number of appellate court nominees with records that threaten the civil rights of minorities, women, the disabled - indeed, all Americans. These troubling civil rights records include pressing for federal tax exemptions for Bob Jones University, seeking to limit or strike down important federal civil rights laws, defending anti-civil rights state law provisions, and consistently ruling against civil rights plaintiffs. Among the most troubling examples are:

· **Charles Pickering**, whose nomination to the Fifth Circuit was rejected by the Senate Judiciary Committee last year, has been severely criticized for unethical conduct as a Mississippi judge for intervening with the prosecution to get a reduced sentence for a convicted cross-burner. Pickering has criticized the "one-person, one vote" principle and important provisions of the Voting Rights Act. He has ruled against the vast majority of people bringing job bias suits in his court, based on a false preconception of the merits of such claims. He voted for a series of measures as a state legislator to weaken African-American voting strength, and wrote a student law review article suggesting how to make the state's ban on inter-racial marriage enforceable as a crime.

· **Jeffrey Sutton**, re-nominated to the Sixth Circuit, has vigorously argued to restrict or eliminate federal protections against discrimination based on race, sex, age, and disability, going even further than the narrow 5-4 majority of the Supreme Court. For example, in arguing that a breast cancer survivor should not be able to sue a state agency for discrimination based on disability, he claimed that the landmark Americans with Disabilities Act was "not needed." In an article for the Federalist Society, he strongly supported a Thomas-Scalia opinion that would have severely limited the Voting Rights Act and required reconsidering at least 28 Supreme Court rulings.

· **Terrence Boyle**, re-nominated to the Fourth Circuit, was reversed twice by the Supreme Court, once in a unanimous ruling, for deciding that congressional redistricting in North Carolina improperly favored minority voters. A North Carolina district judge and former staffer to Senator Jesse Helms, Boyle also refused to accept a settlement of a sex discrimination claim against a state agency, even though the agency had agreed, and was reversed when he later allowed the state to withdraw from the settlement.

· **Carolyn Kuhl**, re-nominated to the Ninth Circuit, was one of two Reagan Justice Department officials who persuaded the Attorney General to reverse prior policy and support the granting of tax-exempt status to Bob Jones University despite its racially discriminatory policies, over the protests of more than 200 Justice Department lawyers. By an 8-1 vote, the Supreme Court rejected Kuhl's position and upheld the IRS denial of tax exempt status to Bob Jones University.

· **Miguel Estrada**, re-nominated to the D.C. Circuit, has been opposed by the Congressional Hispanic Caucus and the Puerto Rican Legal Defense and Education Fund. He has argued that the NAACP should not even be able to represent its members in court in challenging a so-called anti-loitering ordinance, which had a racially discriminatory impact, and has denied the problems of racial profiling caused by such ordinances.

· **Timothy Tymkovich**, re-nominated to the Tenth Circuit, argued for the constitutionality of a Colorado provision barring the state and municipalities from taking action to protect gays and lesbians from discrimination. Even after the Supreme Court rejected his claim and ruled the provision unconstitutional, Tymkovich wrote a stinging article attacking the decision and defending the provision as reflecting "good faith."

· **Priscilla Owen**, whose nomination to the Fifth Circuit was rejected by the Senate Judiciary Committee last year, has often dissented from Texas Supreme Court decisions on discrimination and workers' rights. For example, in one case she tried to make it much harder for workers to prove discrimination in firing, contradicting what the majority called the "plain meaning" of the state anti-bias law.

· **Jay Bybee**, re-nominated to the Ninth Circuit, has attacked and worked to undermine the Supreme Court ruling striking down the Colorado anti-gay provision defended by Tymkovich, comparing the Court's ruling to protecting "the illiterate" or "persons with communicable diseases." He defended the Defense Department's policy of denying security clearances to gay contractors because of their sexual orientation, claiming that "a homosexual may be emotionally unstable." He has also argued going even further than the 5-4 Supreme Court majority in restricting Congress' authority to protect women against discrimination and violence.

· **David McKeague**, re-nominated to the Sixth Circuit, dismissed a Justice Department request to investigate Michigan prisons under a federal law clearly authorizing such investigations. DOJ had received numerous complaints that female prisoners were being systematically abused, including being forcibly raped, by male guards.

Reproductive Choice and Health

President Bush once pledged, "I will do everything in my power to restrict abortions." As president, he is fulfilling that pledge in many different ways, and he favors methods that are just below the radar screen of most Americans. A favorite way to placate his right-wing base without alarming the pro-choice majority is nominating anti-choice judges. Among the most troubling examples:

· **Priscilla Owen**, whose nomination to the Fifth Circuit was rejected by the Senate Judiciary Committee

last year, repeatedly tried to rewrite Texas law from the bench in order to deny young women their right to choose. Her opinions were so far outside the legal mainstream that one of her colleagues on the Texas Supreme Court, who is now President Bush's White House Counsel, accused her of an "unconscionable act of judicial activism."

· **Charles Pickering**, whose nomination to the Fifth Circuit was rejected by the Senate Judiciary Committee last year, led the Republican Party to respond to Roe v. Wade with an anti-choice plank to the party platform calling for an amendment to the U.S. Constitution to ban abortion. As a Mississippi state senator, he voted for a resolution calling for a constitutional convention to propose an amendment to ban abortion.

· **Carolyn Kuhl**, re-nominated to the Ninth Circuit, urged the Supreme Court to overturn Roe v. Wade as a Deputy Solicitor General in the Reagan Department of Justice. She argued that "the textual, historical and doctrinal basis of that decision is so far flawed . . . that this Court should overrule it . . . "

· **John Roberts**, re-nominated to the D.C. Circuit, urged the Supreme Court to overturn Roe v. Wade as Principal Deputy Solicitor General in the Bush I Department of Justice. In a case that did not even directly implicate Roe, Roberts argued "We continue to believe that Roe was wrongly decided and should be overruled . . . "

· **Timothy M. Tymkovich** argued to the Supreme Court and testified to the U.S. Senate that states should not have to use Medicaid funds to pay for abortions in cases of rape or incest. He even argued that there are "no medical reasons" to fund such abortions.

Environmental Health and Safety

As The New York Times recently stated, "[t]he courts may be the last best hope for stopping the administration's assault on the environment." This depends, however, on lifetime federal judges who will enforce laws that protect clean air, clean water, public health, and natural resources. Right-wing activists and their Bush administration allies understand this and are pursuing a concerted campaign to pack the courts with extremist, anti-environmental judges. Among the most troubling examples are:

· **Priscilla Owen**, whose nomination to the Fifth Circuit was rejected by the Senate Judiciary Committee last year, has written court opinions that would elevate the rights of polluters over the rights of neighbors and the public; unjustifiably bar State law claims against corporations that are often the best avenue for protecting the environment and public health; and restrict the public's access to public information about pollution.

· **Jeffrey Sutton**, re-nominated to the Sixth Circuit, has vigorously advocated against federal authority to prevent destruction of waters and wetlands that serve as critical habitat for migratory birds; against private actions for victims of environmental injustice; and against attorneys' fees for successful environmental plaintiffs.

· **Charles Pickering**, whose nomination to the Fifth Circuit was rejected by the Senate Judiciary Committee last year, was reversed repeatedly by the Fifth Circuit for improperly dismissing claims filed by victims in toxic tort cases concerning an EPA Superfund site.

· **Carolyn Kuhl**, re-nominated to the Ninth Circuit, in her position as Deputy Solicitor General in the Reagan Administration, urged the Supreme Court to overrule its precedent on "associational standing," which allows environmental and other groups to protect the rights of their members in court. The Court

rejected her argument without dissent. In 1999, as a judge, she was reversed for a decision that represented "a nullification of an important part of California's anti-SLAPP [strategic lawsuit against public participation] legislation." Anti-SLAPP laws prevent lawsuits designed to intimidate individuals and groups who exercise their right to speak out about pollution and other issues.

Workers' Rights

Federal court of appeals judges' decisions have a direct impact on workers' lives. Courts of Appeals decide whether workers are entitled to minimum wages and overtime pay under the Fair Labor Standards Act, and whether they are entitled to unpaid family leave under the Family and Medical Leave Act. They review workplace safety rules and also have the power to overturn union elections and unfair labor practice decisions by the National Labor Relations Board. President Bush is now poised to stack the courts with ultraconservative appointees, including many who, according to the Los Angeles Times, "share a disdain for worker rights." Some of the most troubling examples include:

· **Priscilla Owen**, whose nomination to the Fifth Circuit was defeated by the Senate Judiciary Committee but who has been re-nominated by President Bush, has issued a series of decisions undermining the right of workers to seek compensation for job injuries. Owen has consistently ruled against workers' interests and in favor of employers and insurers. She also takes a narrow view of anti-discrimination laws, ruling in one case that a nurse who reported a co-worker for the unauthorized dispensing of drugs could not be protected as a whistleblower because the nurse reported the misconduct to her supervisor rather than a state agency.

· **Deborah Cook**, re-nominated to the Sixth Circuit, consistently rules against workers and in favor of employer and insurer interests, particularly in cases involving the right of workers to recover damages for workplace injuries. As an Ohio Supreme Court Justice, Cook frequently dissents from pro-worker rulings. The Ohio Chamber of Commerce consistently gives Cook very high "pro-business" ratings.

· **Charles Pickering**, whose nomination to the Fifth Circuit was rejected by the Senate Judiciary Committee, consistently rules against workers in employment discrimination cases and displayed his bias against these cases when he stated at his hearing his erroneous belief that the meritorious cases are resolved by the federal Equal Employment Opportunity Commission.

· **Jeffrey Sutton**, re-nominated to the Sixth Circuit, has been a leader in the effort to persuade the Supreme Court to limit the scope of federal protections against age and disability discrimination. As a result, state and local public employees have been stripped of their ability to sue their employers for violations of these laws.

Consumer Protection and Corporate Responsibility

A number of President Bush's federal judicial nominees exhibit a bias in favor of corporations and against ordinary Americans. In private practice, they have overwhelmingly represented big business, and, as judges, they have tended disproportionately to rule in favor of corporate interests and against individuals. Overall, these actions by Bush nominees have restricted the ability of individual consumers and workers to obtain relief from harms done by corporate malfeasance and have protected corporations from liability, even when their wrongdoing was reckless or intentional. Among the most troubling examples are:

· **Priscilla Owen**, whose nomination to the Fifth Circuit was rejected by the Senate Judiciary Committee

last year, began her career as a lawyer in private practice representing primarily large corporations, often oil and pipeline interests. As a Texas Supreme Court Justice, she has consistently ruled for big corporations and against consumers, often dissenting from decisions by conservative justices appointed by then-Governor Bush. She accepted large campaign contributions from energy giants Enron and Halliburton and then ruled in their favor in several cases. In one case, she voted to grant immunity to a lawyer being sued for malpractice whose firm had given generously to her campaign. Owen also stated in a dissent that a federal law intended to promote automobile safety could not be used to sue a car manufacturer whose defective design caused a teenager to be paralyzed when he was ejected from a car in an accident.

· **Miguel Estrada**, re-nominated to the D.C. Circuit, has often represented large HMOs, such as Aetna, that were sued by injured plaintiffs who were denied health coverage. In one case involving a schizophrenic woman who killed herself after the HMO denied hospitalization, Estrada argued that federal law does not allow a plaintiff to sue an HMO, even if the HMO's wrongdoing was intentional. In another case, he argued against requiring HMOs to produce records that showed that they had altered billing statements to pay doctors less than they were owed for care they had provided.

· **Deborah Cook**, re-nominated to the Sixth Circuit, has consistently voted to deny claims brought by individuals injured by corporate wrongdoing. She argued in one dissent that a corporation that exposed its employees to a toxic chemical and concealed information about its potential harms did not have to compensate an employee who developed lung disease as a result. In another, she asserted that a worker could not sue for psychological trauma she incurred while working, even though psychological injuries are not covered by Workers' Compensation, leaving the worker with no remedy. And in a third, she said that a widow defrauded by a contractor and a bank could not sue because the contract clause that barred suit was viable, even though it was part of the scheme to defraud her.

· **Carolyn Kuhl**, re-nominated to the Ninth Circuit, argued as a lawyer in private practice on behalf of two major defense contractors that the qui tam provision of the False Claims Act, which allows private individuals to sue corporations that committed fraud against federal government programs, was unconstitutional. As a judge, Kuhl dismissed a case brought under a California law enacted to prevent suits against whistleblowers and others acting in the public interest. The California appellate court reversed Kuhl's decision in unusually strong terms, calling it "a nullification of an important part of California's anti-[abusive lawsuit] legislation." Kuhl also dismissed a claim brought by a breast cancer patient whose privacy was invaded when a drug salesman who misrepresented his identity participated in her doctor's examination of her breasts.

Thanks to the Leadership Conference on Civil Rights, National Abortion Rights Action League, Alliance for Justice, AFL-CIO, Sierra Club and other groups for compiling this information.

Judge Carolyn Kuhl

Nominated to: Court of Appeals, 9th Circuit

Status of nomination: Nominated 6/22/01; No hearing scheduled

- Born 1952, St. Louis, Missouri
- B.A., 1974, cum laude, Princeton University
- J.D., 1977, Duke University School of Law
- 1977-78, Clerk, then-Judge Anthony Kennedy, Ninth Circuit
- Munger, Tolles & Rickershauser
  - Associate, 1978-81
  - Partner, 1986-95
- U.S. Department of Justice
  - Special Assistant, U.S. Attorney General William French Smith, 1981-82
  - Deputy Assistant, U.S. Attorney General, Civil Division, 1982-85
  - Deputy Solicitor General, 1985-86
- Judge, Superior Court for Los Angeles County, appointed by Republican Gov. Wilson

Civil Rights. As a member of the Reagan administration, Judge Kuhl was one of two Justice Department officials who persuaded the Attorney General to reverse an 11-year Internal Revenue Service policy and reinstate the tax-exempt status of Bob Jones University and other racially discriminatory schools. More than two hundred lawyers in the Justice Department's civil rights division signed a letter at the time expressing their concerns about the decision. Indeed, current Solicitor General Ted Olson, who was then head of the Office of Legal Counsel at the Justice Department, was among those who opposed Kuhl's position. The Supreme Court disagreed with the position advocated by Kuhl and, by an 8-1 vote, denied Bob Jones and other racially segregated schools tax-exempt status.

Kuhl's conduct was *not* that of a young employee acting at the behest of her boss; she persuaded him to change his position, over the objections of the head of the IRS, the Department of the Treasury's General Counsel, and over 200 Justice Department lawyers.

Reproductive Rights. Also while in the Reagan administration, Kuhl worked on several high-profile reproductive rights cases. In one case, the Administration urged the Supreme Court to overrule *Roe v. Wade,*even though the constitutionality of*Roe* was not at issue.[1] Former Solicitor General Charles Fried wrote that "the most aggressive memo" urging a reversal of Roe in the case came from Civil Division Deputy Kuhl and another Justice Department attorney.[2] In another case, she argued unsuccessfully in support of a Reagan Administration rule requiring federally-funded family planning providers to notify parents within ten days of prescribing contraceptives to minors.

Judge Kuhl continued her anti-choice activity after leaving the federal government. While in private practice, she represented a group of doctors who were opposed to abortion; she wrote an amicus brief for the Supreme Court case of *Rust v. Sullivan*, arguing that the restrictions on discussing abortion imposed on doctors receiving government funds did not violate the First Amendment.

Record as a Judge. As a California state trial court judge, Judge Kuhl has not generally written published opinions. However, several cases in which she has been overruled on appeal cause concern regarding her willingness to protect individuals' basic rights.



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More Info

In one case, Judge Kuhl dismissed a breast cancer patient's claim of invasion of privacy, after her doctor brought a drug company representative into the room during a breast exam. [3] According to the plaintiff, Ms. Sanchez-Scott, the unidentified man who came in with her doctor was "introduced as 'a person… who was looking at Dr. Polonsky's work.'" The doctor took Ms. Sanchez's fan from her hand during the exam and asked the man to fan her, after which they both laughed and refused when she asked to have it back. After the examination ended, the patient asked who the other man was and, when the receptionist told her that he was a "drug salesman," she "began to cry from shame and anger." The appellate court found the doctor's behavior to be a serious invasion of the patient's privacy.

In another case, Judge Kuhl dismissed a case brought under a California law enacted to prevent suits against whistleblowers and others acting in the public interest. [4] The California appellate court reversed Judge Kuhl's decision in unusually strong terms, calling her decision "a nullification of an important part of California's anti-[abusive lawsuit] legislation."

Republican Party Connections. Judge Kuhl clerked for Judge Anthony Kennedy, who was later appointed to the Supreme Court by President Reagan. She worked in the Reagan administration as a political appointee, assisting Attorney General William French Smith and later Solicitor General Charles Fried. She was appointed to her current position by former Republican Governor Pete Wilson.

Other Information. Judge Kuhl is a member of the Federalist Society.

She lists her net worth as over $6 million. NARAL and the Center for Reproductive Law and Policy oppose Judge Kuhl's nomination because of her views on abortion.

[1] Brief for the United States as Amicus Curiae in support of Appellants, *Thornburgh v. American College of Obstetricians and Gynecologists* 476 US 474 (1986).

[2] Charles Fried, Order and Law: Arguing the Reagan Revolution – a Firsthand Account, 33 (1991).

[3] *Sanchez-Scott v. Alza Pharmaceuticals*Cal. Rptr. 2d 410, 412 (Ct. App., 2d Dist. 2001).

[4] *Liu v. Moore*,Cal. Rptr. 2d 807 (Cal. App. 2d Dist., 3d Div. 1999).

The following organizations have taken an official position on this nominee:

Organization	Position
Center for Reproductive Law and Policy	Opposes
NARAL	Opposes

Alliance for Justice
11 Dupont Circle | Second Floor | Washington, DC 20036
202-822-6070 voice | 202-822-6068 fax

independentjudiciary@afj.org

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- Main Page
- Press Releases
- In the Media
- Factsheets
- Commentary
- The Whistleblower
- Meet Our Staff
- Job Opportunities

OTHER TOPICS

- Corporate Accountability
- Healthcare
- Insurance
- Citizen Advocacy
- The Justice System
- Billing Errors
- Energy

home / ftcr / the whistleblower

The Whistleblower

Exposing Corporate & Government Abuse - Protecting the Public Trust

The Whistleblower #9 - Mar 11, 2002

The taxpayers get cheated, the taxpayers get fined. Last summer, California headlines screamed with stories of a conflict-ridden bureaucracy created by Governor Davis to address the energy crisis. Some energy buyers for the state failed to disclose that they held stock in the companies from whom they purchased power (at historically high prices), while other state consultants had prior business deals with the profiteering power companies; both are prohibited by state ethics laws. After reviewing these public employees and the Dep't of Water Resources (DWR) managers who hired them, the state's conflict-of-interest police, the FPPC, handed down an absurd penalty last week. The DWR admitted that it failed to follow the state's conflict of interest law, so, as punishment, the agency was fined $69,500. The fine, however, will not be paid by those responsible for this ethical lapse (Governor Davis or his executive appointees at the DWR), but by the public agency itself. That is, every last penny of the fine will be paid for by taxpayers. It's like having your car stolen, then getting a speeding ticket in the mail.

Meet Cal. Governor Davis's idea of Consumer Advocates. Explaining his reason for appointing former Edison exec and deregulation advocate Michael Peevey to the California Public Utilities Commission (PUC) Davis said, "I do believe the board needed some balance. We have three consumer advocates...We needed someone with business acumen." Davis's PUC, in the last year, has raised rates far greater than any previous Commission, handed Edison a massive and illegal ratepayer-funded bailout, is proposing a similar bailout of PG&E, and is expected to transfer approximately $8 billion worth of power costs from big businesses to residential and small business consumers at its March 21 meeting. If that's Davis's idea of consumer advocacy, then he ought to have his head checked. And if Michael Peevey is Davis's idea of balance, he ought to get his inner ear checked.

Bush judicial nominee not too Kuhl for whistleblowers. With much public ado about whistleblowers after the Enron scandal, Senators ought to be wary of a judicial nominee waiting in the wings. Unfortunately, California Senator Feinstein has given an initial go-ahead to Pres. Bush's

candidate for the Ninth Circuit Court of Appeals, Judge Carolyn Kuhl. Judge Kuhl's views on whistleblower protections don't mesh with the newly appreciated importance of insiders who speak out against corporate fraud. In a "friend of the court" brief filed in a case involving Boeing, Kuhl argued that suits brought by whistleblowers on behalf of the U.S. government are unconstitutional--a view that served Kuhl's defense contractor clients, but which is out of step with the legal community. As a judge presiding over a case in which a perpetrator of Medicare billing fraud attacked a whistleblower with a costly, frivolous countersuit, Kuhl allowed the Medicare cheat to weasel out of his statutory responsibility to pay the whistleblower's attorney's fees. Judge Kuhl's arbitrary ruling was blocked on appeal and Senators should now block Kuhl's appointment.

Don't let "impact on Andersen" slow down investigation and prosecution. It has been suggested that an indictment of Andersen, one of the world's largest accounting firms, for its complicity in the Enron debacle, would have a serious negative impact on Andersen. According to the New York Times, former Federal Reserve Board Chairman Paul L. Volcker, who is leading a special Andersen oversight board, thinks that an indictment would hurt the company's restructuring effort. So what? Putting a thief in jail might be bad for his future, but we still throw the book at him. White collar criminals should be treated the same.

The Foundation for Taxpayer and Consumer Rights (FTCR) is a non-profit, non-partisan advocacy organization. For over a decade FTCR and its advocates have exposed and challenged injustices that betray the public trust. The Whistleblower newsletter addresses core issues of the corporate and governmental crises of today and blows the whistle on the brewing fiascos of tomorrow. FTCR does not take a position on candidates for any elected office.

For more information about FTCR's work, to DONATE, to join the fight, or to comment, visit our web site at www.consumerwatchdog.org.
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▲ back to top

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spring 2003
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this is what a feminist looks like

Features
The Feminist To-Do List by Gloria Steinem
Ms. Poll Feminist Tide Sweeps In as the 21st Century Begins by Lorraine Dusky
Affirmative Action on Trial by Teresa Stern
Women on Death Row by Claudia Dreifus
In the Thick of Life at 70 by Jessica Chornesky

Special Action Alert
Women Take Action Worldwide
Listing: Coalitions and Groups
National Council of Women's Organizations Statement on War with Iraq
NCWO Partial Members List
Why Peace is (More Than Ever) a Feminist Issue by Grace Paley

Writing of War and Its Consequences
Ghosts of Home by Patricia Sarrafian Ward
Tales from an Ordinary Iranian Girlhood by Marjane Satrapi
Snow in Summer: L.A., CA, 1963 by Helen

fromtheissue

For a Woman to Get that Federal Court Nomination, Does She Have to be Scalia in a Skirt?
(cont.)

The Case of Carolyn Kuhl

Another major procedural change is the attempt to limit the veto power of Democratic senators from the nominee's home state. Previously, if the opposition party's home-state senators did not support the nomination, it would die in committee. Not any more. Senator Barbara Boxer (D-CA) has been a vocal critic of Carolyn Kuhl, a state court judge who was nominated for the U.S. Court of Appeals for the Ninth Circuit. In another era, Kuhl would have been dead in the water, but she too has been renominated and is likely to win confirmation.

Boxer has explained her opposition in detail. "Her record is filled with examples of her advocating for the powerful against the powerless," she stated in a letter to the Recorder a San Francisco legal newspaper. As a young attorney in the Reagan justice department, Kuhl wrote memos urging the overturning of *Roe v. Wade*. When in private practice, she wrote a friend-of-the-court brief urging that counselors in federally funded planning services be barred from even mentioning abortion.

As a Los Angeles County trial judge, Kuhl wrote an opinion that surpasses even these in its disregard for privacy rights, ruling that bringing a drug company salesman into the room when a cancer patient was having her breasts examined-- without letting her know that he wasn't a physician-- was not intrusive enough to violate her privacy. Kuhl, who has been rated well qualified by the ABA, was reversed by the California Court of Appeal, which tartly observed: "A breast cancer patient who goes into an oncologist's office to be examined does not, nor should she, take a risk that ... a drug salesperson will be a part of the process...."

Boxer stated in her letter that she wrote the White House "suggesting three mainstream Republicans who would make excellent circuit court judges and who would have my full support. Those suggestions have been ignored, although the Constitution demands that the Senate have advice and consent role on judges, a

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News
Pat Summitt's 800th Victory
Augusta Golf Club's Red Face
National Map of Priest Abuse
Women Warriors
Lesbians with Strollers
Kopp Trial
Trouble in Herat, Afghanistan
Reproductive Rights in Poland
Health Clinics in Guatemala
Congolese Women for Peace
Global Good News Round-Up
The Opposite of a Nuclear Bomb

Departments
Lower Breast Cancer Risks by Liz Galst
The Making of an Activist by Gloria Feldt
Nature Conservancy Gainsby Rachel Rabkin
Harvard Stumbles on Rape Rules by Lorraine Dusky
The Bush Overhaul of Federal Courts by Stephanie B. Goldberg
My Friend Yeshi by Alice Walker

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Read Past Issues

The work of Chicago-based writer Stephanie B. Goldberg has

provision that I take very seriously."

Along with Kuhl and Owen, Ohio Supreme Court Justice Deborah Cook also has been renominated for the Federal Court of Appeals for the Sixth Circuit. The prospect of her deciding federal discrimination cases has galvanized local plaintiffs' lawyers. A study of her record found she has ruled in favor of employers 83 percent of the time, says Frederick Gittes, president of the National Employment Lawyers Association. "Her hostile and extreme views concerning laws governing the workplace have no place on the federal bench," he says.

Looking Beyond Gender

To those who say that feminists ought to be heartened to have gender representation on the bench even if they're getting Scalia in a skirt, Isabelle Katz Pinzler, Special Counsel to the NOW Legal and Educational Fund, has an answer: "I would rather have a pro-civil rights, pro-choice man than most of these women in terms of how they're going to decide cases," she says. "Diversity is important, but it's not the only consideration."

Ultimately, if you're offering up judges that look like America but think like Wall Street, you're playing fast and loose with democracy. "If courts are perceived as being governed by political ideology, they lose public support and are no longer seen as an independent branch of government," says Goldman. "They're just an arm of the regime."

Unfortunately, that seems to be what the current regime is after.

Take Action



President Bush's changes in appointment procedure make it far easier for the executive branch to tranform the federal court system--judge by judge-- into a long-lasting instrument of political ideology.

Don't let Bush stack the courts with anti-abortion justices! Donate today to the Feminist Majority Foundation's Never Go Back campaign.

the U.S. Supreme Court

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Roe v. Wade

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the lower Federal Courts

• • •

court Coalition

U.S. Court of Appeals for the Ninth Circuit

Carolyn Kuhl

Planned Parenthood Federation of America Statement Regarding the Nomination of Carolyn Kuhl to the Ninth Circuit Court of Appeals

The Planned Parenthood Federation of America (PPFA), the world's largest and most trusted voluntary family planning organization, has a long-standing history of working to ensure the protection of reproductive rights as well as working to advance the social, economic, and political rights of women. Because lower federal courts exercise enormous power in deciding cases involving women's rights, the right to privacy, reproductive freedoms, and other basic civil rights, PPFA believes that judges appointed to these courts must demonstrate a commitment to safeguarding these fundamental rights. PPFA will oppose confirmation of nominees who fail to do so.

We believe that California Superior Court Judge Carolyn Kuhl's record demonstrates that she is not committed to protecting these rights. Therefore, PPFA opposes her nomination to the United States Court of Appeals for the Ninth Circuit.

Judge Kuhl held various positions in the U.S. Department of Justice during the Reagan administration. From 1982 to 1985, Kuhl held the appointment of Deputy Assistant Attorney General for the Civil Division. During her tenure in that position, the Supreme Court agreed to hear Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), a challenge to several Pennsylvania abortion restrictions. The Reagan administration filed a brief in Thornburgh that not only supported the Pennsylvania restrictions, but also called for an outright reversal of Roe v. Wade:

Indeed, the textual, doctrinal and historical basis for Roe v. Wade is so far flawed, and . . . is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it. [1]

The Acting Solicitor General at the time the Thornburgh brief was filed, Charles Fried, wrote, in his book, Order and Law, that when he was considering what position to take in the case, "[t]he most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil, who recommended that we urge outright reversal of Roe." [2]

In addition, when in private practice, Kuhl chose to serve as counsel for the American Academy of Medical Ethics in Rust v. Sullivan, 500 U.S. 173 (1991), the case challenging the "gag rule" - federal regulations promulgated by the Bush I administration that prohibited health care professionals at family planning clinics that receive funding from the Title X program from counseling women about abortion - or even providing non-directive counseling that informed them of abortion as an option. Kuhl's brief argued that this prohibition did not violate the rights of the health care providers and their patients.

Given Kuhl's record demonstrating animosity towards reproductive rights, PPFA joins other organizations concerned with women's rights and civil rights in opposing her nomination to the Ninth Circuit Court of Appeals.

[1]Brief for the United States as Amicus Curiae in Support of Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379).

[2]Charles Fried, Order and Law: Arguing the Reagan Revolution - A Firsthand Account 33 (1991).

» Back to Circuit Courts Map

① not supporting Bob Jones

② legal position –
who decides

③ narrow lens

(i) DOJ rule
(ii) non-discrimination

Carolyn Kuhl's Record: Discrimination/Race

- Judge Kuhl has stated on the public record that: "the Federal Government has and should play an aggressive, vigorous role in fighting discrimination. The civil rights laws have had a major impact in changing our society for the better, including by giving the Executive Branch the power to punish unlawful discriminatory conduct in employment, housing, government contracting and federal programs. The Government must continue to be a force for change by rooting out discrimination under its statutory mandates and bringing actions to compensate victims of discrimination." *May 29, 2001 Letter from Judge Kuhl to Sen. Boxer.*

- Judge Kuhl's record as a California Superior Court Judge has demonstrated her personal commitment to fair treatment of all persons, to non-discrimination, and to enforcement of the civil rights laws.

  ✓ For example, in *Francis Iwekaogwu v. City of Los Angeles*, 75 Cal.App.4th 803 (1999), Judge Kuhl upheld a large damage award in an employment discrimination and retaliation case where an employee was discriminated against because of his race (African-American) and national origin (Nigerian).

  ✓ Leo James Terrell, an attorney for the NAACP and a lifelong Democrat that appeared before Judge Kuhl in *Iwekaogwu*, has written, "I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit." He went on to say that, "...I found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional." Letter from Leo James Terrell to Senator Barbara Boxer (May 23, 2001).

  ✓ Bruce Broillet, a noted plaintiff's attorney in Los Angeles, wrote that, "...I can confirm to you that she has received excellent reviews from other plaintiffs' attorneys who have handled cases before her. In my own experience, her rulings were balanced and well reasoned and her temperament was conducive of a fair and equitable trial." Letter from Bruce Broillet to Senator Barbara Boxer (May 14, 2001).

  ✓ Ninety-seven of Judge Kuhl's colleagues, those who know her best, wrote in a letter to the Senate Judiciary Committee: "We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand." Letter from 97 judges of the California Superior Court, Los Angeles County, to Chairman Orrin G. Hatch, Senator Patrick J. Leahy, Senator Dianne Feinstein, and Senator Barbara Boxer (Feb. 28, 2003).

FRANCIS EGBULE IWEKAOGWU, Plaintiff and Respondent,
v.
CITY OF LOS ANGELES, Defendant and Appellant.

No. B120350.

Court of Appeal, Second District, Division 4, California.

Oct. 13, 1999.

SUMMARY

An engineer brought an action against the city, his employer, under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) for discrimination on the basis of race and national origin, hostile work environment, and retaliation. The jury found in plaintiff's favor on his retaliation claim, failed to reach a verdict on the other theories of liability, and awarded him $775,000. The trial court denied the city's motions for judgment notwithstanding the verdict and for new trial based on insufficiency of the evidence and jury misconduct. A juror had discussed the case with her husband, a union representative, and communicated his opinion that plaintiff had been subjected to retaliation to the other jurors, but they stated to the judge that they could disregard her statements and form their own opinions. The trial court conditioned its denial of defendant's motion for new trial on plaintiff's acceptance of a remittitur reducing the jury's verdict to $500,000 based on the facts of the case and questionable jury conduct during deliberations. Plaintiff accepted the remittitur and the trial court entered judgment in the amount of $500,000 in his favor. (Superior Court of Los Angeles County, No. BC140265, Ernest M. Hiroshige, Judge.)

The Court of Appeal affirmed. The court held that sufficient evidence supported the jury's verdict in favor of plaintiff on his retaliation claim. The facts at trial could have led the jury to interpret remarks by plaintiff's supervisors as indicating an intent to retaliate. There was also evidence that supported inferences that, in retaliation for plaintiff's complaints, plaintiff's supervisor ensured that he was not given further promotions or opportunities for overtime, and that the city's reasons for its employment actions with respect to plaintiff were pretextual. The court also held that no prejudice resulted from any juror misconduct that occurred. The court also held that the damage award was not excessive, since, even though it was clear that economic damages could have been only a relatively small portion of the jury's award, evidence of plaintiff's emotional distress damages supported ***804** the bulk of the award. (Opinion by Kuhl, J., [FN*] with Vogel (C. S.), P. J., and Epstein, J., concurring.)

FN* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Civil Rights § 3--Employment--Fair Employment and Housing Act--Retaliation--Sufficiency of Evidence.
In an action brought by an engineer against the city, his employer, under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) for retaliation after plaintiff filed a discrimination claim, sufficient evidence supported the jury's verdict in favor of plaintiff. The facts at trial included several remarks by plaintiff's supervisors that could have been interpreted as indicating an intent to retaliate against plaintiff for his complaints of discrimination. The jury could have inferred that, in retaliation for plaintiff's complaints, plaintiff's supervisor ensured that he was not given further promotions or opportunities for overtime. There was also evidence of disparate treatment after plaintiff lodged his complaints, and plaintiff offered sufficient evidence to create an inference that the city's reasons for its employment actions with respect to plaintiff were pretextual.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 757, 763.]

(2) Appellate Review § 155--Scope of Review--Sufficiency of Evidence-- Inferences.
In considering a claim on appeal that a jury's verdict in favor of a plaintiff was not supported by

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the evidence, the appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his or her favor, and give the plaintiff the benefit of all reasonable inferences in support of the original verdict.

(3a, 3b) Civil Rights § 3--Employment--Fair Employment and Housing Act-- Retaliation--Prima Facie Case.
To establish a prima facie case of retaliation under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), the plaintiff must show that he or she engaged in a protected activity, the employer subjected him or her to adverse employment action, and there is a causal link between ***805** the protected activity and the employer's action. At least three types of evidence can be used to show that an employer's nonretaliatory explanation for its actions is pretextual: (1) direct evidence of retaliation, such as statements or admissions, (2) comparative evidence, and (3) statistics. Direct evidence of retaliation may consist of remarks made by decision makers displaying a retaliatory motive.

(4a, 4b, 4c) Trial § 33--Custody, Conduct, and Deliberations of Jury--Conduct of Jurors--Outside Opinion--Sarcastic Remark--Suggestion of Impermissible Damage Award.
In an action arising from discrimination and retaliation brought by an engineer against the city, his employer, under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), the trial court properly denied the city's motion for new trial based on jury misconduct following the jury's verdict for plaintiff on his retaliation claim. No prejudice resulted from any juror misconduct that occurred. While a presumption of prejudice arises when there has been any juror misconduct, the presumption may be rebutted by evidence that no prejudice resulted. Even though one juror had discussed the case with her husband, a union representative, and communicated to the other jurors her husband's opinion that plaintiff had been subjected to retaliation, when the trial court excused that juror and interviewed the others, they agreed they could disregard her statements and form their own opinions. Another juror's cutting and sarcastic words and emotional descriptions of personal experiences did not constitute misconduct. Finally, only one juror stated that the damage award should set an example; even though punitive damages were not permitted, that one remark did not establish either an express agreement to include exemplary damages in the verdict or that there was extensive discussion of the topic.

(5) New Trial § 105--Appellate Review--Juror Misconduct.
On appeal from denial of a motion for new trial on grounds of juror misconduct, the appellate court has a constitutional obligation to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial.

(6) Trial § 33--Custody, Conduct, and Deliberations of Jury--Conduct of Jurors--Suggestion of Impermissible Damage Award.
A statement by a juror suggesting that a verdict should include an impermissible category of damages is not by itself jury misconduct. To establish misconduct requiring reversal, juror declarations must establish an express agreement by the jurors to include such impermissible ***806** categories of damages in their verdict, or extensive discussion evidencing an implied agreement to that effect.

(7a, 7b) Civil Rights § 3--Employment--Fair Employment and Housing Act--
Retaliation:Damages § 17.2--Excessive and Inadequate Damages--Award Not Excessive.
In an action brought by an engineer against the city, his employer, under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) for retaliation after plaintiff filed a discrimination claim, in which the jury awarded plaintiff $775,000 in damages but plaintiff accepted a remittitur reducing that award to $500,000, the damage award was not excessive. The verdict was not broken down into economic and noneconomic damages. From the evidence introduced at trial, it was clear that economic damages could have been only a relatively small portion of the jury's award; however, evidence of plaintiff's emotional distress damages supported the bulk of the award. Even though plaintiff had not yet received psychological treatment, the jury could have concluded that he should receive such treatment. The jury also could have concluded that he was suffering from emotional distress that significantly altered his ability to enjoy life and to engage in ordinary activities, that

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interfered with his family life, and that included fear of physical harm from coworkers.

(8) Damages § 16--Excessive and Inadequate Damages--Appellate Determination.
The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. The jury and judge see and hear the witnesses and frequently see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice, or corruption on the part of the jury.

COUNSEL

James K. Hahn, City Attorney, Winston F. Tyler, Richard M. Helgeson and Catharine H. Vale, Assistant City Attorneys, for Defendant and Appellant.

Law Offices of Leo James Terrell and Leo James Terrell for Plaintiff and Respondent. ***807**

KUHL, J. [FN*]

> FN* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of California Constitution.

Francis Egbule Iwekaogwu (Iwekaogwu) was employed as an engineer in the harbor department of the City of Los Angeles (City). While employed there Iwekaogwu, an African-American from Nigeria, complained that he was subjected to discriminatory treatment on the basis of his race and national origin. Eventually he brought this action against the City, alleging claims under the California Fair Employment and Housing Act, Government Code section 12900 et seq., for discrimination on the basis of race and national origin, hostile work environment, and retaliation. The jury found in favor of Iwekaogwu on his retaliation claim but was unable to reach a verdict on the other theories of liability. The jury awarded damages in the amount of $775,000.

The City filed posttrial motions arguing that there was insufficient evidence to support the verdict and that a new trial should be granted on grounds of jury misconduct and excessive damages. The court rejected the City's contentions concerning sufficiency of the evidence and jury misconduct. The court denied the City's motion for a new trial on damages, conditioned on the plaintiff's accepting a remittitur reducing the jury's verdict to $500,000. Iwekaogwu accepted the remittitur and judgment was entered for the plaintiff in the amount of $500,000. The City filed this appeal, reasserting the arguments made in its posttrial motions. We affirm the judgment.

Factual and Procedural Background

Because all reasonable inferences must be drawn in favor of the judgment below, we describe the facts in the light most favorable to Iwekaogwu.

Iwekaogwu is an African-American male. His national origin is Nigerian. He has two masters degrees in civil engineering.

Iwekaogwu was hired by the City Department of Public Works in July 1988. In December 1989 he was hired by the harbor department of the department of public works as a civil engineering assistant II. He was hired for the structural design section, a small unit of approximately six engineers. Iwekaogwu was the first African-American to join the structural design section of the harbor department.

During Iwekaogwu's interview with the harbor department, one of the interviewers asked him whether he had ever been harassed on the job before. ***808** The interviewer told Iwekaogwu that he should "get prepared because there [are] a lot of them in the Harbor Department."

After Iwekaogwu was hired, Max Weismair was his immediate supervisor. At the end of 1990 Weismair gave Iwekaogwu an evaluation, giving him the highest possible rating in all categories. The evaluation also was signed by Larry Anderson, Weismair's supervisor.

Iwekaogwu took and passed an examination to become a civil engineer associate. When the list of those who had passed the examination was published in 1991, Iwekaogwu approached Weismair about a

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promotion to the position of civil engineer associate. Weismair told Iwekaogwu that he would discuss the issue with Larry Anderson. Later Weismair told Iwekaogwu that Anderson had said that the harbor department was not a place for Iwekaogwu to continue his professional career and that if he needed any promotional opportunity he should seek it elsewhere. As of that time Iwekaogwu had not had any professional contact with Anderson.

After this incident, in a conversation with Doug Thiessen in 1991, Iwekaogwu threatened to file a race discrimination action against the harbor department. Thiessen at that time was not a member of the structural design section of the harbor department. However, Iwekaogwu testified that Thiessen went to Adam Birkenbach and Vernon Hall to discuss the matter. [FN1] Birkenbach was Anderson's supervisor and Hall was Birkenbach's supervisor.

> FN1 There was no objection to this testimony by Iwekaogwu concerning what Thiessen did.

In August 1991 Iwekaogwu was promoted to the position of civil engineer associate. However, when promotions for the period from July 1991 to early 1992 were announced at a general meeting in early 1992, Iwekaogwu's promotion to civil engineer associate was not announced.

In October 1992 and May 1993 Weismair again gave Iwekaogwu the highest rating on his job evaluations.

In 1993 Iwekaogwu took an examination for the position of structural engineering associate I. He had the highest score of all the candidates in the harbor department on the examination and was ranked eighth in the City overall. Iwekaogwu also took and passed the examination for the position of civil engineer. He never was notified that he was eligible to apply for a position as civil engineer on the basis of his test scores. However, in 1993 the construction management division of the harbor department promoted a White male to the position of civil engineer in that division, even though that person had failed the civil engineer examination that Iwekaogwu had passed. ***809**

Raymond Aliviado became Iwekaogwu's supervisor in late 1993. Prior to that time Aliviado had been one of Iwekaogwu's coworkers in the structural design section. Aliviado had begun keeping a diary with comments about Iwekaogwu's work in 1991, when they were coworkers. Aliviado continued keeping notes about Iwekaogwu after he became Iwekaogwu's supervisor. Iwekaogwu was the only employee about whom Aliviado kept notes.

On or about April 18, 1994, Iwekaogwu spoke to Bob Zmuda (who was second in command of the section under Aliviado) about Iwekaogwu's interest in a promotion to the position of structural engineering associate. Zmuda spoke with Aliviado and then told Iwekaogwu that Aliviado had said he was waiting to fill the existing structural associate position with the civil associate. Zmuda also told Iwekaogwu that Aliviado had said that Iwekaogwu was doing an unsatisfactory job, but that Zmuda had worked with Iwekaogwu on a lot of projects and found him very competent.

Slightly more than a week after Iwekaogwu inquired about a promotion, Aliviado gave Iwekaogwu a job evaluation, rating him as unsatisfactory overall. The evaluation included comments that Iwekaogwu needed to listen to and follow instructions more carefully, to be more careful in checking his work, to better interpret engineering drawings, and to take initiative and ask more questions.

Iwekaogwu then wrote a letter to Ezunial Burts, the executive director of the harbor department. He delivered it by hand to a secretary in the executive director's office in early May 1994. [FN2] Burts testified that he did not see the letter until after litigation was commenced, but that the letter was referred to Hall who in turn assigned it to Anderson for follow-up.

> FN2 The letter bears the date May 2, 1992. However it discusses events that occurred through late April 1994. It bears a date stamp of May 4, 1994.

Iwekaogwu's letter was captioned "Discrimination Complaint in Engineering Division of the Harbor Department of the City of Los Angeles." After reciting Iwekaogwu's history of employment in the harbor department, the letter complained about the employment evaluation from Aliviado; hostile actions by Aliviado toward Iwekaogwu, including his yelling at Iwekaogwu in front of coworkers; the failure to announce his promotion in 1991; and other

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actions. Iwekaogwu described these as "instances where I have been discriminated against." The letter states: "I honestly feel that I have suffered more than enough reprisals for humbly requesting for a promotion, just as others did, in 1991." It concludes by stating: "I strongly feel that Mr. Ray Aliviado is not acting within his professional and city rules and regulations. Rather he is relying on his personal prejudices to make ***810** professional judgements [*sic*]. He is not acting alone. He is receiving advice from somewhere and I will appreciate a full fledged investigation."

On May 16, 1994, Iwekaogwu had a meeting with Anderson concerning Iwekaogwu's letter to Burts. Anderson said that he would speak with Birkenbach to discuss the letter and that he would get back to Iwekaogwu in a week. Anderson asserted that there was no discrimination in the harbor department and that it was not possible for Aliviado to discriminate against Iwekaogwu. Anderson asked if Iwekaogwu had heard about the Ku Klux Klan, Neo Nazis and Skinheads rising up all over the United States and Europe. Anderson said "that is racial discrimination" and there was no discrimination in the harbor department. Anderson also told Iwekaogwu that as long as he remained in the harbor department he should not expect any promotions. Anderson did not follow up with Iwekaogwu after this meeting. However, after the meeting, Aliviado no longer supervised Iwekaogwu.

In May 1994 Zmuda replaced Aliviado as supervisor in the structural design section. In October 1994 Zmuda selected Angel Lim to be the structural engineering associate for the structural design section. Lim was transferred from the construction management section. Lim had taken the structural engineering examination and had scored lower on it than Iwekaogwu. Aliviado told Zmuda that Lim would be a good man for the job, although Aliviado had never worked with Lim on a project in the harbor department and had never evaluated his work performance. Zmuda hired Lim for the structural design section without looking at any of his prior performance evaluations and after talking to him for five or ten minutes on a couple of occasions.

After Zmuda became his supervisor in 1994, Iwekaogwu submitted a request for overtime. About the same time two other members of the structural design section made similar requests. Zmuda approved overtime for the other two but tore up Iwekaogwu's overtime sheet. Zmuda told Iwekaogwu that he did not want him coming in and asking for overtime. After that, Iwekaogwu was not given overtime. Iwekaogwu asked for overtime again in 1995, but his request was denied. While Zmuda was the supervisor of the structural design section, everyone in the section was approved to do some overtime work except Iwekaogwu. [FN3]

> FN3 Iwekaogwu filed an objection to exhibit 233 lodged by the City. That exhibit is an employee overtime report. We strike exhibit 233 as filed by the City as it appears to be incomplete when compared to the version of exhibit 233 filed by Iwekaogwu.

In April 1995 Iwekaogwu telephoned Sandra Peelen of the equal employment opportunities section of the City. He complained to her about discriminatory treatment and followed up with a letter dated April 14, 1995. The ***811** letter repeated many of the complaints made in the letter addressed to Burts and added others, including the denial of overtime. Iwekaogwu followed up with Peelen by telephone and met with her in June 1995. In July 1995 Iwekaogwu filed a complaint with the California Department of Fair Employment and Housing (DFEH). Zmuda learned of this complaint at the time it was filed. An employee of the personnel department suggested to Zmuda that he keep a log on Iwekaogwu when the DFEH complaint was filed, and Zmuda began doing so.

Meanwhile, Iwekaogwu received a job evaluation from Zmuda in May 1995. The evaluation indicated that Iwekaogwu "needs improvement." The evaluation stated that Iwekaogwu needed to pay more attention to checking of finished work and to ask more questions early in the design process to develop better engineering judgment.

Iwekaogwu filed the complaint in this case in December 1995.

On July 3, 1996 Zmuda again rated Iwekaogwu. The overall rating was "improvement needed." Zmuda noted that Iwekaogwu's performance had deteriorated. On July 18, 1996, Zmuda wrote a letter to Iwekaogwu to document "an oral warning given to you on July 8, 1996 as a result of insubordinate behavior and performance problems." The letter documented several instances when

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Iwekaogwu refused to provide information or was uncooperative. The events described in the letter had occurred over a one-year period.

On several occasions Zmuda told Iwekaogwu that Iwekaogwu had to leave the structural design section "because [Zmuda] considered [Iwekaogwu] a litigant and a filer of discrimination complaints." On October 8, 1996, Zmuda drew an outline of a dead man with fake blood, like a crime scene drawing, in the harbor department offices on some carpet that was about to be replaced. The drawing was three to four feet away from the entrance to Iwekaogwu's office. Zmuda testified that he had drawn the figure outside of his own office, which was across from Iwekaogwu's, and that the drawing was a Halloween joke. Iwekaogwu testified that Zmuda had told a witness that the drawing "shows that one of us would be leaving the structural section very soon and that individual knows that this is directed at him."

With respect to economic damages, testimony was introduced that the difference in salary between a civil engineer associate (the position Iwekaogwu held beginning August 1991) and a civil engineering is $12,000 to $15,000 per year. A civil engineer associate is paid $23.35 per hour, and ***812** the difference in rate of pay between a civil engineer associate and a structural engineering associate is 51 cents per hour. Overtime is paid at time and one-half. For the year ending June 30, 1993, Iwekaogwu worked 58 hours of overtime.

With respect to evidence concerning Iwekaogwu's emotional distress, Iwekaogwu testified that he has nightmares about his supervisors "going after [him] at night," that he is under stress, that he has been treated by a doctor with medication for high blood pressure, that his relationship with his children has changed, that his wife threatened to leave him because of his "stressed-out" condition caused by his work situation, that he has trouble sleeping and that he eats less. He worries about mortgage payments and his future ability to afford private schooling for his children. Although he was referred for psychological counseling, there was no testimony that he received treatment from a psychologist or psychiatrist. No medical practitioner testified concerning his emotional distress. Iwekaogwu's wife testified that he used to be a fun-loving person but has changed. She testified that Iwekaogwu now cries a lot and has withdrawn from activities with his children and with social acquaintances. She confirmed that she had threatened to leave her husband because he was unhappy and would not communicate. She testified that they were having difficulty paying bills and that they could not afford to send their children to private school.

The case was submitted to the jury on May 21, 1997. On June 3 a juror sent a note to the judge, informing him that another juror, Ms. Hirtle, had admitted that she had sought the advice of her spouse about the case. The court inquired on the record of Ms. Hirtle. She stated that she had discussed the facts of the case with her husband, a union representative, and that her husband had said "yes, that's retaliation." Ms. Hirtle stated that she had communicated her husband's opinion to the other jurors but had not told the other jurors anything more than this and had not communicated anything about her husband's reasoning. The court indicated that it would excuse Ms. Hirtle and substitute an alternate juror.

The City moved for a mistrial. The court then questioned the other jurors about Ms. Hirtle's statements in the jury room and whether they would be able to disregard what Ms. Hirtle had said about her conversation with her husband and form their own opinions. The other jurors agreed with Ms. Hirtle's account of what was stated in the jury room and each agreed that he or she could disregard what Ms. Hirtle had said about her husband's opinion. The court denied the City's motion for a mistrial, excused Ms. Hirtle for cause, substituted an alternate juror and instructed the jurors that they were to disregard Ms. Hirtle's statements about her conversation with her husband. ***813**

The jury returned a special verdict, finding in favor of Iwekaogwu on his claim that he was retaliated against by the City for making a complaint of discrimination based on race or national origin. The jury was unable to reach a verdict on Iwekaogwu's claim that he was discriminated against on account of his race or national origin by the City's failure to promote him and on his claim that he was subjected to a hostile work environment. The jury awarded damages of $775,000. No question concerning punitive damages was submitted to the jury.

The City filed a motion for judgment notwithstanding the verdict on the ground that the evidence was insufficient as a matter of law to

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support the jury's verdict. The City also filed a motion for a new trial and for reduction of damages. In the new trial motion the City again argued insufficiency of the evidence and also argued that the damages award was not supported by the evidence and was excessive as a matter of law.

The City also argued that juror misconduct deprived it of a fair trial. The City offered the declarations of three jurors. These jurors testified that (1) one juror had been very aggressive in deliberations, threatening to walk out when deliberations were not going his way, interrupting other jurors, and telling others "you don't know what you're talking about," "shut up," and "you're stupid"; (2) that when Ms. Hirtle had stated what her husband had told her, the foreperson had tried to secure an agreement from other jurors not to tell anyone about Ms. Hirtle's misconduct; (3) that when the discussion of damages started, each juror had written down what amount he or she would award, that one juror stated he was "playing the averages" by proposing the amount of $2 million, and that the jury negotiated up and down from the various amounts proposed by jurors at the outset; and (4) that during the discussion of damages, when one juror pointed out the jury instruction stating that damages could not amount to punishment, another juror asserted that the jury ought to set an example and send a message to the City that it cannot treat any employee as Iwekaogwu was treated. The declaration of one juror stated that after Ms. Hirtle talked about her husband's opinion, the jurors "all discussed what had happened and everyone stated that he/she did not feel that Ms. Hirtle's announcement had in any way affected his/her decision, only Ms. Hirtle's."

Iwekaogwu filed declarations of other jurors 35 days after the City served and filed its notice of motion for new trial and its juror declarations. The City moved to strike these declarations as untimely under Code of Civil Procedure section 659a. The court overruled the City's objections.

The court denied the City's motion for judgment notwithstanding the verdict. The court denied the City's motion for new trial, conditioned on the ***814** plaintiff's accepting a remittitur reducing the jury's verdict to $500,000. Regarding the City's allegations of juror misconduct, the court stated that it was "convinced ... based on all of the evidence that, in general, the jurors did not commit misconduct," and that, regarding Ms. Hirtle, "the subsequent inquiry of other jurors and the instructions of the Court alleviated any possible taint regarding her consultation with her husband." In setting the remittitur amount, the court stated that it "was persuaded by the moving papers that the verdict was excessive due to the facts of the case and some possible questionable activity by some jurors during deliberations."

Plaintiff accepted the remittitur, and judgment was entered in the amount of $500,000. The City filed a timely notice of appeal.

Discussion

I

(1a) On appeal the City first argues that the evidence was insufficient to establish the elements of a claim for retaliation under the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq. (2) The City concedes that in considering this issue " ' "... the appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict...." ' ..." (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703 [38 Cal.Rptr.2d 413], citations omitted.)

(3a) The FEHA makes it unlawful "[f]or any employer ... to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint ... under this [Act]." (Gov. Code, § 12940, subd. (f).) To establish a prima facie case of retaliation, "... the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action." (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476 [4 Cal.Rptr.2d 522].)

(1b) The City alleges that only employment actions after May 1994 could be considered by the jury in determining whether Iwekaogwu was retaliated against by the City, because his first complaint of employment discrimination was the letter delivered to Burts's office in that month. However there was evidence that, prior to August 1991, Iwekaogwu had threatened to file a race discrimination action against

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the harbor department ***815** (after Anderson stated that Iwekaogwu should seek promotional opportunities outside the harbor department), and that this threat was communicated to two of Anderson's supervisors. The City concedes that an employee engages in protected activity under the FEHA when he threatens to file a charge of employment discrimination. (See, e.g., *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1156, fn. 3; *Silver v. KCA, Inc.* (9th Cir. 1978) 586 F.2d 138, 141, fn. 2.)

Thus there was evidence that Iwekaogwu engaged in activity that was protected from retaliation as early as August 1991. Subsequently Iwekaogwu experienced adverse employment actions (1) when he was not promoted to the structural engineering associate position in the structural design section and instead Angel Lim was given that job, (2) when he was not promoted to the level of civil engineer, and (3) when he was denied his requests for overtime.

The City argues that the position of structural engineering associate never was posted for promotion. However, although there was not a formal posting, the structural design section found a way to fill the position by transferring Lim from another section of the harbor department. The point is that the job was filled and Iwekaogwu did not fill it.

The City also argues that Iwekaogwu's place on the eligibility list for civil engineer never was high enough to allow him to be considered for that position. However, the City was willing to fill a civil engineer position in another section with someone who actually had failed the civil engineer examination that Iwekaogwu had passed. If the person who failed the examination was eligible for a civil engineer position, then the jury could have concluded that Iwekaogwu should have been eligible for the position as well, regardless of his place on the eligibility list.

Thus there was evidence from which a jury could have concluded that in 1991 Iwekaogwu engaged in protected activity by threatening to file a race discrimination complaint and that Iwekaogwu was subjected to adverse employment actions thereafter. The City argues, however, that there was insufficient evidence under the three-stage approach of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804 [93 S.Ct. 1817, 1824-1825, 36 L.Ed.2d 668], to allow a jury to conclude that there was a causal relationship between the protected activity and the adverse employment actions. The City argues that it offered a legitimate, nonretaliatory explanation for its acts (poor performance by Iwekaogwu), and that Iwekaogwu failed to show that this explanation was pretextual because he did not offer evidence demonstrating that the criticisms of his performance were inaccurate. ***816**

(3b) The City takes too narrow a view of the type of evidence that may be offered to show that an employer's nonretaliatory explanation for its actions is pretextual. A plaintiff is not limited to a direct attack on the employer's explanation. At least three types of evidence can be used to show pretext: (1) direct evidence of retaliation, such as statements or admissions, (2) comparative evidence, and (3) statistics. (*Penk v. Oregon State Bd. of Higher Educ.* (9th Cir. 1987) 816 F.2d 458, 462 [considering sex discrimination claim].) Iwekaogwu offered both direct evidence of retaliation and comparative evidence.

Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive. (See *Lindahl v. Air France* (9th Cir. 1991) 930 F.2d 1434, 1439 [sexist comments in sex discrimination case].) (1c) The facts presented at trial include several remarks by Iwekaogwu's supervisors that can be interpreted as indicating an intent to retaliate against Iwekaogwu for his complaints of discrimination.

Most directly, there was evidence that Zmuda told Iwekaogwu on several occasions that Iwekaogwu had to leave the structural design section because Zmuda considered him a litigant and a filer of discrimination complaints. Poignantly demonstrating this attitude was Zmuda's statement that the "crime scene" outline drawn outside Iwekaogwu's office was intended to show that "someone" will be leaving the structural design section soon.

It was Zmuda who selected the person to fill the position of structural engineering associate and who refused Iwekaogwu's requests for overtime. Zmuda's supervisor, Anderson, had met with Iwekaogwu in May 1994 concerning the complaints of discrimination in the Burts letter. This occurred prior to Zmuda's decisions on the structural engineering associate position and the overtime

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requests. Indeed Anderson appointed Zmuda to be Iwekaogwu's supervisor immediately following Anderson's meeting with Iwekaogwu concerning his discrimination charge. The jury could have inferred that when Anderson appointed Zmuda to be Iwekaogwu's supervisor, he told Zmuda of Iwekaogwu's discrimination charge, even though Zmuda denied that he knew of Iwekaogwu's complaints before July 1995.

This inference (that Anderson told Zmuda of Iwekaogwu's discrimination charge) is supported by Anderson's exceedingly defensive reaction to Iwekaogwu's complaints of discrimination. Anderson's reaction also is direct evidence of an intent to retaliate. Anderson was assigned responsibility for addressing the allegations Iwekaogwu made in his letter to Burts. When Anderson met with Iwekaogwu, he categorically denied that there was any discrimination in the harbor department, apparently without conducting an ***817** investigation. Even more significantly, Anderson made comments indicating that the only conduct he considered to rise to the level of discrimination was conduct such as that of the Ku Klux Klan, Neo Nazis and Skinheads. Anderson's offensive comments plainly allow an inference that he did not take Iwekaogwu's complaints seriously and that he harbored a deep resentment about the complaints. At the same meeting he told Iwekaogwu not to expect any promotions.

Anderson was Iwekaogwu's second-level supervisor when each of the adverse employment decisions described above was made. An individual employment decision should not be treated as a " ' "watertight compartment, with discriminatory statements in the course of one decision somehow sealed off from (that is, irrelevant to) every other decision." ' " (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 667 [8 Cal.Rptr.2d 151], quoting *Roebuck v. Drexel University* (3d Cir. 1988) 852 F.2d 715, 734, fn. 32.) The jury could have inferred that, in retaliation for Iwekaogwu's complaints, Anderson ensured that Iwekaogwu was not given further promotions or opportunities for overtime.

Iwekaogwu also offered comparative evidence of pretext; that is, evidence that he was treated differently from others who were similarly situated. Although Iwekaogwu's performance was criticized, Zmuda did not even review the performance evaluations of the person hired to fill the structural engineering associate position and only conducted a brief interview of that person. A civil engineer position in the harbor department was filled by a person who had failed the civil engineer examination that Iwekaogwu had passed. Iwekaogwu was the only engineer in the structural design section who was not approved to perform at least some overtime work after 1994. All of these employment decisions took place after Iwekaogwu's discrimination complaints had been communicated to Anderson's supervisors in 1991. The denial of overtime and the decision concerning the structural engineering associate position occurred after Anderson met with Iwekaogwu about his complaint to Burts. From this evidence of disparate treatment, a jury could have inferred that Iwekaogwu experienced adverse employment actions in retaliation for his complaints of discrimination.

Iwekaogwu offered sufficient evidence to create an inference that the City's reasons for its employment actions with respect to Iwekaogwu were pretextual. The jury's verdict on the retaliation charge is supported by substantial evidence.

II

(4a) The City contends that the trial court should have granted its motion for a new trial on grounds of juror misconduct. (5) On appeal ***818** from denial of a motion for new trial on grounds of juror misconduct, the appellate court, " ' " 'has a constitutional obligation [citation] to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial.' " ' " (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1364 [31 Cal.Rptr.2d 906], quoting *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1745 [286 Cal.Rptr. 435].)

(4b) While a presumption of prejudice arises when there has been any juror misconduct, the presumption may be rebutted by evidence that no prejudice resulted. (*English v. Lin, supra,* 26 Cal.App.4th at p. 1364.) In this case, considering only the record that was created during juror deliberations and the declarations submitted by the City, [FN4] we conclude that no prejudice resulted from any juror misconduct that occurred.

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FN4 The City argues that the trial court was precluded by Code of Civil Procedure section 659a from considering the declarations filed by Iwekaogwu because they were filed outside the time limits prescribed by that section. Because we find on the basis of the declarations filed by the City that the court properly denied the new trial motion, we need not consider whether the time limits for filing affidavits or declarations by a party opposing a motion for new trial may be extended by the court.

The City first argues that Ms. Hirtle's misconduct in seeking her husband's opinion of the case infected the remainder of the jury. The court obtained a representation from each juror that he or she could refrain from considering Ms. Hirtle's comments about her husband's views and that those comments would have no bearing on his or her consideration of the case. The court instructed the jury to refrain from considering anything Ms. Hirtle said about her conversation with her husband.

The court's colloquy with the other jurors is evidence that Ms. Hirtle's misconduct did not infect the verdict. Ms. Hirtle did not communicate to the other jurors any of her husband's reasons for his views. There is no evidence that the jurors failed to follow the court's instructions to ignore Ms. Hirtle's comments about her husband. The City expresses concern that at one point some jurors proposed to agree not to tell the judge of Ms. Hirtle's conduct. But this evidence does not impeach the jurors' statements to the court that they would not consider what Ms. Hirtle had said about her husband. To the contrary, in a declaration filed by the City, one juror stated that even before Ms. Hirtle's misconduct was reported to the court, the jurors had assured each other that what Ms. Hirtle had reported about her husband would not affect any juror's views. No prejudice resulted from Ms. Hirtle's misconduct.

The City also argues that one juror engaged in misconduct that affected the outcome of the case by rude behavior and strong words directed to fellow ***819** jurors. No juror declaration stated that any juror voted a particular way because he or she was intimidated by the conduct of any other juror. The courts have recognized that "[i]f transient comments made in the heat of discussion during deliberations become a potential vehicle for attacking the verdict of the jury, freedom of discussion in the jury room is chilled, and the free exchange of ideas is inhibited." (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 977 [205 Cal.Rptr. 191].) Thus jurors' "remarks may be candid, even unflattering. But cutting and sarcastic words do not ipso facto constitute jury misconduct." (*Ibid.*) Our review of the record, including the description of deliberations included in the City's juror declarations, convinces us that the juror's "cutting and sarcastic words" did not constitute juror misconduct.

The City also complains that the same juror gave emotional descriptions of instances of discrimination he had seen as a reserve police officer. But "[j]urors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 741 [223 Cal.Rptr. 859].) A juror does not commit misconduct merely by describing a personal experience in the course of deliberations. (*Id.* at pp. 741-742.) There is no evidence that any juror decided the case based on the juror's description of his own experiences rather than on the basis of the evidence presented at trial. We find no basis for concluding that misconduct occurred.

The City also contends that the jury committed misconduct by "an arbitrary and flippant process of assessing damages by voting on various numbers proposed without regard to the evidence." Putting to one side the issue of whether the damages awarded were excessive, there is no evidence of misconduct in the manner in which the jurors went about their deliberations. The juror declarations submitted by the City do not establish that there was a quotient verdict-a verdict determined by an agreement in advance to average the amounts suggested by each juror without further deliberation. (See *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064-1065 [18 Cal.Rptr.2d 106] [defining quotient verdict].) It is not misconduct for jurors to use an average as a basis for further consideration and deliberation. (*Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1647 [35 Cal.Rptr.2d 246].) The juror declarations in this case state only that individual jurors suggested damage awards and that several of these figures were selected for consideration and further balloting. This was not misconduct.

Finally, the City argues that a new trial should be ordered because a juror stated that the damages award should set an example and send a message to the City that it cannot treat its employees like Iwekaogwu was treated. The ***820** jury was not

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permitted to include punitive damages in its verdict. (6) A statement by a juror suggesting that a verdict should include an impermissible category of damages is not by itself jury misconduct. (*Moore v. Preventive Medicine Medical Group, Inc.*, *supra*, 178 Cal.App.3d at p. 740.) "[T]o establish misconduct requiring reversal, juror declarations must establish '[a]n express agreement by the jurors to include such [impermissible categories of damages] in their verdict, or extensive discussion evidencing an implied agreement to that effect.' " (*Ibid.*, quoting *Krouse v. Graham* (1977) 19 Cal.3d 59, 81 [137 Cal.Rptr. 863, 562 P.2d 1022].) (4c) The juror declarations filed by the City evidence only one remark made by one juror. They do not establish either an express agreement to include exemplary damages in the verdict or that there was extensive discussion of the topic. (Cf. *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 172-173 [209 Cal.Rptr. 427] [extensive discussion among jurors evidencing an implied agreement to inflate verdict to compensate for attorney fees and taxes].)

We conclude that no act of juror misconduct precluded the City from receiving a fair trial.

III

(7a) Although the trial court held that "in general, the jurors did not commit misconduct," the court concluded that "the verdict was excessive due to the facts of the case and some possible questionable activity by some jurors during deliberations." It was a "permissible procedure" for the court to include questionable activity by the jury "as a reason for his conclusion that damages were excessive." (*Tramell v. McDonnel Douglas Corp., supra* , 163 Cal.App.3d at p. 171.) The court granted a remittitur that was accepted by the plaintiff, thus reducing the jury's $750,000 verdict to a $500,000 award. The City nonetheless contends that the $500,000 award is excessive as a matter of law.

(8) "The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines* ***821** (1961) 56 Cal.2d 498, 506-507 [15 Cal.Rptr. 161, 364 P.2d 337], quoted with approval in *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727 [236 Cal.Rptr. 633].)

(7b) The verdict in this case was not broken down into economic and noneconomic damages. From the evidence introduced at trial, it is clear that economic damages could have been only a relatively small portion of the jury's award. If Iwekaogwu had been given the structural engineer associate position instead of Lim, his salary would have been increased by $1,060.80 per year for the approximately two and one-half years between when Lim received the job and the time of trial. If, in addition to this promotion, Iwekaogwu had been permitted to work overtime during this period, and if he had worked 58 hours of overtime as he did in 1993, he could have earned an additional $2,075.82 per year for the approximately two and one-half years he was denied overtime. Economic damages on this basis would be less than $10,000. If the jury found that, absent retaliation, Iwekaogwu would have been promoted to civil engineer, his damages would have been $12,000 to $15,000 per year, for a maximum of $37,500 if Iwekaogwu had been promoted to civil engineer in the fall of 1994.

The issue, then, is whether the evidence of Iwekaogwu's emotional distress damages can support an award of over $450,000 for that element of damages. Giving deference to the ruling of the trial court, we cannot say that the amount of the remittitur was excessive as a matter of law.

In *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1293- 1294 [261 Cal.Rptr. 204], cited in the City's brief, the court held that an award of over $1 million in emotional distress damages was not excessive in a race discrimination case. In that case, to be sure, the plaintiff's symptoms of emotional distress were more severe than Iwekaogwu's symptoms. In *Watson* the plaintiff, in addition to nightmares, loss of appetite, and loss of interest in ordinary activities, suffered from a severe psychiatric disorder which would require medical treatment. (*Id.* at p. 1283.)

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Iwekaogwu had been referred for psychological treatment but did not receive such care. Nevertheless, the jury could have concluded that Iwekaogwu should receive such treatment. The jury also could have concluded that he was suffering from emotional distress that significantly altered his ability to enjoy life and to engage in ordinary activities, that interfered with his family life, and that included fear of physical harm from coworkers. The remittitur amount chosen by the trial court was not excessive as a matter of law in light of the evidence presented at trial and the deference due the trial court's exercise of its discretion. (See also *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 997 [16 Cal.Rptr.2d 787] [award of $662,000 for emotional distress in sex harassment case is "well within the range of awards in similar cases"].) ***822**

Disposition

The judgment is affirmed. Iwekaogwu shall receive his costs on appeal.

Vogel (C. S.), P. J., and Epstein, J., concurred.

A petition for a rehearing was denied November 5, 1999, and appellant's petition for review by the Supreme Court was denied January 25, 2000. ***823**

Cal.App.2.Dist.,1999.

Iwekaogwu v. City of Los Angeles

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Carolyn Kuhl: Bob Jones University Case

Allegation: As a member of the Reagan administration, Judge Kuhl was one of two Justice Department officials who persuaded the Attorney General to reverse an 11-year Internal Revenue Service policy and reinstate the tax-exempt status of Bob Jones University and other racially discriminatory schools. More than two hundred lawyers in the Justice Department's civil rights division signed a letter at the time expressing their concerns about the decision. Indeed, current Solicitor General Ted Olson, who was then head of the Office of Legal Counsel at the Justice Department, was among those who opposed Kuhl's position. The Supreme Court disagreed with the position advocated by Kuhl and, by an 8-1 vote, denied Bob Jones and other racially segregated schools tax-exempt status. *Alliance for Justice*

Facts:

- Judge Kuhl has stated that she believes the decision made by the Government in the *Bob Jones* case in 1982 was wrong: "The [Attorney General's] decision was wrong because it appeared insensitive to minorities, regardless of the nondiscriminatory motives of those involved in the decision." She also added that from a legal standpoint, the IRS, who was the Justice Department's client, had a defensible legal position, which the Justice Department should have defended. *May 29, 2001 Letter from Judge Kuhl to Senator Boxer.*

  ✓ In an editorial to the LA Times, former Solicitor General Charles Fried wrote of Carolyn Kuhl and the Bob Jones case: "By the time Kuhl came to the office of the solicitor general as my deputy in 1985, I knew she had come to believe (as did I) that she had been wrong, if for no other reason than seeming to side with Bob Jones confused the Reagan administration's message that we were strongly committed to civil rights and racial equality while opposed to quotas." LA TIMES, Jan. 17, 2003 at 17.

- Judge Kuhl believes that the Federal government should play an aggressive, vigorous role in fighting discrimination. *May 29, 2001 Letter from Judge Kuhl to Senator Boxer.*

- At the time of the *Bob Jones* case, Judge Kuhl was 29 years old and had no decision-making authority regarding the matter. Judge Kuhl was on the staff of the Attorney General and was assigned to perform staff work for the Attorney General and other presidentially appointed Justice Department officials.

  ✓ Charles Cooper of D.C.'s Cooper & Kirk, who worked with Kuhl at the Justice Department on this issue, characterizes descriptions of Kuhl's role in the decision making process as "unfair" and "grossly incomplete." Cooper observed that Kuhl "wasn't making policy, she was taking notes -- when she and I were even in the room." Jonathan Groner, *Going After the Bush Bench*, LEGAL TIMES, February 1, 2002.

- Judge Kuhl's original concerns focused on the problems that could arise from the IRS's potential unfettered discretion to define what was "public policy" in any number of situations for purposes of tax-exempt status – not on the specific allegations relating to Bob Jones University.

  ✓ Charles Cooper, who worked with Kuhl at the Justice Department on this issue, stated: "Neither C. Kuhl nor anyone else favored such a policy; to the contrary, all agreed that racially discriminatory private schools should not be tax exempt, and draft legislation to that effect was prepared and proposed to Congress. [Kuhl and others involved in the case] just believed that if the school was going to lose the tax exemption that it was entitled to under 501(c)(3), Congress and not the IRS should make that decision." http://www.judicialselection.org/nominees/kuhl.htm

  ✓ Judge Kuhl's research focused on problems that could arise from granting a bureaucratic agency such as the IRS unfettered authority to determine when an organization "violates public policy" and, therefore, is not entitled to tax-exempt status. In particular, Judge Kuhl was concerned with the IRS potentially denying all-girls schools (Judge Kuhl attended an all-girls high school) tax-exempt status on the ground they discriminated on the basis of sex. *May 29, 2001 Letter from Judge Kuhl to Senator Boxer.*

- The decision to change the Administration's position on 501(c)(3) was based on a legal analysis. Deputy Attorney General Edward Schmults testified before the Senate Finance Committee soon after the Administration's position on 501(c)(3) was announced. He stated:

  ✓ "This committee has inquired as to how the Department of Justice, as part of an administration committed to combatting racial discrimination, could have advised the Department of Treasury that the Internal Revenue Service lacks authority to deny tax-exempt status to private nonprofit schools that discriminate on the basis of race. The answer Mr. Chairman, is that <u>we undertook, as is our responsibility, an objective and comprehensive analysis of the law in the area, and concluded that there is neither a constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970.</u>" *Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools: Hearing Before the Senate Comm. on Finance*, 97th Cong. 109 (1982).

  ✓ "While some undoubtedly disagree with the Department's legal position, no one can fairly attribute racial motives to our decision, nor justifiably accuse us of acting irresponsibly or in derogation of our obligation to resist racial discrimination in all forms through vigorous enforcement of the Constitution and Federal law." *Id.*

  ✓ Similarly, Deputy Secretary of the Treasury, R.T. McNamar testified that: "Although it is unusual for any agency to recount in detail the events which led to a particular legal or policy decision, Congress has indicated a desire to inquire

into this matter and there have been allegations that the decision was the result of a political choice. On the contrary, as the chronology of events will show, the decision was the result of a careful, thorough legal analysis, and was made despite a recognition of the politically unpopular nature of that decision." *Id.* at 226.

- At the time, many people shared the public policy concerns regarding the IRS' authority to determine whether an organization is entitled to tax-exempt status.

  ✓ In his concurrence in the *Bob Jones* case, Justice Lewis Powell observed that Congress, not the IRS, should develop national policy regarding tax exemption:

> . . . the balancing of these substantial interests is for Congress to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently "fundamental" to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote "public policy."
> . . . .
> . . . . The contours of public policy should be determined by Congress, not by judges or the IRS.

Bob Jones, 461 U.S. at 611 (Powell, J., concurring).

  ✓ Liberal Harvard Law Professor Larry Tribe, in a 1984 letter to then Attorney General William French Smith, wrote, "...I have the highest regard for the quality of the brief submitted to the Supreme Court by the Department of Justice in the *Bob Jones* case. I thought it was a powerful and, in most respects, entirely compelling legal document." Professor Tribe based this letter on his position, like that of the Department, that the IRS' policy exceeded its authority and needed to be backed by Congressional action. February 10, 1984 Letter from Laurence H. Tribe to Attorney General William French Smith.

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Los Angeles Times January 17, 2003 Friday

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January 17, 2003 Friday Home Edition

SECTION: California Metro; Part 2; Page 17; Editorial Pages Desk

LENGTH: 588 words

HEADLINE: Commentary;
Time-Traveling to Thwart a Judge;
Her mistake is ancient history. The left is unfair inattacking L.A. court member.

BYLINE: Charles Fried, Charles Fried, a professor of law at Harvard Law, School, was solicitor general of the United States from 1985 to 1989, and an associate justice of the Supreme Judicial Court of, Massachusetts from 1995 to 1999.

BODY:
"Have you no sense of decency?" lawyer Joseph Welch famously thundered at Joe McCarthy, when the senator, during the Army-McCarthy hearings, tried to smear one of Welch's associates because of a left-wing association in that man's youth. Just such a smear is being orchestrated by far-left groups against Los Angeles Superior Court Judge **Carolyn Kuhl,** whom President Bush has nominated to the 9th Circuit Court of Appeals.

The left-wing rap against Kuhl is that more than 20 years ago, as a 29-year-old junior member of U.S. Atty. Gen. William French Smith's staff, she expressed the view that, however odious the practices and beliefs of Bob Jones University -- which had a policy against interracial dating -- it was not the job of the IRS to make social policy by deciding which nonprofits would enjoy the tax exemptions mandated by Congress.

Certainly Kuhl, a devout Roman Catholic, could have harbored no personal sympathy for the virulently anti-Catholic university. That Kuhl's legal argument was not unreasonable is demonstrated by the fact that liberal Harvard law professor Laurence Tribe wrote Smith at the time, commending that position as well considered and principled.

By the time Kuhl came to the office of the solicitor general as my deputy in 1985, I knew she had come to believe (as did I) that she had been wrong, if for no other reason than seeming to side with Bob Jones confused the Reagan administration's message that we were strongly committed to civil rights and racial equality while opposed to quotas.

This is well known to those who have investigated her career, and it is what she put down in her answers to Sen. Barbara Boxer's questionnaire. Her answers, too, are part of the public record.

But that episode was a long time ago. Since then, Kuhl has had a distinguished career as deputy solicitor general, as a private practitioner in one of California's leading law firms and now as a Los Angeles Superior Court judge.

In the heated caldron of a busy trial court, she has won the admiration of a large array of lawyers representing the widest spectrum of interests and clients. The American Bar Assn. has accorded her its highest rating of "well qualified" for a 9th Circuit seat.

Prominent Democrat lawyers, business lawyers and members of the plaintiffs' bar, including civil rights attorneys such as Vilma Martinez and Leo James Terrell, have gone on the public record in support of Kuhl. They respect her for her fairness.

So why this campaign against her by interest groups such as the Alliance for Justice and People for the American Way?

Surely it has something to do with keeping a mainstream, common-sense jurist from joining the most liberal -- and most frequently reversed -- court of appeals in the country. Then there is the instinct to take another scalp in the partisan battles between Democrats and Republicans in the Senate.

It has become standard practice to trash a good person by seizing on one item in a long and varied career to distort who the person is and what he or she stands for. It is a game that groups on all sides have been playing for years now, but the Alliance for Justice and People for the American Way are exceptionally vicious and skillful at it.

Even distinguished newspapers like the Los Angeles Times and the New York Times have allowed themselves to become parties to these shabby practices in editorializing against Kuhl.

The public deserves not just strong opinions but a full and fair presentation of the facts.

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HARVARD UNIVERSITY
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LAURENCE H. TRIBE
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February 10, 1984

Honorable William French Smith
Attorney General of the United States
Department of Justice
10th and Constitution Ave., N.W.
Room 5111
Washington, D.C. 20530

Dear Mr. Attorney General:

I am writing to tell you something that I told Chuck Cooper some time ago: that I have the highest regard for the quality of the brief finally submitted to the Supreme Court by the Department of Justice in the Bob Jones case. I thought it was a powerful and, in most respects, entirely compelling legal document. As I told Chuck, I continue to think that the Fifth Amendment itself may well prevent all Federal subsidies, even by way of tax-deductible status, of racially discriminatory private schools. But I do not think that the Supreme Court's use of congressional inaction to support the legality of the IRS policy was at all legitimate. If Congress wishes to legislate a tax rule, it must do so by action -- not by silence. In this regard, you might find it interesting to glance at my enclosed article on the sounds of congressional silence. I mention the Bob Jones decision in a disapproving way at page 531, footnote 91.

Yours truly,

Laurence Tribe

Laurence H. Tribe
Tyler Professor of
Constitutional Law

LHT:lks
enclosure
cc: Edwin Meese, III

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Legal Times January 28, 2002

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Legal Times

January 28, 2002

SECTION: COURT WATCH; Pg. 01

LENGTH: 1441 words

HEADLINE: Going After the Bush Bench
As They Begin to State Their Case, Liberals Target Pickering

BYLINE: By Jonathan **Groner**

BODY:
The liberals have found their poster boy. His name is Charles Pickering Sr.

Almost nine months after President George W. Bush unveiled his first judicial nominees, a broad coalition of liberal civil rights groups gathered Jan. 24 to announce their opposition to Pickering, a nominee for the U.S. Court of Appeals for the 5th Circuit.

To the groups, Pickering, a U.S. district judge in Mississippi, is wrong on civil rights and abortion. He is also a close friend of fellow Mississippian Trent Lott, the conservative Senate minority leader who is pushing hard for Pickering.

And while other nominees have waited months for a confirmation hearing, Pickering is scheduled to get a second, highly unusual go-round before the Senate Judiciary Committee the week of Feb. 4-thanks to Chairman Patrick Leahy, the liberal Democrat from Vermont.

Pickering is the first Bush judicial nominee to draw formal, public opposition. But he is unlikely to be the last.

In a Jan. 25 speech, Leahy vowed to hold hearings on such controversial nominees as 5th Circuit nominee Priscilla Owen, D.C. Circuit nominee Miguel Estrada, and 10th Circuit pick Michael McConnell.

The liberal coalition, which includes such groups as NARAL, the National Women's Law Center, and the Leadership Conference on Civil Rights, has not said much lately about Estrada or McConnell.

But Owen, as well as 9th Circuit nominee Carolyn **Kuhl** and 6th Circuit pick Jeffrey Sutton, seems likely to face formal opposition.

At the Jan. 24 press conference, Alliance for Justice President Nan Aron took care to distinguish between "unqualified candidates with controversial records" such as Pickering, and noncontroversial Bush choices. That same day, the Senate Judiciary Committee held hearings for six judicial nominees who have drawn no opposition, including Richard Leon, nominated to the U.S. District Court for the District of Columbia.

"The president must understand that when he sends to the Senate experienced, moderate candidates, he will have the support of the Senate and the American people," Aron declared. On the other hand, Aron said, Pickering "represents just the first threat to turn back the clock on rights all Americans rightly enjoy."

At the press conference, NARAL President Kate Michelman said Pickering came first simply because "he is the most controversial nominee to date who has received a hearing." That relatively unpublicized event took place Oct. 18 at the height of the anthrax scare on Capitol Hill.

Pickering was denounced for a student law review note he wrote in 1959, explaining how Mississippi could strengthen a law then on the books that prohibited interracial marriages. He also drew fire for supporting a constitutional amendment to overrule *Roe v. Wade* when he was a Mississippi legislator in the 1970s.

The civil rights groups also claimed that as a federal trial judge for the last 11 years, Pickering has often revealed distaste for the Voting Rights Act and other civil rights laws, and routinely ruled against plaintiffs in discrimination cases.

"His positions leave us little alternative but to oppose his nomination," said Wade Henderson, executive director of the broad-based Leadership Conference on Civil Rights, at the press conference. "These positions ought to disqualify him for any federal circuit court, all the more so for the 5th Circuit, which has more people of color than any other."

But supporters of Pickering find little merit in the criticisms.

"When you look closely at the objections, there's nothing there. He is committed to following the law and Supreme Court precedent," replies John Nowacki, deputy director of the Center for Law and Democracy, a conservative group active on judicial nominations. "The law review article was three and a half pages of academic analysis, and Pickering says he wouldn't support the statute today."

Pickering's supporters also note that he has served on the board of directors of the Institute for Racial Reconciliation, a biracial project established in 1999 by the University of Mississippi to come to terms with the state's history of racism.

Next in Line?

While the liberal activists only targeted Pickering, they suggested another candidate that they may well end up opposing.

"One doesn't have to look any further than the other nominee named to fill a second vacancy on the 5th Circuit bench to see how the rights of minorities and women may be threatened," Aron said.

That person is Owen, a Texas state judge who, like several other controversial Bush choices, was nominated last May and has not had a hearing. Until now, Owen's selection has not drawn the publicity that has surrounded selections such as Sutton or Estrada.

Owen, a partner at Houston's Andrews & Kurth before winning election to the Texas Supreme Court in 1994 and again in 2000, is criticized for repeatedly ruling against permitting minors to have abortions without parental consent.

Ten such cases came before the court under a new Texas law in 2000. In one of those cases, she was in the minority, and Alberto Gonzales, then a fellow judge on the court and now White House counsel, said the dissenters' view was "an unconscionable act of judicial activism."

The Alliance for Justice Web site says that Owen's record "strongly suggests a strain of conservative judicial activism."

A Bush administration lawyer responds that the key criterion for prospective judges is that they must be "advocates of judicial restraint, the notion that judges should follow the law.

"As far as we're concerned, whether you are pro-choice or pro-life is irrelevant," this lawyer says. "If groups wish to impose a political litmus test on abortion, then we are just talking past each other. We see a person's policy views as completely irrelevant."

Owen made the news last week when it was disclosed in *The New York Times* that in 1996, she wrote the opinion in a 7-0 ruling that saved the Enron Corp. about $220,000, after she had accepted campaign contributions from the now-bankrupt company.

In a position paper handed out at the Jan. 24 press conference, People for the American Way singled out two other Bush nominees who "have troubling records and could cause serious damage to our rights and liberties." These were Sutton and **Kuhl.**

Kuhl, a state judge in Los Angeles since 1995 and a former clerk for then-9th Circuit Judge Anthony Kennedy, drew scrutiny for work she had done while in the solicitor general's office from 1981 to 1986, during the Reagan administration.

PFAW said **Kuhl** urged the Supreme Court to overturn *Roe v. Wade* in *Thornburgh v. American College of Obstetricians and Gynecologists,* a 1986 Supreme Court case. PFAW also claimed that **Kuhl** "reportedly played a key role in convincing then-Attorney General [William French] Smith to support tax-exempt status for racially discriminatory Bob Jones University."

Charles Cooper of D.C.'s Cooper & Kirk, who worked with **Kuhl** at the Justice Department, terms these descriptions "unfair" and "grossly incomplete." Cooper says that as a 28-year-old special assistant to the SG, **Kuhl** "wasn't making policy, she was taking notes-when she and I were even in the room."

Besides, says Cooper, whether the Internal Revenue Service had the legal right to deny tax exemption to Bob Jones was in fact a "tough legal issue"-the Supreme Court took it up and ruled 8-1 against the SG's position that the IRS had no such right-and the Reagan administration in any case wanted to amend the tax code to deny the exemption.

On abortion, Cooper says, "I don't even know her personal view on abortion. But I hope we haven't come to the point where a nominee is disqualified because they take a certain interpretive approach to the due process clause."

Sutton, PFAW said, has worked to "severely limit federal protections against discrimination and injury based on disability, race, age, sex, and religion." In *Alabama v. Garrett,* a 5-4 Supreme Court ruling last year, the 41-year-old Jones, Day, Reavis & Pogue partner successfully argued on federalism grounds against the application of the Americans With Disabilities Act to the states.

Several disability-rights groups have announced opposition to Sutton, and he has tried to mend fences with the disability community.

Supporters say that Sutton, like other Bush nominees, should not be pilloried for advocating the position of his clients.

Says Cooper: "It is the very definition of 'extreme' to focus on a case that involved successful advocacy of a client's cause in the Supreme Court. If that is what the opposition has come to, it is very sad."

LOAD-DATE: January 29, 2002

Carolyn Kuhl: Affirmative Action

Allegation: Carolyn Kuhl wrote that "affirmative action is a divisive societal manipulation." *Affirmative Action Today: A Legal and Practical Analysis, BNA Special Report, 1986.*

Facts:

- Judge Kuhl, writing long before her judicial service, focused on seemingly inconsistent Supreme Court precedent and the practical implications such inconsistency had for employers.

  ✓ She pointed out that on the one hand, the Court had held that it was unlawful to discriminate on the basis of race or sex even if the person disadvantaged by the discrimination was a white male. While on the other hand, the Court held that it was permissible, under some circumstances, for an employer to have a program that gives preferences on the basis of race or gender - to persons who have not been victims of discrimination by that employer.

  ✓ She also made the point that under Supreme Court precedent at that time, if an employer were to defend its affirmative action program, it must show that it had generally discriminated in the past. However, such an admission would open up the employer to suits from individuals claiming past discrimination.

- Kuhl suggested that, "in the controversy over affirmative action, actual victims of discrimination often have been ignored. Discrimination is not victimless. Real people are denied jobs, refused promotions, fired, or constructively discharged. Yet a generalized affirmative action program may not give relief to those individuals who have actually been harmed."

- Judge Kuhl suggested that a direct remedial approach would "emphasize identification and elimination of employment practices that are barriers to hiring minority-group members and women, and on restoring victims of those discriminatory practices to the place they would have been, absent discrimination." Such an approach "recognizes individual dignity."

- Civil rights lawyers who have appeared before Judge Kuhl have felt that their clients' claims for racial justice were treated fairly. Leo James Terrell, an attorney for the NAACP and a lifelong Democrat that appeared before Judge Kuhl in *Francis Iwekaogwu v. City of Los Angeles*, has written, "I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit." He went on to say that, "...I found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional." Letter from Leo James Terrell to Senator Barbara Boxer (May 23, 2001).

- Regardless of her personal philosophies, Judge Kuhl understands that her role on the bench is to "administer justice equally, to rich and poor alike, without regard for the status of the litigant

in society." She also understands that a judge must administer "the law as embodied in the constitution and the laws passed by the legislative branch." *May 29, 2001 Letter from Judge Kuhl to Sen. Boxer.*

12/23/2002 09:22 213-738-6599 JUDGE KUHL PAGE 02

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AFFIRMATIVE ACTION TODAY: A LEGAL AND PRACTICAL ANALYSIS

A BNA SPECIAL REPORT

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favored in an[illegible]stem resist changing that system. Consequently, stems tend to be self-perpetuating.

ier within large corporations is an interlocking system of subjective are self-perpetuating and that function with impunity. Organizations ndividuals to interpret policies to suit their own subjective beliefs and lf-interests perpetuate a culturally based lack of acceptance and which preempts upwardly mobile non-traditional managers. Interviews qualified employees of those companies perceived as among the best lack managers to work, reveal that no large corporation, regardless of osture, has removed these obstacles.

Paths to Progress and Conclusions

ıced degree reflects higher levels of ambition, intellectual competence, ations of achievement. High achievers not only have a desire, but a al need to achieve. Success for high achievers is inextricably inter- their self-concept. A failure to achieve can contribute to a devaluation chiever's sense of self. This can lead to depression and deep psychologi- ns. When the need to succeed is preempted by *situational circum- which it does not matter how well a high achiever performs or how sig- contribution*, deep frustration sets in. Ultimately, not only the would- iever pays a price, but so do loved ones and family.

rporations limit their EEO focus to issues of legal exposure or legal he review of a numbers-oriented process requiring "technical" compli- postures calibrate levels of concern and priority with potential levels of npact from class action suits, loss of government contracts, selective ıpaigns, or the market impact of a negative image.

ıgh companies accept equal upward mobility as a human, a medical, anizational effectiveness issue and as a reflection of an organization's

ts measured in business is what gets done. We have never measured bility and this has made it invisible on national reports. In part because sight, it has been put out of mind.

plicit control and measurement systems both at the national level for t tracking, and internal monitoring within organizations will improve t situation immeasurably. But much more is required for ultimate matter how explicit any process or set of rules, a lack of good will or ommitment to the spirit as well as the letter of EEO will lead to defeat king by the letter of a labor contract will paralyze an organization.

e culture, like corporate strategy, starts at the top — with the CEO. departments, no matter how powerful, legal departments, no matter l, and EEO executives, no matter how well intended, cannot fix this emselves. People change their deeply held beliefs and ingrained habits there is compelling self-interest to change. Those companies in which ırd mobility is driven from the top down by a sincere CEO; that have ere interest in expanding their knowledge of the issues they face; and ate executive career progress and pay with progress, as in all other bjectives, will succeed.

Some may postulate that a universe of "best qualified" should be unimportant in the overall scheme of national priorities because it is primarily constituted of the middle class. However, if those members of a group who have the greatest motivation and education are not allowed to succeed, what motivation to strive or indulge in self-help is there for the disadvantaged?

The mainstream of the American economy is dominated by large corporations. Since the *Fortune* 500 companies control more than 50 percent of America's industrial assets, any group not allowed to succeed in America's largest corporations is, to a significant extent, preempted from succeeding in America. Corporations not only reflect but influence society. An issue at stake is: What kind of nation we want to create? A nation in which competence and character will be the criteria for success? Or a nation in which psychologically based insecurities perpetuate predesignated places based upon color, gender, or other non-performance related criteria?

Humankind has a tendency to rationalize, to deny or to avoid unpleasant truth. But truth is not the exclusive monopoly of any one ideology. We would do well to use the standard of truth as we choose future directions.

CAROLYN B. KUHL

The Supreme Court has established two ultimately conflicting principles in its cases to date. The Court has held that it is unlawful to discriminate on the basis of race or sex even if the person disadvantaged by the discrimination is a white male. But in its cases last Term, the Court also held that it is permissible, at least under some circumstances, for an employer to maintain a system that gives preferences on the basis of race — or gender — to persons who have not been victims of discrimination by that employer.

Discrimination is not victimless. Real people are denied jobs, refused promotions, fired, or constructively discharged.

These two principles cannot be reconciled; they can only be compromised. How the Court crafts that compromise will determine the future of affirmative action.

Unfortunately, the path to compromise promises to be long and litigious. Lurking beneath many of the Court's decisions is a tendency to approach questions of discrimination, remedies, and reverse discrimination differently, depending on whether or not the case is postured so that a real person (non-minority) who has been disadvantaged by an affirmative action plan stands before the Court. This tendency is evident in the Court's resolution of *Local 93, International Association of Firefighters v. City of Cleveland*. The Court in that case permitted entry of a race-conscious consent decree over the objection of a union that was asserting the interests of white employees, but at the same time left open the possibility that a white employee later could sue for discrimination caused by the decree, notwithstanding the judicial approval of the decree. Ultimately, the lawfulness of an employer's affirmative action conduct cannot depend on who brings suit and when the suit is brought. But the Court's approach

has prolonged the day of reckoning when the principles it now has articulated must be compromised.

In the meantime, although the Court has given some indication of a standard for when affirmative action may be appropriate, the ambiguity inherent in that standard will make employers nervous that the lawfulness of their actions may depend upon who sues first, or indeed that they may prove a case against themselves by defending the first lawsuit. *Wygant* and *Local 28, Sheet Metal Workers International v. EEOC* seek to protect non-minority-group individuals by requiring a history of discrimination by the particular employer before race- or gender-conscious affirmative action is appropriate. But this compromise between principles of general non-discrimination and tolerance of remedial racial preference places the employer in an extremely difficult situation. To defend its affirmative action program, an employer must be prepared to show that it has discriminated in the past, an admission that may serve as a predicate for backpay or other claims by the class of past discriminatees.

In the controversy over affirmative action, actual victims of discrimination often have been ignored. Discrimination is not victimless. Real people are denied jobs, refused promotions, fired, or constructively discharged. Yet a generalized affirmative action program may not give relief to those individuals who actually have been harmed. In litigation, especially class actions, the dynamic of the process is conducive to a quick fix rather than a meticulous searching out of past victims. The employer has no incentive to focus on compensation of specific past victims — it can avoid backpay liability and probably minimize dislocations in its work force by agreeing to a future-oriented racial preference. Counsel for a plaintiff class, who may be strapped for litigation resources, can avoid the time-consuming task of reviewing each class member's employment file and can minimize potential conflicts among the interests of class members by focusing on racial preferences in

In my view, the generalized preferences based on race or sex that are commonly termed "affirmative action" are not a desirable remedy for discrimination.

future hiring and promotions rather than on putting all class members where they would have been in the absence of discrimination.

But by glossing over individualized remedies for past discrimination, our legal system has failed to insist on a form of justice that recognizes individual dignity by restoring to a person what is rightfully his. A direct remedial approach would emphasize identification and elimination of employment practices that are barriers to hiring minority-group members and women, and on restoring victims of those discriminatory practices to the place they would have been, absent discrimination. Instead of insisting on such an approach to individual justice, however, courts and litigants have placed primary remedial emphasis on affirmative action, a divisive societal manipulation.

In my view, the generalized preferences based on race or sex that are commonly termed "affirmative action" are not a desirable remedy for discrimination. Generalized racial preference, regardless of justification, carries the unavoidable and derogatory connotation that persons of the race or sex to which the preference

is given are incapable of competing on the same basis as others. I would agree with Justice Powell's statement in a speech to the American Bar Association's Litigation Section after the conclusion of the last Supreme Court Term: "It is to be hoped that the day will soon come when race and ancestry are factors no longer taken into account in either private or governmental decision-making."

NATHAN PERLMUTTER

In *Plessy v. Ferguson*, Supreme Court Justice Henry Brown expounded on the "distinction between the white and colored races — a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color."

Today, this language, and the thought it transmits, seem archaic. Still, almost a century after they were described, Brown's racial distinctions are alive and well and thriving in public and private employment sectors. They have survived the overturning of the *Plessy* decision (in 1954, by *Brown v. Board of Education*). They have survived the revolutionary civil rights legislation of the 1960s. They have survived racial enlightenment.

In fact, they are public policy. The rationale for racial differentiation in public affairs has, of course, changed. The logic of *1984* — the book, not the year — is employed to explain that current racial distinctions exist not to separate the races, but to integrate them; that, in order to realize equality of opportunity, we must first provide racial preference.

The argument, though patently simplistic, has a political appeal. Affirmative action originally reflected the recognition that by simply abolishing discrimination we would not bring about equality. An extra effort had to be made to assist those individuals who were disadvantaged by years of inferior education and second-class status. And so a shortcut was devised. Rather than attacking the problem of

The concept of race-based exclusion, outlawed by the Civil Rights Act of 1964, [has] evolved into race-based preference.

discrimination at its root — inadequate education — and making an effort to identify those individuals who needed assistance, whole classes of people were stereotypically lumped together and accorded wholesale preferences in admissions and hiring. The concept of race-based exclusion, outlawed by the Civil Rights Act of 1964, thereby evolved into race-based preference.

The result has been the sacrifice of equality of opportunity for the sake of equality of results. Those who advocate race-based preferences distinguish "benign" or "inclusive" quotas from the old, now rejected "exclusive" quotas. But the only differences between "inclusive" and "exclusive" quotas is in the skin color of the victims. As the late Professor Alexander Bickel wrote, "[I]f the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded."

"Affirmative action" and "quotas" are not interchangeable terms. Far from synonymous, the principles are antithetical in theory as well as in practice. ADL's

Carolyn Kuhl: *Meritor Savings Bank v. Vinson*
Sexual Harrassment

Allegation: As Deputy Solicitor General, Kuhl signed an *amicus* brief on the side of the employer charged with sexual harassment in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). This is the landmark case in which the Supreme Court first ruled that sexual harassment in the workplace violates Title VII of the Civil Rights Act of 1964. Kuhl's brief argued that companies should not be liable for the actions of their employees. *National Women's Law Center*

Facts:

- The Government's position on this issue was supportive of the individual plaintiff, a black woman, and contrary to the interests of the corporate defendant, Meritor Savings Bank. The Government's position was in accord with briefs filed by several amici, including the Women's Bar Association of the State of New York, and a group of state Attorneys General that included Joseph Lieberman of Connecticut, and Hubert H. Humphrey, III of Minnesota.

- The Government argued that Title VII has a broad remedial purpose and seeks to eliminate any discrimination that affects the "terms, conditions, or privileges of employment." The Government argued that the application of Title VII of the Civil Rights Act of 1964 should not be limited to harassment in which the victim, who refuses a supervisor's advances, suffers tangible or economic loss, or quid pro quo harassment. The Supreme Court accepted the Government's argument and held that pervasive sexual harassment that alters a victim's employment, including his or her psychological well-being, by creating an abusive work environment is actionable under Title VII.

- At the time of the decision, the *National Organization for Women* (NOW) was pleased with the outcome. NOW called the decision "on balance a victory for working or employed women." *The New York Times*, June 20, 1986.

- The government was not advocating that companies should never be held liable for the actions of their employees. The position, and one that the Supreme Court expressly adopted, was that employers are not automatically liable for the actions of their supervisors, and the facts in each case must be examined in light of traditional agency principles before assigning liability. Other amicus briefs urging the same position were filed by the Equal Employment Advisory Council and the Chamber of Commerce of the United States.

- In her capacity as Deputy Solicitor General at the Department of Justice, Judge Kuhl was merely advocating the position of the United States government in her work on this case. (Judge Kuhl was the fourth person listed on the amicus brief after then Solicitor General Charles Fried and Assistant Attorneys General Reynolds and Willard).

Supreme Court of the United States

MERITOR SAVINGS BANK, FSB, Petitioner
v.
Mechelle VINSON et al.

No. 84-1979.

Argued March 25, 1986.
Decided June 19, 1986.

Female bank employee brought sexual harassment suit against bank and supervisor under employment discrimination statute. The United States District Court for the District of Columbia entered judgment in favor of employer and supervisor and employee appealed. The Court of Appeals, Spottswood W. Robinson, III, Chief Judge, 753 F.2d 141, reversed and remanded. Motion for rehearing was denied. 760 F.2d 1330. On grant of certiorari, the Supreme Court, Justice Rehnquist, held that: (1) claim of hostile environment sexual harassment is form of sex discrimination actionable under Title VII employment discrimination statute; (2) employee's allegations were sufficient to state claim for hostile environment sexual harassment; (3) district court's erroneous belief that sexual harassment claim will not lie absent economic effect on employee required remand; (4) correct inquiry on issue of sexual harassment was whether sexual advances were unwelcome, not whether employee's participation in them was voluntary; (5) evidence of employee's sexually provocative speech and dress was not per se inadmissible; and (6) mere existence of grievance procedure in bank and bank's policy against discrimination, coupled with employee's failure to invoke that procedure, did not necessarily insulate bank from liability.

Affirmed and remanded.

Justice Marshall filed opinion concurring in judgment, in which Justices Brennan, Blackmun and Stevens joined.

Justice Stevens filed concurring opinion.

West Headnotes

[1] Civil Rights ⚿167
78k167
(Formerly 78k9.14)

Plaintiff may establish violation of Title VII prohibiting sex discrimination in employment by proving that discrimination based on sex has created hostile or abusive work environment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[2] Civil Rights ⚿167
78k167
(Formerly 78k9.14)

For sexual harassment to be actionable under statute prohibiting sexual discrimination in employment, it must be sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[3] Civil Rights ⚿375
78k375
(Formerly 78k42)

Bank employee's allegations that supervisor made repeated demands for sexual favors, both during and after business hours, and that supervisor fondled her in front of other employees, followed her into women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions, was sufficient to state claim for "hostile environment" sexual harassment in violation of Title VII prohibiting sex discrimination in employment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[4] Federal Courts ⚿462
170Bk462

District court's apparent belief that sexual harassment claim will not lie absent economic effect on employee, without ever making findings considering "hostile environment" theory of sexual harassment required remand of bank employee's sex discrimination in employment action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

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[5] Civil Rights ⚿167
78k167
(Formerly 78k9.14)

Fact that sex-related conduct was "voluntary" in sense that complainant was not forced to participate against her will, is not defense to sexual harassment suit brought under Title VII prohibiting sex discrimination in employment, rather, gravamen of any sexual harassment claim is that alleged sexual advances were unwelcome. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[6] Civil Rights ⚿167
78k167
(Formerly 78k9.14)

In determining whether sexual advances alleged in sex discrimination in employment action were unwelcome, correct inquiry was whether bank employee, by her conduct, indicated that sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[7] Civil Rights ⚿381
78k381
(Formerly 78k43)

While voluntariness in sense of consent is not defense to sexual harassment claim, it does not follow that complainant's sexually provocative speech or dress is irrelevant as matter of law in determining whether he or she found particular sexual advances unwelcome. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[8] Civil Rights ⚿381
78k381
(Formerly 78k43)

Bank employee's dress and personal fantasies were not per se inadmissible in bank employee's sex discrimination in employment action brought against bank. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[9] Civil Rights ⚿167
78k167
(Formerly 78k9.14)

Employers are not always automatically liable for sexual harassment by their supervisors. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[10] Civil Rights ⚿167
78k167
(Formerly 78k9.14)

Absence of notice to employer does not necessarily insulate employer from liability for sexual harassment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[11] Civil Rights ⚿167
78k167
(Formerly 78k9.14)

Mere existence of grievance procedure and policy against discrimination, coupled with bank employee's failure to invoke that procedure, did not insulate bank from liability under Title VII prohibiting sexual discrimination in employment for sexual harassment by employee's supervisor. Civil Rights Act of 1964, § 701 et seq. as amended, 42 U.S.C.A. § 2000e et seq.

***2400 *57 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties presented conflicting testimony about the existence of a sexual relationship between respondent and the supervisor. The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment.

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The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment. The Court of Appeals reversed and remanded. Noting that a violation of Title VII may be predicated on either of two types of sexual harassment--(1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment--the Court of Appeals held that since the grievance here was of the second type and the District ****2401** Court had not considered whether a violation of this type had occurred, a remand was necessary. The court further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

Held:

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. Pp. 2404-2407.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to noneconomic ***58** injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment. Pp. 2404-2406.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim. The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an *economic* effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary. Pp. 2406.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome. Pp. 2406-2407.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability. Pp. 2407- 2408.

243 U.S.App.D.C. 323, 753 F.2d 141, affirmed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. ---. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post,* p. ---.

F. Robert Troll, Jr., argued the cause for petitioner. With him on the briefs were *Charles H. Fleischer* and *Randall C. Smith.*

Patricia J. Barry argued the cause for respondent Vinson. With her on the brief was *Catherine A. MacKinnon.**

* Briefs of *amici curiae* urging reversal were filed for the United States et al. by *Solicitor General Fried, Assistant Attorneys General Reynolds and Willard, Deputy Solicitor General Kuhl, Albert G. Lauber, Jr., John F. Cordes, John F. Daly,* and

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Johnny J. Butler; for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Garen E. Dodge;* for the Chamber of Commerce of the United States by *Dannie B. Fogleman Stephen A. Bokat;* and for the Trustees of Boston University by *William Burnett Harvey* and *Michael B. Rosen.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by *W. Cary Edwards,* Attorney General of New Jersey, *James J. Ciancia,* Assistant Attorney General, *Susan L. Reisner* and *Lynn B. Norcia,* Deputy Attorneys General, *John Van de Kamp,* Attorney General of California, *Joseph I. Lieberman,* Attorney General of Connecticut, *Neil F. Hartigan,* Attorney General of Illinois, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Paul Bardacke,* Attorney General of New Mexico, *Robert Abrams,* Attorney General of New York, *Jeffrey L. Amestoy,* Attorney General of Vermont, *and* Elisabeth S. Shuster; *for the America Federation of Labor and the Congress of Industrial Organizations et al. by* Marsha S. Berzon, Joy L. Koletsky, Laurence Gold, Winn Newman, *and* Sarah E. Burns; *for the Women's Bar Association of Massachusetts et al. by* S. Beville May; *for the Women's Bar Association of the State of New York by* Stephen N. Shulman *and* Lynda S. Mounts; *for the Women's Legal Defense Fund et al. by by* Linda R. Singer, Anne E. Simon, Nadine Taub, Judith Levin, *and iBarry H. Gottfried;* for the Working Women's Institute et al. by *Laurie E. Foster;* and for Senator Paul Simon et al. by *Michael H. Salsbury.*

***59** Justice REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*

I

In 1974, respondent **Mechelle Vinson** met Sidney Taylor, a vice president of what is now petitioner **Meritor Savings Bank** ****2402** (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant ***60** branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment. [FN<<dagger>>] Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

> FN<<dagger>> Like the Court of Appeals, this Court was not provided a complete transcript of the trial. We therefore rely largely on the District Court's opinion for the summary of the relevant testimony.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to ***61** call witnesses to support this

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charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson v. Taylor,* 22 EPD ¶ 30,708, p. 14,693, n. 1, 23 FEP Cases 37, 38-39, n. 1 (DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

> "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment **2403 with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.,* at 14,692, 23 FEP Cases, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Ibid.,* 23 FEP Cases, 43.

*62 Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.,* at 14,691, 23 FEP Cases, at 42.

The Court of Appeals for the District of Columbia Circuit reversed. 243 U.S.App.D.C. 323, 753 F.2d 141 (1985). Relying on its earlier holding in *Bundy v. Jackson,* 205 U.S.App.D.C. 444, 641 F.2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U.S.App.D.C., at 327, 753 F.2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever." *63 *Id.,* at 328, 753 F.2d, at 146. The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id.,* at 328, n. 36, 753 F.2d, at 146, n. 36.

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," 42 U.S.C. §

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2000e(b), as well as on the EEOC Guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence--or even the appearance--of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 243 U.S.App.D.C., at 332, 753 F.2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting. 245 U.S.App.D.C. 306, 760 F.2d 1330 (1985). We granted certiorari, 474 U.S. 1047, 106 S.Ct. 57, 88 L.Ed.2d 46 (1985), and now affirm but for different reasons.

****2404** II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong.Rec. 2577-2584 (1964). The principal argument in opposition ***64** to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.,* at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.,* at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30-31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent " 'to strike at the entire spectrum of disparate treatment of men and women' " in employment. *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting *Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

***65** Second, in 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-434, 91 S.Ct. 849, 855, 28 L.Ed.2d 158 (1971), these Guidelines, " 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142, 97 S.Ct. 401, 410-11, 50 L.Ed.2d 343 (1976), quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed.124 (1944). The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 CFR § 1604.11(a) (1985). Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct

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constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo,* where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, ****2405** hostile, or offensive working environment." § 1604.11(a)(3).

In concluding that so-called "hostile environment" (*i.e.,* non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed.Reg. 74676 (1980). *Rogers v. EEOC,* 454 F.2d 234 (CA5 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers,* the Court of Appeals for the Fifth ***66** Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

> "[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers...." 454 F.2d, at 238.

Courts applied this principle to harassment based on race, *e.g., Firefighters Institute for Racial Equality v. St. Louis,* 549 F.2d 506, 514- 515 (CA8), cert. denied *sub nom. Banta v. United States,* 434 U.S. 819, 98 S.Ct. 60, 54 L.Ed.2d 76 (1977); *Gray v. Greyhound Lines, East,* 178 U.S.App.D.C. 91, 98, 545 F.2d 169, 176 (1976), religion, *e.g., Compston v. Borden, Inc.,* 424 F.Supp. 157 (SD Ohio 1976), and national origin, *e.g., Cariddi v. Kansas City Chiefs Football Club,* 568 F.2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.

[1] Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee,* 682 F.2d 897, 902 (1982):

> ***67** "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Accord, *Katz v. Dole,* 709 F.2d 251, 254-255 (CA4 1983); *Bundy v. Jackson,* 205 U.S.App.D.C., at 444-454, 641 F.2d, at 934-944; *Zabkowicz v. West Bend Co.,* 589 F.Supp. 780 (ED Wis.1984).

[2][3] Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers v. EEOC, supra,* at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson,* 682 F.2d, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case--which include not only pervasive harassment but ****2406** also criminal conduct of the most serious nature--are plainly sufficient to state a claim for "hostile environment" sexual harassment.

[4] The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD ¶ 30,708, at 14,692-14,693, 23 FEP Cases, at 43, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or

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both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie ***68** absent an *economic* effect on the complainant's employment. See *ibid.* ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

[5][6] Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship ..., that relationship was a voluntary one." *Id.,* at 14,692, 23 FEP Cases, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

[7][8] Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," 243 U.S.App.D.C., at 328, n. 36, 753 F.2d, at 146, n. 36, which the District Court apparently admitted ***69** into evidence, "had no place in this litigation." *Ibid.* The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR § 1604.11(b) (1985). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation." 243 U.S.App.D.C., at 328, n. 36, 753 F.2d, at 146, n. 36. While the District Court must carefully weigh the ****2407** applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged actions. The Court of Appeals took the opposite view, holding that an employer is ***70** strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not

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surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that "so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curiae,* contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and EEOC as *Amici Curiae* 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, ***71** whether or not the employer knew, should have known, or approved of the supervisor's actions. *E.g., Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723, 725 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to

> "a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e.g.,* by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate****2408** management officials." Brief for United States and EEOC as *Amici Curiae* 26.

As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). The Guidelines do require, however, an "examin[ation of] the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid.*

***72** This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing ... that the employer must have become conscious of [them]," *Taylor v. Jones,* 653 F.2d 1193, 1197- 1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

[9][10] We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.

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See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

[11] Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's *73 interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

IV

In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

**2409 Justice STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that Justice MARSHALL has answered is fairly presented by the record, I join both the Court's opinion and Justice MARSHALL's opinion.

*74 Justice MARSHALL, with whom Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS join, concurring in the judgment.

I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court's opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The issue the Court declines to resolve is addressed in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971) (EEOC Guidelines on Employment Testing Procedures of 1966); see also *ante,* at 2404. The Guidelines explain:

> "Applying general Title VII principles, an employer ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.
>
> "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR §§ 1604.11(c), (d) (1985).

The Commission, in issuing the Guidelines, explained that its rule was "in keeping with the general standard of employer *75 liability with

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respect to agents and supervisory employees.... [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor." 45 Fed.Reg. 74676 (1980). I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt companywide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity. [FN1] The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

FN1. The remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA). See *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419, and n. 11, 95 S.Ct. 2362, 2372, and n. 11 (1975); see also *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 768-770, 96 S.Ct. 1251, 1266-67, 47 L.Ed.2d 444 (1976).

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer. [FN2] Thus, **2410 for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did. *E.g., Flowers v. Crouch-Walker Corp.,* *76 552 F.2d 1277, 1282 (CA7 1977); *Young v. Southwestern Savings and Loan Assn.,* 509 F.2d 140 (CA5 1975); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (CA6 1972). Following that approach, every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee. See *Horn v. Duke Homes, Inc., Div. of Windsor Mobile Homes,* 755 F.2d 599, 604-606 (CA7 1985); *Craig v. Y & Y Snacks, Inc.,* 721 F.2d 77, 80-81 (CA3 1983); *Katz v. Dole,* 709 F.2d 251, 255, n. 6 (CA4 1983); *Henson v. Dundee,* 682 F.2d 897, 910 (CA11 1982); *Miller v. Bank of America,* 600 F.2d 211, 213 (CA9 1979).

FN2. For NLRA cases, see, *e.g., Graves Trucking, Inc. v. NLRB,* 692 F.2d 470 (CA7 1982) ; *NLRB v. Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp.,* 473 F.2d 374, 384 (CA5 1973); *Amalgamated Clothing Workers of America v. NLRB,* 124 U.S.App.D.C. 365, 377, 365 F.2d 898, 909 (1966).

The brief filed by the Solicitor General on behalf of the United States and the EEOC in this case suggests that a different rule should apply when a supervisor's harassment "merely" results in a discriminatory work environment. The Solicitor General concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC Guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor "is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim." Brief for United States and EEOC as *Amici Curiae* 24. In the latter situation, he concludes, some further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority *77 vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in "hostile environment" cases, that sexual harassment does not create employer liability

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until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Agency principles and the goals of Title VII law make appropriate some limitation on the liability of employers for the acts of supervisors. Where, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict employer liability. See 29 CFR § 1604.11(c) (1985). Those considerations, however, do not justify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the "pure" hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief. See *Bundy v. Jackson,* 205 U.S.App.D.C. 444, 456, n. 12, 641 F.2d 934, 946, n. 12 (1981). Under Title VII, the EEOC must notify an employer of charges made against it within 10 days after receipt of the complaint. 42 U.S.C. § 2000e-5(b). If the charges appear to be based on "reasonable cause," the EEOC must attempt to ****2411** eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* An employer whose internal procedures assertedly would have redressed the discrimination can avoid injunctive relief by employing these procedures after receiving notice of the complaint or during the conciliation period. Cf. Brief for United ***78** States and EEOC as *Amici Curiae* 26. Where a complainant, on the other hand, seeks backpay on the theory that a hostile work environment effected a constructive termination, the existence of an internal complaint procedure may be a factor in determining not the employer's liability but the remedies available against it. Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

I therefore reject the Solicitor General's position. I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

106 S.Ct. 2399, 477 U.S. 57, 91 L.Ed.2d 49, 54 USLW 4703, 40 Fair Empl.Prac.Cas. (BNA) 1822, 40 Empl. Prac. Dec. P 36,159

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21ST BRIEF of Level 1 printed in FULL format.

MERITOR SAVINGS BANK, FSB, PETITIONER v. MECHELLE VINSON

No. 84-1979

October Term, 1985

December 11, 1985

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

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether unwelcome sexual advances by a supervisor toward a subordinate female employee, which create an intimidating, hostile, or offensive working environment, constitute employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.

2. Whether the court of appeals erred in determining that respondent could show a violation of Title VII in this case, where the district court has found that any sexual relationship between respondent and her supervisor "was a voluntary one" and that finding was not clearly erroneous.

3. Whether an employer can be held strictly liable for an offensive working environment created by a supervisor's sexual advances, where the employer does not know of, and could not reasonably have known of, the supervisor's misconduct.

<=1> View Table of Authorities

INTEREST OF THE AMICI CURIAE

Title VII of the Civil Rights Act of 1964, *42 U.S.C. 2000e* et seq., prohibits discrimination in employment because of a person's sex. The Equal Employment Opportunity Commission (EEOC) is the agency established by Congress to interpret

and enforce Title VII. The Attorney General is responsible for the judicial enforcement of Title VII in cases where the employer is a government, a governmental agency, or a political subdivision. *42 U.S.C. 2000e-5*(f)(1). The United States, in its capacity as employer and otherwise, has a strong interest in ensuring the fair and balanced enforcement of the federal civil rights laws.

STATEMENT

1. In September 1974 respondent Mechelle Vinson met Sidney Taylor, an assistant vice president of petitioner Meritor Savings Bank and manager of one of the bank's branch offices (Pet. App. 30a-31a). She inquired whether she might obtain employment at the bank (id. at 31a). Taylor gave her an application form, which she completed and returned the next day. Later that same afternoon, Taylor called Vinson to tell her that she had been hired (ibid.).

Working under Taylor's supervision, Vinson progressed to the positions of teller, head teller, and assistant branch manager (Pet. App. 30a-31a). She achieved her promotions based solely on her merits (id. at 31a). She received all the usual and customary increases in salary, bonuses, and promotions, solely on the basis of merit (id. at 42a). She was twice offered promotions that would have entailed transfer to other branches of the bank, but she rejected those offers (id. at 43a).

In June 1978 Taylor notified Vinson that she had taken an excessive number of "sick days" and suggested that she "work towards correcting" the situation (Plaintiff's C.A. App. 104). On September 21, 1978, Vinson failed to report for work and notified Taylor that she would be on sick leave "indefinite[ly]" (Pet. App. 31a, 43a). On November 1, 1978, the bank terminated Vinson's employment because of her excessive use of sick leave (id. at 3a, 31a, 43a).

On September 22, 1978, the day after commencing sick leave, Vinson brought this action against Taylor and the bank (Pet. App. 34a). She alleged that during her four-year tenure at the bank she had "constantly been subjected to sexual harassment" by Taylor, who allegedly "sought sexual favors * * * from [her] as an inducement for retaining her employment" (Plaintiff's C.A. App. 11). She alleged that Taylor had forced her to have sexual intercourse with him and had threatened to fire her if she refused (ibid). She alleged that Taylor's conduct violated, inter alia, Title VII. She sought injunctive relief, $200,000 in compensatory and punitive damages against Taylor and the bank, and attorney's fees (id. at 12; see Pet. App. 30a).

An eleven-day bench trial was held, at which conflicting testimony was presented. The district court found that Vinson "was not required to grant Taylor * * * sexual favors as a condition of * * * her employment" and that "her promotions and advancements * * * did not result from her rendering sexual favors to Taylor" but rather were "based on merit alone" (Pet. App. 42a). The court did not resolve the conflicting testimony about the existence of a sexual relationship between Vinson and Taylor. It found, however, that "[i]f [Vinson] and Taylor did engage in an intimate or sexual relationship * * * that relationship was a voluntary one by [Vinson] having nothing to do with her continued employment * * * or her advancement" at the bank (ibid.). The court found that Vinson had been offered two opportunities to transfer to desirable

jobs at other branches of the bank, and thus to escape Taylor's alleged harassment, but had declined those offers (id. at 43a). The court found that Vinson had not reported Taylor's alleged rapes to the police, had not reported his alleged sexual advances to any officials of the bank, and had not, before commencing her lawsuit, filed a charge with the EEOC alleging sexual harassment (id. at 42a-43a). The court credited Taylor's testimony that he and Vinson had clashed over his training instructions concerning another employee "[i]n late summer or early September [of] 1978," shortly before Vinson took indefinite sick leave (id. at 43a-44a). The court ultimately found that Vinson "was not the victim of sexual harassment and was not the victim of sexual discrimination while employed" by the bank (id. at 44a).

Although the district court concluded that Vinson had not proved a violation of Title VII, it nevertheless proceeded to address the question of the bank's liability. It found that the bank had an express policy against discrimination and an internal grievance procedure (Pet. App. 41a, 43a), and it found that neither Vinson nor any other employee had ever lodged a complaint about sexual harassment by Taylor (id. at 43a-44a). The court found that Vinson's raises, bonuses, and promotions were determined by officials other than Taylor, and that Taylor could only make "written recommendations" regarding personnel actions (id. at 40a, 43a). The court found that there was "no evidence" as to whether Taylor's title as assistant vice president was "honorary or whether [it] confer [red] upon [him] some greater responsibility and relationship to the management of the bank" (id. at 41a). The court ultimately found that "the bank was without notice and cannot be held liable for the alleged actions of Taylor" (ibid.).

2. The court of appeals reversed (Pet. App. 1a-21a). It recited that it had "[g]iven due deference to the [district] court's findings of fact," but disagreed with that court's "legal conclusion that Vinson did not suffer a violation" of Title VII (Pet. App. 6a). The court of appeals reiterated its holding in *Bundy v. Jackson, 641 F.2d 934 (1981)*, that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits, such as raises or promotions, on sexual favors (often called "quid pro quo" harassment), and harassment that, while involving no effects on economic benefits, creates a hostile or offensive working environment (Pet. App. 6a). Although Vinson's complaint had specifically linked Taylor's alleged harassment to threats of discharge (Plaintiff's C.A. App. 11), the court of appeals expressed the view that "Vinson's grievance was clearly of the [hostile environment] type" (Pet. App. 7a). Because the district court had not explicitly considered the possibility that Taylor's alleged sexual advances had created a hostile environment, the court of appeals held that a remand was necessary (id. at 7a-8a).

The court of appeals concluded that the district court's finding that any sexual relationship between Vinson and Taylor "was a voluntary one" did not obviate the need for a remand. The court of appeals was "uncertain as to precisely what the [district] court meant" by this finding (Pet. App. 8a). If the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," the court said, Vinson's voluntariness "had no materiality whatsoever" (id. at 9a, 10a). The court surmised that the district court, in making its finding of voluntariness, "may have considered the voluminous testimony regarding Vinson's dress and personal

fantasies," testimony that in the court of appeals' view "had no place in this litigation" (id. at 9a n.36).

On the issue of the bank's liability, the court of appeals held that an employer is absolutely liable for sexual harassment practiced by a supervisory employee, regardless of whether the employer actually knew or should have known about the misconduct (Pet. App. 10a-20a). In so ruling, the court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person" (id. at 13a, quoting *42 U.S.C. 2000e*(b)). The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote employees, since "even the appearance * * * of a significant degree of influence in vital job decisions gives any supervisor the opportunity" to take sexual advantage of subordinates (Pet. App. 17a-18a).

The employer's petition for rehearing en banc was denied, with Judges Bork, Scalia and Starr dissenting (Pet. App. 22a-29a). The dissenting judges expressed concern that the panel's holding about "voluntariness" would enable plaintiffs to turn consensual "sexual dalliances" into Title VII violations, simply by characterizing them as "harassment" after the fact (id. at 23a-24a). The dissent argued that the combined effect of that holding and the panel's holding on vicarious liability would be to make the employer "an insurer that all relationships between supervisors and employees are entirely asexual," thus impelling employers to police in unseemly fashion their workers' personal affairs (id. at 25a-26a). The dissent likewise faulted the panel's ruling that an employer cannot introduce "evidence of an employee's dress or behavior in an effort to prove that any sexual advances were solicited or welcomed" (id. at 24a). The dissent noted the absence of any authority for that ruling, and contended that the panel's evidentiary rulings, when "[a]dded to the elimination of any voluntariness defense, * * * make certain that to be charged is to be guilty" (id. at 24a-25a).

SUMMARY OF ARGUMENT

We agree with the court of appeals that proof of a sexually hostile work environment establishes discrimination "because of * * * sex" *(42 U.S.C. 2000e-2*(a)(1)) in violation of Title VII. The court of appeals erred, however, in reversing the district court's determination that respondent failed to prove her case here. While unwelcome sexual advances may create a hostile work environment, consensual sexual relationships do not provide a basis for Title VII liability. The district court found that any sexual relationship between respondent and her supervisor "was a voluntary one" on her part (Pet. App. 42a) and that she "was not the victim of sexual harassment" (id. at 44a). These ultimate factual findings were grounded on reasonable credibility determinations and on findings of subsidiary fact that the court of appeals did not rule "clearly erroneous" (Fed. R. Civ. P. 52(a)). The court of appeals accordingly had no basis for reversing the district court's judgment and remanding for another trial. Anderson v. City of Bessemer City, No. 83-1623 (Mar. 19, 1985).

Because respondent failed to prove a violation of Title VII against anyone, there is no need for this Court to consider the question of the bank's liability for its supervisor's alleged action. If the Court should reach that question, however, it should reverse the judgment below. The court of appeals' theory of absolute employer liability is erroneous as a matter of statutory construction

and ignores the special characteristics of "hostile environment" claims. In our view, an employer should not be liable unless it knew or had reason to know of the sexually offensive atmosphere. An employer without actual knowledge will have "reason to know" of sexual misconduct at his workplace if victims of sexual harassment have no reasonably available means of bringing complaints to the employer's attention and seeking redress. Because it is unclear on this record whether an employee in Vinson's position had an effective means of complaint and redress, a remand would be necessary on this question. Whether a particular employer has "reason to know" about sexual misconduct may often involve difficult factual issues, but an employer in our view should generally be able to insulate itself from liability by publicizing a policy against sexual harassment and implementing a procedure designed to resolve sexual harassment complaints.

DISCUSSION

A. Unwelcome Sexual Advances That Create A Hostile Working Environment Violate Title VII 1. Sexual harassment in the workplace is a serious national problem of great concern to employers and employees alike. Typically, although not always, directed at women, sexual harassment may pose substantial barriers to the victim's professional advancement, and may create such indignities and such intolerable working conditions as to force a woman to abandon her job. There is evidence that the incidence of such behavior is unfortunately widespread, even where employeers have taken strong measures to eliminate it. Besides imposing economic costs, sexual harassment is often founded on stereotypical views of women, and may, in whatever form it takes, inflict serious psychological, if not physical, hardships upon them.

The term "sexual harassment" is used in common parlance to denote a wide range of improper behavior in the workplace, behavior that may be engaged in by supervisors, co-workers, or non-employees. Sexual harassment may include physical conduct, such as unwelcome touching or fondling, or may be limited to such verbal abuse as lewd or obscene comments, insults or denigration of women, or repeated unwelcome invitations to social or sexual activity. Sexual harassment may impose an unpleasant or intolerable working environment or may involve the coercion of sexual favors through the offer or threat of job-related benefits or detriments.

Although sexual harassment is undoubtedly a phenomenon with a long history, it has only recently been generally acknowledged as a serious social and legal problem. The responses to the problem, at both the state and the federal levels, have taken several forms. Some states have adopted specific statutory protections for the victims of sexual harassment, n1 or have interpreted their own civil rights laws to include sexual harassment as a form of prohibited sex discrimination. n2 In states that have abandoned the traditional doctrine of employment at will, some courts have recognized dismissals based on sexual harassment as a form of wrongful discharge. n3 Numerous courts have found sexual harassment to be tortious, either on such traditional theories as assault and battery, or on such modern theories as intentional infliction of emotional distress. n4

n1 See, e.g., Cal. Gov't Code § 12940(j) (West Supp. 1985); Mich. Comp. Laws Ann. § 37.2103(h) (1985); Wis. Stat. § 111.36 (1985).

n2 See, e.g., *Continental Can Co. v. State, 297 N.W.2d 241, 246-249 (Minn. 1980); Howard University v. Best, 484 A.2d 958 (D.C. App. 1984); Holien v. Sears, Roebuck & Co., 689 P.2d 1292 (Or. 1984).*

n3 See, e.g., *Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Holien v. Sears, Roebuck & Co., 689 P.2d at 1294.*

n4 E.g., lucas v. *Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984); Phillips v. Smalley Maintenance Systems, Inc., 711 F.2d 1524 (11th Cir. 1983); Stewart v. Thomas, 538 F. Supp. 891 (D.D.C. 1982).* See generally Montgomery, Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions, *10 Golden Gate U.L. Rev. 879 (1980)* (discussing available tort remedies).

The United States, like many employers, has taken strong steps to eliminate sexual harassment in the work-place. Stern disciplinary measures, including discharge or demotion, are imposed on federal supervisory employees found to have sexually harassed subordinates. See *Hostetter v. United States, 739 F.2d 983 (4th Cir. 1984);* Evans v. Department of the Army, No. 85-683 (Fed. Cir. May 23, 1985), cert. denied, No. 85-300 (Nov. 12, 1985). The merit Systems Protection Board has recognized that a federal agency "has an obligation to its employees to create and maintain a work environment free of sexual harassment." *Snipes v. United States Postal Service, 6 M.S.P.B. 16, 17 (1981).* Other governmental and private employers have likewise made sexual harassment by supervisors a ground for dismissal. n5

n5 See *State ex rel. Miller v. Richardson, 229 Kan. 234, 623 P.2d 1317 (1981)* (statutory ouster of public official); *Edwards v. Florida Department of Highway Safety, 470 So.2d 9 (Fla. Dist. Ct. App. 1985)* (discharge of public official); *Phillips v. Plaquemines Parish School Board, 465 So.2d 53 (La. App. 1985)* (same); *Sears, Roebuck & Co. v. Florida Unemployment Appeals Comm'n, 463 So.2d 465 (Fla. Dist. Ct. App. 1985)* (denial of unemployment benefits to former supervisor discharged by a private employer for practicing sexual harassment).

2. Title VII of the Civil Rights Act makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex" *(42 U.S.C. 2000e-2*(a)(1)). n6 In 1980, the EEOC issued guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. See Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.11 et seq. As an "administrative interpretation of the [Civil Rights] Act by the enforcing agency," these guidelines are "entitled to great deference." Compare *Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975),* with *General Electric Co. v. Gilbert, 429 U.S. 125, 141-156 (1976).*

n6 The legislative history of the 1964 Act sheds little light on the meaning of this terminology, since the word "sex" was added to the bill at the last minute by its opponents on the House floor in an effort to prevent its passage. See 110 Cong. Rec. 2577 (1964) (remarks of Rep. Smith); id. at 2581-2582 (remarks of Rep. Green). See generally C. Whalen & B. Whalen, The Longest Debate 115-121 (1982). However, in amending the 1964 Act by passage of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 et seq., Congress spoke more fully regarding the prohibition against sex discrimination. While not specifically addressing sexual harassment, the committee reports emphasize that "[d]iscrimination against women is no less serious then other forms of prohibited employment practices and is to be

accorded the same degree of social concern given to any type of unlawful discrimination." H.R. Rep. 92-238, 92d Cong., 1st Sess. 4-5 (1971); S. Rep. 92-415, 92d Cong., 1st Sess. 7-8 (1971).

In defining actionable "sexual harassment," the EEOC guidelines first describe the types of workplace sexual misconduct that may, under certain circumstances, violate Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" (29 C.F.R. 1604.11(a)). As they apply to the charges at issue in this case, the guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly tied to the grant or denial of an economic quid pro quo, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (29 C.F.R. 1604.11(a)(3)). n7

n7 The EEOC guidelines also provide that sexual misconduct at the workplace constitutes prohibited "sexual harassment" where "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment" and where "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual" (29 C.F.R. 1604.11(a)(1) and (2)). This type of sexual harassment is commonly referred to as "quid pro quo" harassment. The issue of "quid pro quo" harassment is not presented here because the district court found (Pet. App. 42a-43a), and the court of appeals did not disagree (see id. at 6a-7a), that Vinson achieved all her promotions based solely on merit, and that Taylor's alleged conduct had no effect on the salary, bonuses, and other economic terms and conditions of employment that Vinson received. The courts of appeals have held various manifestations of "quid pro quo" sexual harassment to be violations of Title VII. See, e.g., *Bundy v. Jackson, 641 F.2d 934* (D.C. Cir, 1981); *Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985); Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).*

In determining that "hostile environment" harassment violates Title VII, the Commission drew upon a long line of judicial decisions and EEOC precedents holding that Title VII grants employees the right to a workplace free of discriminatory intimidation, ridicule, and insult. A cause of action based on a discriminatory work environment was first recognized in *Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971)*, cert. denied, *406 U.S. 957 (1972)*, where it was held that an Hispanic plaintiff established a Title VII violation by demonstrating that her employer created an offensive working atmosphere for employees by giving discriminatory service to its Hispanic patrons. As the Fifth Circuit explained *(454 F.2d at 238)*:

[T]he phrase "terms, conditions, or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. * * * One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers * * *.

The courts and the EEOC have regularly applied the same principle to find Title

VII violations where hostile working environments are created by discrimination based on race, n8 religion, n9 or national origin. n10

n8 E.g., *Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-515* (8th Cir.), cert. denied, *434 U.S. 819 (1977)* (racially segregated employee eating clubs condoned by employer violate Title VII by creating a discriminatory work environment); *Gray v. Greyhound Lines, 545 F.2d 169, 176 (D.C. Cir. 1976)* (pattern of racial slurs violates Title VII by creating a discriminatory work environment); *United States v. City of Buffalo, 457 F. Supp. 612, 631-635 (W.D. N.Y. 1978)* (holding that black employees are entitled to a work environment free of racial abuse and insult); *1973 Empl. Prac. Dec. (CCH) P6193 (1970)* (discharge for interracial association violates Title VII); *id. P6216* (1971) (pattern of insulting racial remarks violates Title VII).

n9 E.g., *Weiss v. United States, 595 F. Supp. 1050 (E.D. Va. 1984)* (anti-Semitic verbal abuse of an employee violated his Title VII right to a nondiscriminatory working environment); *Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976)* (demeaning religious slurs by supervisor violated Title VII); *1973 Empl. Prac. Dec. (CCH) P6347 (1972)* (religious preaching that created an environment of religious intimidation violated Title VII).

n10 E.g., *Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977)* (indicating that a pattern of offensive ethnic slurs would violate Title VII); *1973 Empl. Prac. Dec. (CCH) P6354 (1972)* (pattern of racial and ethnic slurs, also appearing on restroom walls, violates Title VII).

With equal unanimity, the courts have held, consistently with the EEOC guidelines, that a plaintiff may establish a violation of Title VII by demonstrating the existence of a hostile work environment caused by discrimination based on sex. As the Eleventh Circuit wrote in *Henson v. City of Dundee, 682 F.2d 897, 902 (1982):*

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

The Fourth and District of Columbia Circuits have reached the same result for substantially the same reasons. *Katz v. Dole, 709 F.2d 251, 254-255 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934, 943-944 (D.C. Cir. 1981).*

While holding that claims of sexual harassment may state a cause of action under Title VII, the EEOC and the lower courts have also recognized that such claims, particularly when they fall in the "hostile environment" category, are distinct in Title VII jurisprudence, both in their theoretical formulation and in the practical problems that they pose. Sexual attraction is a fact of life, and it may often play a role in the day-to-day social exchange between employees in the workplace. For this reason, "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected sexual advances" is not always easy to discern. *Barnes v. Costle, 561 F.2d 983, 999 (D.C. Cir. 1977)* (MacKinnon, J., concurring). Whereas racial slurs are

intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous. Sexual liaisons between employees, for obvious reasons, are likely to be private and unacknowledged. Determinations as to their nature -- indeed, as to their existence -- will thus often depend "largely upon the [trial] court's view of the credibility of the witnesses." *Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1385 (D. Colo. 1978)*. And because "no policy can be derived from the equal employment opportunity laws to discourage" sexual relationships between consenting co-workers (*Barnes v. Costle, 561 F.2d at 1001* (MacKinnon, J., concurring)), it is essential to craft Title VII rules in such a way that they do not intrude on "purely personal, social relationship[s]." Preamble to Interim Guidelines on Sex Discrimination, *45 Fed. Reg. 25024 (1980)*.

Because of the important interests at stake in defining the boundaries of unlawful sexual harassment, the EEOC, the courts, and the commentators have correctly emphasized several principles to guide the disposition of such charges. The gravamen of any hostile environment claim must be that the alleged sexual advances are "unwelcome" (29 C.F.R. 1604.11(a)). In weighing such allegations, the trier of fact must determine whether the defendant's conduct was indeed unwelcome in light of all the circumstances, including evidence that the plaintiff substantially contributed to the allegedly distasteful atmosphere by his or her own "sexually suggestive conduct." *Gan v. Kepro Circuit Systems, 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D. Mo. 1982)*. See, E.g., *Evans v. Mail Handlers, 32 Fair Empl. Prac. Cas. (BNA) 634, 637 (D.D.C. 1983)* (plaintiff welcomed sexual advances and thus failed to establish prima facie case). The unwelcome conduct, moreover, must be sufficiently severe or pervasive as to affect the general working environment of the complaining worker and thus to be properly characterized as a "term or condition of employment" (*Henson v. City of Dunndee, 682 F.2d at 904)*. Sexual flirtation or innuendo, even vulgar language that is "trivial or merely annoying," does not necessarily establish a sexually hostile environment (*Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 433 (E.D. Mich. 1984))*. Rather, the conduct complained of must be such that it illegally poisons the atmosphere (*Katz v. Dole, 709 F.2d at 255)*, and does so from the viewpoint of the reasonable victim (*Henson v. City of Dundee, 682 F.2d at 904)*. n11 The question whether a pattern of activity constitutes illegal sexual harassment, or rather "establishes a purely personal, social relationship without discriminatory employment effects," necessarily "requires a factual determination" (Preamble to Interim Guidelines on Sex Discrimination, *45 Fed. Reg. 25024 (1980))*. The EEOC guidelines accordingly emphasize the need for a careful review of "the record as a whole and * * * the totality of the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred" (29 C.F.R. 1604.11(b)). Finally, because claims of sexual harassment almost invariably involve "serious credibility issues" (*Craig v. Y & Y Snacks, 721 F.2d at 79)*, special deference should be paid to the findings of the trier of fact.

n11 Compare, e.g., *Bundy v. Jackson, 641 F.2d at 940* (finding a violation where female employee complained about supervisor's sexual advances to a higher official, who replied that "any man in his right mind would want to rape you"), and *1983 Empl. Prac. Dec. (CCH) P6758 (1981)*, with *Scott v. Sears, Roebuck & Co., 605 F. Supp. 1047, 1055-1056 (N.D. Ill. 1985)* (finding no violation where plaintiff's perception of flirtations as sexual "propositions" was objectively

unreasonable), and *1983 Empl. Prac. Dec. (CCH) P6818 (1982).*

3. We agree with the court of appeals below, and with the uniform conclusion of the EEOC and the other appellate courts that have considered the question, that sexual harassment which "has the purpose or effect of * * * creating an intimidating, hostile, or offensive working environment" (29 C.F.R. 1604.11(a)(3)) constitutes discrimination because of sex in violation of Title VII. It follows both from the language o the statute and from strong considerations of legislative policy that an employer violates Title VII when he knowingly permits sexual harassment to pollute an employee's working environment.

Although we agree that allegations of a sexually hostile working environment state a cause of action under Title VII, we believe that the court of appeals erred in reversing the district court's conclusion that Vinson failed to prove a violation of Title VII based on the evidence adduced at trial. The district court's findings of fact, which the court of appeals did not hold "clearly erroneous" (Fed. R. Civ. P. 52(a); see Pet. App. 6a & n.23), unambiguously show that Vinson failed to prove "sexual harassment" of any sort to the satisfaction of the district judge. Indeed, the district court's findings show appropriate sensitivity to the need to ensure that sexual harassment charges do not become a tool by which one party to a consensual sexual relationship may punish the other. As we have noted (see pages 13-15, supra), litigation about sexual harassment presents difficult problems of proof and involves serious credibility issues, considerations that warrant special deference to the reasoned conclusions of the trier of fact. In its insensitivity to these concerns, the court of appeals appears to have endorsed a view of sexual harassment that would allow Title VII actions to be based on purely personal and consensual relationships between co-workers. Such an approach not only would unfairly subject employers to liability for an ill-defined class of activities, but would intrued improperly and unnecessarily upon the privacy of the individuals involved in such relationships.

The district court found as a fact that Vinson "received the usual and customary increases in salary, Christmas bonuses, and promotions on the basis of merit," that her advancements "did not result from her rendering sexual favors to Taylor," and that she "was not required to grant Taylor * * * sexual favors as a condition of * * * her employment" (Pet. App. 42a). As the court of appeals evidently realized (id. at 6a-7a), these findings completely disposed of any "quid pro quo" claim. Indeed, these findings directly refuted the principal allegations of Vinson's complaint -- that Taylor "sought sexual favors * * * as an inducement for retaining her employment" and that Taylor "ha[d] forced [her] to have sexual intercourse with him using the threat that if she refused she would be terminated" from her job (Plaintiff's C.A. App. 11).

Although the district court did not make explicit findings as to the sexual neutrality or hostility of Vinson's working environment -- quite possibly because her complaint, contrary to the court of appeals' assertion (Pet. App. 7a), proffered in essence a "quid pro quo" claim -- the trial court did find that any sexual relationship between Vinson and Taylor "was a voluntary one" on her part (id. at 42a) and that she "was not the victim of sexual harassment" during her four-year tenure at the bank (id. at 44a). While these findings would seem on their face likewise to dispose of any "hostile environment" claim, the court of appeals professel to be "uncertain as to precisely what the

district court meant" by these findings (id. at 8a), a profession that was followed (id. at 9a-10a) by an elaborate exegesis upon the ambiguity of the word "voluntary."

This was error. A determination as to the existence of sexual harassment requires a careful review of "the record as a whole and * * * the totality of the circumstances" (29 C.F.R. 1604.11(b)). Consideration of the district court's ultimate findings in light of the record as a whole permit only one conclusion: the trial judge meant exactly what he said -- that Vinson's participation in any sexual relationship with Taylor was consensual and "voluntary," that Taylor's advances (if any) were not unwelcome, and that Vinson accordingly failed to prove that she was "the victim of sexual harassment."

The district court held an eleven-day trial at which both Vinson and Taylor testified. The court's findings make clear that in critical respects it believed Taylor's testimony (e.g., his testimony that Vinson's charges may have stemmed from work-related disputes) and did not believe Vinson's (e.g., her testimony that Taylor had threatened to have her fired if she refused to grant him sex). See Pet. App. 42a-43a. The trial established, moreover, that Vinson's charges of sexual harassment had absolutely no evidentiary support beyond her own bare allegations. Sociological and medical studies have shown that sexual harassment far less extreme than that which Vinson alleged -- repeated rapes and assaults over a two-year period -- often has severely debilitating effects, both physical and psychological, upon its victims. See, e.g., Note, Employer Liability for Co-Worker Sexual Harassment under Title VII, 13 N.Y. U. Rev. of Law and Social Change 83, 84-85 n.6 (1984-1985) (citing authorities); R. Conte & D. Gregory, Sexual Harassment -- Some Proposals Toward More Realistic Standards of Liability, *32 Drake L. Rev. 407, 418 n.47* (1982-1983). Yet Vinson did not produce a single witness who could testify to having encountered any evidence of Taylor's harassment of Vinson, either by witnessing his conduct, by hearing Vinson complain about it, or by noting its adverse effects on her demeanor. Indeed, one of Vinson's co-workers, who testified that "she though there was a relationship between [Vinson] and Taylor," also testified that Vinson "did not appear to be afraid of Taylor" (Pet. App. 42a n.7), testimony obviously at odds with Vinson's charges of repeated rape. The EEOC in similar circumstances has held that a "bare assertion" of sexual harassment "cannot stand without some factual support." *1983 Empl. Prac. Dec. (CCH) P6832 (1982).*

The district court's findings of subsidiary fact, when added to its credibility determinations, amply support its conclusion that Vinson "was not be victim of sexual harassment" (Pet. App. 44a). The court found that Vinson did not report Taylor's alleged rapes to the police and did not file an EEOC charge alleging sexual harassment by Taylor until after this lawsuit had begun (id. at 42a). Indeed, the record is devoid of evidence that Vinson mentioned Taylor's alleged activities to anyone, whether to co-workers, family, or friends. The district court found that Vinson had twice refused opportunities to transfer to desirable jobs at other branches of the bank and thus to escape Taylor's supervision -- a pattern of decisionmaking difficult to reconcile with her charges of repeated sexual abuse (id. at 43a). As Vinson herself testified (id. at 32a), she did not file her lawsuit until nearly a year after the alleged harassment had ceased, and, as the district court found (id. at 43a), she filed it the day after she reported sick, in the wake of several work-related disputes

with Taylor about her excessive use of sick leave and her refusal to follow Taylor's training instructions. When viewed in the context of the record as a whole, Vinson's long silence and her delay in asserting her claim well-nigh compelled the district court's findings either that no sexual activities took pace, or that, if any took place, Vinson's participation was consensual and voluntary.

In the course of impugning the district court's finding of "voluntariness," the court of appeals surmised (Pet. App. 9a n.36) that the district judge might have based that finding on "the voluminous testimony about Vinson's dress and personal fantasies." There was absolutely no basis for the court of appeals' inference. The district court made no mention whatever of the testimony about Vinson's dress and sexual fantasies, and, as we have pointed out, the district court's finding of voluntariness was amply supported by its credibility determinations and its subsidiary findings of fact. In any event, the court of appeals cited no authority, and we know of none, for the proposition that testimony about a plaintiff's sexually provocative dress and publicly-expressed sexual fantasies "ha[s] no place in this [sort of] litigation" (ibid.). While it is of course true that "a woman does not waive her Title VII rights by her sartorial or whimsical proclivities" (ibid.), it does not necessarily follow that evidence of a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether that person finds particular sexual advances obnoxious or unwelcome. The EEOC guidelines emphasize that the trier of fact must determine the existence of sexual harassment "on a case by case basis," viewing "the record as a whole" and "the totality of the circumstances" (29 C.F.R. 1604.11(b)). The Commission in its decisions has held that an individual's "participating in sexual conduct in the workplace," e.g., by "using dirty remarks and telling dirty jokes," may indicate that the sexual advances complained of are not "unwelcome." E.g., 2 Empl. Prac. Guide (CCH) P6839, at 7014 (Nov. 28, 1983). The courts have likewise held that a complainant's sexual aggressiveness and sexually explicit conversations may be relevant in assessing a charge of harassment. E.g., *Gan v. Kepro Circuit Systems, 28 Fair Empl. Prac. Cas. (BNA) at 640*. While evidence of this sort must obviously be used with care, there is no basis for creating a per se rule against its admissibility.

Claims of sexual harassment pose difficult and sensitive problems. In adjudicating such claims, it is essential that courts recognize and condemn a form of discrimination that can seriously limit employment opportunities for women, while avoiding unfair imposition of Title VII liability for consensual relationships that have taken a bad turn. The district court in this case properly analyzed the "totality of the circumstances" (29 C.F.R. 1604.11(b)) and concluded that Vinson was not the victim of sexual harassment. The district court's findings of subsidiary fact were not clearly erroneous, as the court of appeals acknowledged (Pet. App. 6a & n.23), and there was no basis for setting aside the district court's ultimate factual finding. Anderson v. City of Bessemer City, No. 83-1623 (Mar. 19, 1985). The court of appeals erred in doing so, and in remanding this case for further proceedings. n12

n12 Even if the court of appeals were correct in ordering a remand, it is not easy to see what relief the district court could award if it were to find a "hostile environment" after another trial. The district court has found, and the court of appeals has agreed, that Vinson was denied no work-related economic benefits by reason of Taylor's alleged harassment. Vinson is no longer employed

by the bank, and the district court found that her employment was property terminated for abusing the bank's sick-leave policy. Vinson failed to make a timely amendment of her complaint to allege discriminatory or constructive discharge, and, even if she were permitted to renew that motion on remand, it is by no means clear that such an allegation could survive the factual findings the district court has already made, not to mention Vinson's own testimony that the alleged harassment ceased almost a year before she left the bank's employ. Since Vinson is no longer subject to Taylor's supervision, but is complaining of a past wrong, injunctive relief would clearly be inappropriate. See *City of Los Angeles v. Lyons, 461 U.S. 95 (1983)*. Moreover, damages for such past injuries as emotional distress are unavailable under Title VII. See *Bundy v. Jackson, 641 F.2d 934, 946 n.12 (D.C. Cir. 1981)*. Vinson's complaint would thus seem to be moot in a practical sense. But see *Henson, 682 F.2d at 905-906; Katz, 709 F.2d at 251 n.1; Joshi v. Florida State University, 646 F.2d 981, 991 n.33 (5th Cir. 1981)*, cert. denied, *456 U.S. 972 (1982); Dean v. Civiletti, 670 F.2d 99 (8th Cir. 1982)*.

B. Employers Should Be Liable Under Title VI If They Can Be Shown To Have Tolerated A Sexually Hostile Working Environment

Although the district court concluded that Vinson had not proved a violation of Title VII, it nevertheless proceeded to consider the question of the bank's liability. The court found that Taylor had no authority to hire, fire, or promote employees (Pet. App. 40a, 43a); that all employment decisions affecting Vinson were made by other bank officials (ibid.); that any sexual relationship between Vinson and Taylor "he[d] nothing to do with her continued employment * * * or her advancements or promotions at [the bank]" (id. at 42a); that the bank had "an express policy * * * of nondiscrimination in employment practices" (id. at 43a); and that neither Vinson nor any other employee had complained to the bank of Taylor's alleged harassment, by utilizing the bank's grievance procedure or otherwise (id. at 41a, 43a). The district court ultimately found that "the bank was without notice" and hence could not properly be held liable for Taylor's alleged actions (id. at 41a).

The court of appeals reversed, holding that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knows of nor reasonably could have known of the alleged misconduct, and even though the employer would have disapproved of and stopped the misconduct if aware of it. The court held that a supervisor, even if he lacks authority to hire, fire, or promote, is nevertheless an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself sexually upon subordinates (Pet. App. 17a-18a). The court of appeals drew no distinction in this respect between "quid pro quo" and "hostile environment" cases, and expressed the view that the EEOC guidelines furnish "unambiguous" support for its strict-liability approach (id. at 15a, quoting 29 C.F.R. 1604.11(c)).

Since, in our view of the case, Vinson failed to prove a claim of sexual harassment against anyone, there is no need for this Court, any more than there was for the district court, to consider the question of the bank's liability. If the Court should reach this question, however, it should reverse the judgment of the court of appeals and remand the case for the district court to apply what we believe to be the proper standard for employer liability. The court of appeals' theory of strict employer liability in "hostile environment" cases such

as this one is erroneous as a matter of statutory construction and common sense, and would seriously disserve the remedial purposes of Title VII.

Title VII prohibits discrimination by an employer, defined to include "any agent of such a person" *(42 U.S.C. 2000e*(b)). One of the fundamental principles of agency, as that term has traditionally been understood, is that a person who is another's agent for some purposes does not therefore act as the other's agent for all purposes. Rather, a principal's liability is limited to acts of the agent that are within the scope of the agent's employment. See W. Prosser & R. Keeton, Law of Torts 502 (1984); Restatement (Second) of Agency § 219(1) (1958). An agent's actions are generally viewed as being within the scope of his employment if they represent the exercise of authority autually vested in him, or of authority which third parties reasonably believe him to possess by virtue of his principal's conduct, generally called "apparent authority." See Restatement (Second) of Agency §§ 7, 8 (1958). While such common-law principles are not necessarily transferrable in all their particulars to Title VII, Congress's decision to use the term "agent," rather than such words as "subordinate" or "supervisory employee," surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

When a Title VII charge is based on allegations of sexual harassment, the question whether a supervisor is acting as his employer's agent should turn primarily on the scope of authority delegated to the supervisor and on the character of the actions alleged. It is well established under Title VII that a supervisor exercises the actual authority delegated to him by his employer when he makes, or threatens to make, decisions affecting the employment status of his subordinates. Such actions are, therefore, imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Thus, the courts have routinely held employers liable under Title VII for the discriminatory discharge of employees by supervisory personnel, regardless of whether the employer knew, should have known, or approved of the supervisors' actions. See, e.g., *Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723, 725 (6th Cir. 1972)* (racially motivated discharge "by a person in authority at a lower level of management" is attributable to employer despite upper management's "exemplary" record in race relations); *Tidwell v. American Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971)* (upper level management's lack of knowledge irrelevant where supervisor illegally discharged employee for refusing discriminatorily to disqualify black applicant). See also *Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977)* ("The defendant is liable as principal for any violation of Title VII * * * by [a supervisor] in his authorized capacity as supervisor.").

Applying these principles, the EEOC guidelines provide that employers are likewise vicariously liable for sexual harassment practiced by supervisory personnel where the supervisor's actions are undertaken within the scope of authority delegated by the employer. In general, harassment which affects tangible job benefits and is manifested in a supervisory employment decision -- that is, "quid pro quo" harassment -- will give rise to vicarious liability under the guidelines. That is because the authority to make or substantially influence such decisions is within the scope of authority that the employer has delegated to the supervisor. Contra, *Barnes v. Costle, 561 F.2d 983, 995 (D.C. Cir. 1976)* (MacKinnon, J., concurring) (supervisor not acting within apparent scope of employment when he extorts sexual consideration from subordinate in

exchange for favorable job action). In such cases, the supervisor has obviously "relie[d] upon his * * * actual authority to extort sexual consideration from an employee * * * [and had used] the means furnished to him by the employer to accomplish the prohibited purpose." *Henson v. City of Dundee, 682 F.2d at 910.*

Where a sexual harassment claim proceeds on a pure "hostile environment" theory, however, as Vinson's claim now does, the usual basis for a finding of agency will often disappear. By definition, the supervisor in such circumstances is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim. Nor, except in unusual cases, could it be demonstrated that the employer had authorized the supervisor to engage in sexual harassment per se, or that the supervisor's sexually harassing conduct has furthered any business of his employer as principal. n13 In a pure "hostile environment" case, therefore, the usual bases for imputing the supervisor's actions to his employer may be lacking.

n13 See Restatement (Second) of Agency § 165 comment c (1958) ("If [a party] knows that the agent is acting for the benefit of himself or a third person, the transaction is suspicious upon its face, and the principal is not bound unless the agent is authorized.").

For this reason, the Fourth and Eleventh Circuits have held that an employer cannot be held absolutely liable, on a theory of vicarious liability, for a supervisor's creation of a working environment that is sexually offensive. Rather, on those courts' view, the plaintiff must proceed on a theory of direct liability and "prove that higher management knew or should have known of the sexual harassment." *Henson v. City of Dundee, 682 F.2d at 905, 910.* Accord, *Katz v. Dole, 709 F.2d at 255-256 & n.6.* The employee can demonstrate actual knowledge on the employer's part by filing an EEOC charge or "by showing that she complained to higher management" about the misconduct (*Henson, 682 F.2d at 905).* n14 Alternatively, a victim can demonstrate the employer's awareness "by showing * * * the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." Ibid. Accord, e.g., *Taylor v. Jones, 653 F.2d 1193, 1197-1199 (8th Cir. 1981)* (holding employer liable for racially hostile working environment where practice of highly offensive racial slurs "was so pervasive and so long continuing * * * that the employer must have become conscious of it").

n14 A complainant may wish to pursue both avenues simultaneously in order to prevent the Title VII statute of limitations from running. See *42 U.S.C. 2000e-5*(e); *I.U.O.E. v. Robbins & Myers, Inc., 429 U.S. 229, 236 (1976).* The filing of an EEOC charge would of course trigger attempts at voluntary conciliation (see *42 U.S.C. 2000e-5*(b)).

While we agree with the Fourth and Eleventh Circuits that an employer should not be held liable for sexual harassment of the pure "hostile environment" type unless it knows or has reason to know about such misconduct, n15 neither of those courts addressed a fundamental doctrinal problem: under what circumstances should knowledge of the sexually harassing conduct be imputed to the employer? For example, if the victim's supervisor is the offending party, and if the employer has limited the victime to complaint through the supervisor, it is not unreasonable to impute to the employer to supervisor's knowledge of his own offense. More generally, an employer might well be deemed to have "reason to know" about sexual harassment if it has deliberately turned its back on the problem, that is, if there is no reasonably available avenue by which victims of

sexual harassment can make their complaints known to appropriate officials who are in a position to do something about those complaints.

n15 We do not, however, agree with an aspect of the rationale that the Henson court articulated in adopting this standard. The court stated that "[t]he capacity of any person to create a hostile or offensive environment is not necessarily encessarily enhanced or diminished by any degree of authority which the employer confers upon that individual" *(682 F.2d at 910)*. We think that this statement is contrary both to common sense and to practical experience.

Sexually harassing actions of a supervisor, like those of a co-worker or indeed of a non-employee, have an obvious effect on the working environment, and that effect may be discriminatory. However, to impute the behavior automatically and strictly to the employer -- as is appropriate in "quid pro quo" cases -- is not only doctrinally unwarranted by normal principles of agency law but practically unfair to the employer and perhaps even productive of unnecessary and harmful side effects. Given the naturalness, the pervasiveness, and what might be called the legal neutrality of sexual attraction (as contrasted to racial prejudice), we find much wisdom in Judge Bork's observation that a rule of strict liability would create an incentive for employers to "monitor[ ] or polic[e] * * * employees' voluntary sexual relationships" (Pet. App. 25a n.3). On the other hand, the very fact that sexually harassing conduct almost by definition is outside the scope of any employee's job description should not necessarily shield an employer from responsibility for what may become a condition, and a discriminatory condition, of employment.

The sensible course in determining whether an employer has "reason to know" about the existence of a sexually hostile environment at his workplace should focus on the systemic relation between the conduct of particular individuals -- whether supervisors, co-workers of third parties such as customers or suppliers -- and the employer. More particularly, we propose a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, e.g., by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials. n16

n16 Depending on the facts -- in a small company, perhaps -- an informal means of complaint could well be sufficient.

The rule that we propose recognizes first of all that an employer should not escape responsibility for a condition in the workplace by neglect, indifference, willful ignorance or even connivance, even though that condition may not further the employer's business. Second, such a rule obviates conceptual difficulties regarding actual or constructive notice to corporate employers which, after all, can only act through agents, agents who in some cases may be the very perpetrators of the wrong. Third, such a rule recognizes that sexual harassment

only becomes a violation of Title VII, as opposed to a common law tort, insofar as it creates a hostile and therefore discriminatory work environment. If an employee in the victim's situation might reasonably be expected to know that effective avenues of complaint and redress are available, then the availability of such avenues itself becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the environment as a specifically work environment, leaving only the now-patently-individual and unauthorized behavior of the harasser. Fourth, the rule we propose can be made to apply to and distinguish appropriately among the behavior of supervisors, co-workers and third parties. Both the ways in which these different actors might create a hostile environment, and the ways in which the employer might properly respond, may differ. Finally, the rule we propose creates incentives for employer responses that are likely to prevent and redress harassment, while not tempting employers to engage in preventive measures -- such as declining to hire women, or regulating employees' personal relationships -- so extreme as themselves to be offensive.

The rule we propose is an elaboration of the approach to sexual harassment cases taken by the EEOC, whose guidelines state the Commission will "examine the circumstances of the particular employment relationship" in determining when a supervisor acts as the employer's agent (29 C.F.R. 1604.11(c)). In accordance with the guidelines, our approach looks to the employment setting to determine whether the employer has created a reasonably available avenue of complaint for the victim of a supervisor's harassment, or alternatively whether the employer's policies leave the supervisor with unchecked, final control over the victim. The EEOC's guidelines concerning employer liability for sexual harassment by coworkers or non-employees also mesh with our approach, providing for liability where the employer "knows or should have known" of the misconduct. 29 C.F.R. 1604.11(d) and (e).

The EEOC's considerable experience in dealing with sexual harassment claims has led it to conclude that "[p]revention is the best tool for the elimination of sexual harassment" (29 C.F.R. 1604.11(f)). The standard that we propose for determining employer liability permits the employer to shield himself from liability by taking common-sense steps to prevent sexual harassment. Ideally, an effective preventive program should include an explicit policy against sexual harassment, articulated in a clear statement regularly communicated to employees. In implementing that policy, the employer should take all reasonable steps necessary to prevent sexual harassment from occurring, "such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise, and how to raise, the issue of harassment under Title VII, and developing methods to sensitize all concerned" (ibid). Grievance procedures established to resolve sexual harassment claims in practice should ensure confidentiality, allow complaints to be lodged with persons other than an employee's supervisor, and provide effective remedies, including protection of victims against retaliation, as Title VII itself provides *(42 U.S.C. 2000e-3* (a)). Most importantly, perhaps, grievance procedures should be "user-friendly." Sexual harassment is often as embarrassing to describe as it is distressing to experience. If a grievance procedure is to work, it must be one that victims will not be afraid to use. Of course, a formal grievance procedure is not the only avenue by which an aggrieved employee might make a claim of sexual harassment known to his or her employer, but a procedure that meets the criteria we have described should afford the employer a "safe harbor" defense absent actual knowledge of a sexually hostile environment.

If the Court were to reach the question of the bank's liability in this case, the rule of employer liability that we propose would require a remand to the district court for further factual findings. The bank here did have an "express policy of * * * nondiscrimination in employment practices" and "a grievance procedure whereby any employee [might] state a grievance and have it resolved, if not by a supervisor, then by the division head or the president" (Pet. App. 43a). The bank's general nondiscrimination policy, however, did not address sexual harassment in particular. See Plaintiff's C.A. App. 124. Moreover, the bank's grievance procedure required an employee to attempt to resolve the problem by first communicating it (orally and then in writing) to his or her supervisor (in this case, Taylor). Id. at 125. Only if that process failed would the employee's grievance, together with the supervisor's written reply, be forwarded to upper management (ibid.). On this state of the record, it cannot be determined whether the bank had made available to an employee in Vinson's position -- i.e., an employee who was an assistant branch manager, and who in consequence may previously have had some access to upper managment -- a reasonable avenue by which she could make her allegations of sexual harassment known to appropriate bank officials who were in a position to rectify the problem.

We think that the standard we have proposed provider a rule of liability that is balanced and fair, and that best serves the remedial purposes of Title VII. The gravamen of a "hostile environment" claim is that the employer has improperly tolerated a sexually discriminatory atmosphere. A charge of "toleration" is meaningless if the employer has no way of knowing about the evil, and thus no way to correcting it. If a victim, in order to establish employer liability, must prove that he or she took advantage of reasonably available complaint mechanisms, there will be a strong incentive to bring legitimate claims of sexual harassment to the employer's attention. And if the employer has implemented an effective procedure for resolving such claims, it will be in the employee's interest to use it, since failure to do so will create a presumption that the claimed harassment never took place. As this Court has noted in a related context, the use of grievance procedures should be encouraged as a mode of revolving discrimination claims, for they "may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate a resort to the judicial forum." *Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974).* Most importantly, the mode of resolution that we propose should facilitate swift and effective redress for the victims of sexual harassment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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HEADLINE: SEX HARASSMENT ON JOB IS ILLEGAL

BYLINE: By STUART TAYLOR Jr., Special to the New York Times

DATELINE: WASHINGTON, June 19

BODY:

The Supreme Court ruled unanimously today that sexual harassment of an employee by a supervisor violates the Federal law against sex discrimination in the workplace.

Sexual harassment that is ''sufficiently severe or pervasive'' to create ''a hostile or abusive work environment'' is a violation even if the unwelcome sexual demands are not linked to concrete employment benefits, the Court ruled, as several lower courts have previously held.

But the opinion, written by Justice William H. Rehnquist and joined by five others, said companies are not ''always automatically liable for sexual harassment by their supervisors.'' Women's groups had argued that they were, and a Federal appellate court had agreed.

Suit Against Bank as Employer

The case, the first one on sexual harassment ever considered by the High Court, arose from a suit by Mechelle Vinson, a former employee of the Meritor Savings Bank of Washington, against the bank and a branch manager. Ms. Vinson said that the supervisor had forced her to have sexual relations many times and that he had raped her and fondled her and other women who worked at the branch. The supervisor has denied the charges, and the decision did not close the dispute over the facts.

Justice Rehnquist's opinion said an employer's liability depends on the circumstances. He added that an employer's lack of knowledge of harassment by a supervisor ''does not necessarily insulate that employer from liability,'' but he declined ''to issue a definitive rule on employer liability.''

Justice Rehnquist also said the appellate court had erred in absolutely barring the Meritor bank from introducing testimony designed to show that the employee dressed provocatively and talked about sexual fantasies and thus demonstrated that she would have welcomed advances.

Both the Justice Department, which had sided with the employer in the case while arguing generally that sexual harassment was unlawful, and women's groups,

which had denounced the department's brief, saw the decision as vindicating their positions.

Ellie Smeal, president of the National Organization for Women, called the decision ''on balance a victory for working or employed women'' and ''a defeat for the Reagan Justice Department.''

Deputy Solicitor General Carolyn B. Kuhl said ''we're very happy'' with the decision, which she said agreed with most of the points in the department's brief. Ms. Kuhl termed insignificant the Court's rejection of the department's argument that Ms. Vinson's suit should be thrown out because the evidence supported a Federal district judge's findings that any sexual relationship between the employee and her supervisor had been ''voluntary.''

The Court sent the case back for further proceedings to determine whether any advances had been ''unwelcome.''

Women's groups were pleased that the Court definitively established that sexual harassment in the workplace violates Title 7 of the Civil Rights Act of 1964, which prohibits racial and sexual discrimination.

The Court was unanimous in adopting a broader view of Title 7 than did a dissent in the appellate court that was joined by Judge Antonin Scalia, President Reagan's choice to fill an impending vacancy on the Supreme Court.

That dissent, written by Judge Robert H. Bork, stressed ''the awkwardness of classifying sexual advances as 'discrimination,' '' and suggested, ''Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender.''

Chamber Seeks Link to Job

The Chamber of Commerce of the United States had argued in the case that ''allegations that an individual's supervisory male employee made sexual advances toward an individual subordinate female employee, without any loss or threatened loss of tangible job benefits,'' did not violate the sex-discrimination law.

Justice Rehnquist, on the other hand, ruled that ''when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex.''

Justice Rehnquist, whom the President has said he will nominate for Chief Justice, said, ''Courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.''

Justice Thurgood Marshall, in a separate opinion joined by Justices William J. Brennan Jr., Harry A. Blackmun and John Paul Stevens, said, ''I fully agree with the Court's conclusion that workplace sexual harassment is illegal,'' but he said the Court had not gone far enough.

He Sees Liability in All Cases

He said employers should be held liable whenever supervisors sexually harassed their subordinates, ''regardless of knowledge or any other mitigating factor,'' following the Equal Employment Opportunity Commission guidelines adopted several years ago.

The commission and the Justice Department, in their joint brief, repudiated the commission's guidelines on broad employer liability. They argued that liability should be imposed only on employers that ''knew or had reason to know of the sexually offensive atmosphere'' or had provided ''no reasonably available means of bringing complaints to the employer's attention and seeking redress.''

While Justice Marshall called the Justice Department's position ''untenable,'' Justice Rehnquist did not express a clear view on it. Justice Stevens signed both the Rehnquist and Marshall opinions, saying he saw no inconsistency between them.

In the case, Meritor Savings Bank v. Vinson, No. 84-1979, Ms. Vinson said that she had initially refused sexual advances by Sidney L. Taylor, the supervisor, but ultimately yielded out of fear for her job. Thereafter, she said, he forced her to have sexual relations 40 or 50 times during and after business hours, raped her, and fondled her and other women who worked there.

Mr. Taylor and the bank denied these accusations and said they were an effort to retaliate for a business-related dispute. The bank also said any sexual harassment by Mr. Taylor was unknown and unauthorized by it.

Federal District Judge John Garrett Penn ruled for the defendants, saying that he did not believe Ms. Vinson's allegations and that any sexual relationship was voluntary and did not involve job-related threats or discrimination. The United States Court of Appeals for the District of Columbia Circuit reversed his decision, saying he had applied an incorrect legal standard and should have barred ''the voluminous testimony regarding Vinson's dress and personal fantasies'' which the employer introduced in its defense.

Carolyn Kuhl: Sex Discrimination in Education (VMI)

Allegation: In 1993, while in private practice, Kuhl was the attorney of record on an amicus brief urging the Supreme Court to uphold the constitutionality of the exclusion of women from the Virginia Military Institute (VMI). *National Women's Law Center, 2003.*

Facts:

- Carolyn Kuhl represented three private women's colleges that hired her law firm to advocate the benefits of single sex education for women in an amicus brief urging the Supreme Court to hear the VMI case. There is not a single reference, positive or negative, to VMI in the brief.

  ✓ In support of their petition for writ of *certiorari*, the lawyers for VMI argued that the lower court decision "creates an artificial and unreasonable barrier" to the operation of all single-sex educational programs, including women's colleges.

  ✓ The brief submitted by Judge Kuhl's clients encouraged the Supreme Court to take the VMI case for review. By doing so, her clients were simply asking for a pronouncement from the Court that single-sex women's colleges were not in violation of the lower court's order. In fact, the Court did not take the case at that time, and did not address the merits of VMI's arguments until two years later when it came back up for review.

- Judge Kuhl's brief focused exclusively on preserving the existence of women's colleges and did not did not contain a single reference, either positive or negative, to VMI or any other all-male institution: "This Court should grant the petition for writ of *certiorari* in this case and uphold the constitutionality of single-sex education for women before the current legal uncertainty becomes a tool to eliminate institutions such as the *amici*." *Amicus Br., at 2.*

- Judge Kuhl's clients participated in the VMI case in order to break down traditional barriers to women's progress. For instance, Judge Kuhl argued on behalf of her clients that: "A diverse body of literature suggests that women attending single-sex schools may be even more likely than their peers at coeducational schools to pursue male-dominated careers." *Amicus Br., at 11.*

- Representatives of inner-city single-sex academies, as well as other women's colleges including Wells College, Randolph-Macon Woman's College, Sweet Briar College, and Hollins College, filed amicus briefs that advocated a position nearly identical to that contained in Judge Kuhl's brief.

- Susan Estrich, noted liberal and Michael Dukakis' presidential campaign manager, along with several other women's education scholars, filed a brief in support of VMI's legal position in 1995. Professor Estrich argued that single sex education benefits both men and women, and that VMI should be allowed to remain exclusively male.

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. RECENT STUDIES INDICATE THAT SINGLE-SEX EDUCATION PROVIDES SUBSTANTIAL BENEFITS TO WOMEN	2
A. Single-Sex Education's Contribution to Higher Academic Achievement and Self-Esteem in Women	3
1. *Single-Sex Education Has A Positive Effect On Performance And Attitudes*	3
2. *Single-Sex Education Has Been Linked With Greater Academic Achievement*	8
B. Single-Sex Education's Role in Encouraging Women to Pursue Male-Dominated Careers	11
C. Single-Sex Education As a Beneficial Alternative to a Coeducational Environment	14
II. THE CURRENT STATE OF THE LAW CASTS DOUBT ON THE CONSTITUTIONAL VALIDITY OF SINGLE-SEX EDUCATION AND THEREFORE THREATENS WOMEN'S COLLEGES	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 18

Cooper v. Aaron, 358 U.S. 1 (1955) 17, 18

Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967) 17

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 16

Norwood v. Harrison, 413 U.S. 455 (1973) 17

Trustees of Smith College v. Bd. of Assessors, 385 Mass. 767, 434 N.E. 2d 182 (1982) 18, 19, 20

United States v. Hinds County School Bd., 560 F.2d 619 (5th Cir. 1977) 20

STATUTES

The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* 20

OTHER AUTHORITIES

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS (1992) 13, 15

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, SHORTCHANGING GIRLS, SHORTCHANGING AMERICA (1991) 13, 14

A. ASTIN, FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE (1977) 7

A. ASTIN, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED (1993) 7

Becker, *Differential Treatment of Females and Males in Mathematics Classes*, 12 J. RES. MATHEMATICS EDUC. 40 (1981) 13

Bressler & Wendell, *The Sex Composition of Selective Colleges and Gender Differences In Career Aspirations*, 51 J. HIGHER EDUC. 660 (1980) 11, 12

Constantinople, Cornelius & Gray, *The Chilly Climate; Fact or Artifact?*, 59 J. HIGHER EDUC. 528 (1988) 15

Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status Of Single-Sex Education For Women*, 86 W. VA. L. REV. 295 (1984) 18, 19

TABLE OF AUTHORITIES—Continued

Page

Feldblum, Krent & Watkin, *Legal Challenges To All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171 (1986) 17, 19

Gallagher, *Desegregation: The Effect Of The Proposed Equal Rights Amendment On Single-Sex Colleges*, 18 ST. LOUIS U.L.J. 41 (1973) 17

Gilbert, Gallessich & Evans, *Sex of Faculty Role Model and Students' Self Perceptions of Competency*, 9 SEX ROLES 597 (1983) 10

Ginsburg, *Sex Discrimination In The IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27 (1980) 18

Hall, *Classroom Climate for Women: Tip of the Iceberg*, 51 A. FOR COM. ADMIN. BULL. 64-67 (1985) 15

R. HALL & B. SANDLER, THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN? PROJECT ON THE STATUS AND EDUCATION OF WOMEN (1992) 15

Heller, Puff & Mills, *Assessment of the Chilly College Climate for Women*, 56 J. HIGHER EDUC. 446 (1985) 15

Jones, *Outcome of Girls' Schooling: Unravelling Some Social Differences*, 34 AUSTRALIAN J. EDUC. 153 (1990) 14

Lawrie & Brown, *Sex, Stereotypes, School Subject Preferences and Career Aspirations as a Function of Single/Mixed-Sex Schooling and Presence/Absence of an Opposite Sex Sibling*, 62 BRIT. J. EDUC. PSYCHOLOGY 132 (1992) 12

Lee & Bryk, *Effects of Single-Sex Schools: Response to Marsh*, 81 J. EDUC. PSYCHOLOGY 647 (1989) 5

Lee & Bryk, *Effects of Single-Sex Secondary Schools on Student Achievements and Attitudes*, 78 J. EDUC. PSYCHOLOGY 381 (1986) 3, 4, 13

Lee & Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. EDUC. PSYCHOLOGY 578 (1990) 4, 12, 13

TABLE OF AUTHORITIES—Continued

Page

Marsh, *Effects of Attending Single-Sex and Co-educational High Schools On Achievement, Attitudes, Behaviors and Sex Differences*, 81 J. EDUC. PSYCHOLOGY 70 (1989) 5

Miller, *The Future Of Private Women's Colleges*, 7 HARV. WOMEN'S L.J. 153 (1984) 17, 18, 19

Oates & Williamson, *Women's Colleges & Women Achievers*, 3 SIGNS: J. WOMEN CULTURE & SOC'Y 795 (1978) 8

Rhode, *Association and Assimilations*, 81 Nw.U.L. REV. 106 (1986) 17

Rice & Hemmings, *Women's Colleges and Women Achievers: An Update*, 13 Signs: J. WOMEN CULTURE & SOC'Y 346 (1988) 9, 10

C. RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? (1990) 2, 3, 5, 6, 13

Riordan, *Public and Catholic Schooling: The Effects of Gender Context Policy*, 93 AM. J. EDUC. 518 (1985) 5

Rowe, *Single-Sex and Mixed-Sex Classes: The Effects of Class Type on Student Achievement, Confidence and Participation in Mathematics*, 32 AUSTRALIAN J. EDUC. 180 (1988) 14

Rubenfeld & Gilroy, *Relationship Between College Women's Occupational Interests and a Single-Sex Environment*, 40 CAREER DEV. Q. 64 (1991) 12

Smith, *Women's Colleges and Coed Colleges: Is There A Difference For Women?*, 61 J. HIGHER EDUC. 181 (1990) 7

Stoecker & Pascarella, *Women's Colleges and Women's Career Attainments Revisited*, 62 J. HIGHER EDUC. 394 (1991) 12

Stowe, *Should Physics Classes Be Single Sex?*, PHYSICS TEACHER, September 1991, at 380 13

Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & EDUC. 171 (1982) 19

TABLE OF AUTHORITIES—Continued

	Page
Tidball & Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 193 SCIENCE 645 (1976)	11
Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. HIGHER EDUC. 385 (1985)	11
Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 57 J. HIGHER EDUC. 606 (1986)	11
Tidball, *Perspective On Academic Women and Affirmative Action*, 54 EDUC. REC. 130 (1973)	8, 10
Tidball, *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: J. WOMEN CULTURE & SOC'Y 546 (1988)	9
Trice, *Advantages of the Women's College: What Research Has To Tell Us*, MARY BALDWIN MAG., April 1991, at 10	10
Williams, *Is The Post-Secondary Classroom a Chilly One for Women? A Review of the Literature*, 23 CANADIAN J. HIGHER EDUC. 29 (1990)	15

BRIEF OF MARY BALDWIN COLLEGE, SAINT MARY'S COLLEGE, AND SOUTHERN VIRGINIA COLLEGE FOR WOMEN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Mary Baldwin College is a private four-year liberal arts college for women in Staunton, Virginia. The college is committed to academic excellence and to the education of women in a time of expanding opportunities. Educational programs at the college are designed to provide the foundation for future careers and positions of leadership.

Saint Mary's College is a private two-year liberal arts college and upper level preparatory school for women in Raleigh, North Carolina. The college is dedicated to developing women's confidence and leadership skills, and preparing women for continued study toward a baccalaureate degree and future professional careers, and for lives in which they can be confident, adventurous, productive and fulfilled through their choices. The college offers a traditional liberal arts program.

Southern Virginia College for Women is a private two-year college for women in Buena Vista, Virginia. It is committed to preparing its students for continued study towards a baccalaureate degree, providing its students with career-oriented programs, and creating opportunities for each student to grow and learn in a supportive atmosphere that encourages the development of academic skills and self-confidence.

Amici are dedicated to single-sex education. As private women's colleges, they can attest that a single-sex environment offers women significant advantages that are unobtainable in a coeducational setting. *Amici* are concerned that the Fourth Circuit's decision in this case raises troubling constitutional issues that ultimately could threaten the viability of single-sex education for women.

SUMMARY OF ARGUMENT

Recent studies strongly suggest that single-sex education for women at the secondary and post-secondary level promotes women's academic and career achievement and encourages women to pursue traditionally male-dominated careers. In an era of educational crisis this country cannot afford to abandon successful educational programs such as those offered by the *amici*.

The current state of the law, including the opinion of the Fourth Circuit in this case, casts doubt on the constitutional validity of single-sex education for women. Women's colleges cannot continue to exist if the legal system refuses to recognize the legitimacy of the benefits of single-sex education for women. This Court should grant the petition for writ of *certiorari* in this case and uphold the constitutionality of single-sex education for women before the current legal uncertainty becomes a tool to eliminate institutions such as the *amici*.

ARGUMENT

I. RECENT STUDIES INDICATE THAT SINGLE-SEX EDUCATION PROVIDES SUBSTANTIAL BENEFITS TO WOMEN

Since the 1960's and 1970's the number of women's colleges in the United States has dwindled. In 1960, there were 268 women's colleges in the United States. C. RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 37 (1990). Today, there are only about 56. Pet. App. 52a.

Although this movement away from single-sex education evolved from a variety of economic and societal concerns, those women's colleges that remain have not stood still in the past. The women's colleges of today do not perpetuate outmoded, stereotypical views of women. On the contrary, these colleges play a significant role in the education and development of highly successful

women, many of whom go on to pursue male-dominated careers.

An impressive body of recent studies on single-sex and mixed-sex education at both pre-college and college levels confirms the continued importance of these institutions in American education today. These studies demonstrate that single-sex schools lead to higher achievement and self-esteem in women, encourage women to pursue traditionally male-dominated careers, and alleviate some of the disadvantages women may suffer in a coeducational setting.

A. Single-Sex Education's Contribution to Higher Academic Achievement and Self-Esteem in Women

1. *Single-Sex Education Has A Positive Effect On Performance And Attitudes*

Recent studies analyzing questionnaire, performance test or school record data strongly suggest that, at both the secondary and college levels, women in single-sex schools not only outperform their peers in mixed-sex schools, but show higher levels of self-esteem and a greater sense of personal control.

In one of the most frequently cited of these studies, Professors Valerie Lee and Anthony Bryk compared the effects of single-sex and mixed-sex Catholic secondary schools on a number of specific variables, including areas of academic achievement, achievement gains, educational aspirations, self-image, sense of personal control over environment, and attitudes and behaviors related to academics.[1] *See* Lee & Bryk, *Effects of Single-Sex Secondary*

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[1] Because of the scarcity of single-sex public schools in this country, several of the studies comparing single-sex and mixed-sex secondary schools have used data from private Catholic schools. For a discussion of the formal and informal structure of these Catholic schools, see C. RIORDAN, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 62-81 (1990).

Schools on Student Achievements and Attitudes, 78 J. EDUC. PSYCHOLOGY 381 (1986) (hereinafter "Lee & Bryk (1986)"). Analyzing data from a longitudinal study of randomly-selected high school sophomores and seniors entitled "High School and Beyond," Professors Lee and Bryk "found that single-sex schools appear to deliver specific advantages to their students." *Id.* at 394. Relative to their peers in the coeducational schools, girls from the single-sex schools were more likely to "express specific interests in both mathematics and English," *id.* at 387, demonstrated "significantly greater gains in reading, science, and educational ambition over the course of their high school years," *id.* at 394, and had higher ratings for self-image and sense of personal control, *id.* at 386.

Professors Lee and Bryk attributed these positive results to the absence of distractions and pressures caused by members of the opposite sex:

> [S]ingle-sex secondary schooling may in fact serve to sensitize young women to their occupational and societal potentials in an atmosphere free of some of the social pressures that female adolescents experience in the presence of the opposite sex. Adolescence is a critical period for the formation of attitudes about oneself. It may be that some separation of students' academic and social environments removes the distractions that can interfere with the academic development of some students.

Id. at 394. A follow-up study based on additional data obtained in the second and fourth years after graduation demonstrated that the beneficial effects of single-sex high school experience persisted into the college years. *See* Lee & Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. EDUC. PSYCHOLOGY 578 (190) (hereinafter "Lee & Marks").[2]

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[2] Although most of the studies analyzing the "High School and Beyond" data have found significant advantages for single-sex

The work of Cornelius Riordan, an Associate Professor of Sociology at Providence College, supports these findings. Professor Riordan has conducted three recent studies on single-sex education which have culminated in a recently published book, GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? (1990) (hereinafter "RIORDAN (1990)"). In the first of these studies, Professor Riordan analyzed data from the High School and Beyond survey to examine the influence of single-sex and mixed-sex Catholic school education on advanced mathematics, writing, science, civics, self-esteem, and sense of personal control. *Id.* at 82-113. The results significantly favored the single-sex schools. On average, girls in the single-sex schools "score[d] about one-third of a grade equivalent higher than girls in mixed-sex schools," scoring "almost one full year" higher in science. *Id.* at 112. Girls in the single-sex category also scored higher on measures of self-esteem and personal control than did the girls in the mixed-sex category. *Id.* at 109-10.[3]

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schools, one study found no significant effects due to a single-sex education. *See* Marsh, *Effects of Attending Single-Sex and Coeducational High Schools On Achievement, Attitudes, Behaviors and Sex Differences*, 81 J. EDUC. PSYCHOLOGY 70 (1989). Professors Lee and Bryk have criticized this study on methodological grounds. *See* Lee & Bryk, *Effects of Single-Sex Schools: Response to Marsh*, 81 J. EDUC. PSYCHOLOGY 647 (1989).

[3] The results of Professor Riordan's 1990 study are consistent with an earlier study in which he compared the effects of single-sex Catholic, mixed-sex Catholic, and mixed-sex public schools. *See* Riordan, *Public and Catholic Schooling: The Effects of Gender Context Policy*, 93 AM. J. EDUC. 518 (1985). Although Riordan found virtually no difference between the mixed-sex Catholic and mixed-sex public schools, the performance of students from the Catholic single-sex schools was significantly greater than the performance of students from the mixed-sex schools. Riordan concluded that "[o]n average, Catholic single-sex schools are nearly twice as effective as Catholic mixed-sex schools" and attributed this difference to the "reduced adolescent subculture" and the "greater availability of same-sex role models" found in the single-sex schools. *Id.* at 536.

In the second of his three studies, Professor Riordan investigated the long-term outcomes of single-sex education. *Id.* at 114-15, 129-34. This study analyzed questionnaire and performance test data from the National Longitudinal Study of the High School Class of 1972, a survey that recorded performance test and questionnaire data from high school seniors in the year 1972, and collected additional data from those same students for the years 1973, 1974, 1976, 1979 and 1986. Professor Riordan concluded that the beneficial effects of single-sex education on cognitive ability persist as many as seven years after graduation from high school. *Id.* at 134. In addition, the girls from the single-sex high schools "achieved higher education than their female counterparts from mixed-sex high schools." *Id.* at 134.

Professor Riordan's work also demonstrates that the benefits of single-sex education are not limited to the secondary school level. In the third of his three recent studies, he used the National Longitudinal Study of the Class of 1972 to compare data from women who had attended single-sex colleges with data from women who had attended mixed-sex colleges. *Id.* at 116-28, 133-34. The study found that "women's colleges have a very strong influence on both educational and occupational achievement." *Id.* at 133.

In analyzing the results of his extensive research, Professor Riordan has concluded that

> [S]ingle-sex schools offer an environment that is more conducive to learning than mixed-sex schools, especially for women. They provide more role models for students, and they offer more order and control than mixed-sex schools. In all-girls schools, the adolescent climate is weak, allowing an academic climate to flourish.

Id. at 151.

Professor Riordan's results are consistent with a recent study by Daryl G. Smith, a Professor of Education

and Psychology at the Claremont Graduate School. *See* Smith, *Women's Colleges and Coed Colleges: Is There A Difference For Women?*, 61 J. HIGHER EDUC. 181 (1990). Analyzing data from students enrolled in single-sex and coeducational colleges in 1982 and questioned four years later, Professor Smith found that "women's colleges relate positively to a variety of measures of student satisfaction, perceived changes in skills and abilities, and educational aspirations and educational attainment." *Id.* at 191. Significantly, students from the women's colleges were more likely to obtain a degree from their institutions than their counterparts at the coeducational colleges. *Id.* at 191-92. Students from the women's colleges also gave high ratings to measures "having to do with the academic program of the institution and the contact with faculty and administration, as well as perceived changes in values of tolerance and cultural awareness." *Id.* at 191. The only area where students from coeducational schools rated their experience more positively than did students from the women's colleges was in the area of social life.[4] *Id.* at 192.

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[4] Professor Smith analogized his findings to those of Professor Alexander Astin in FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE (1977). FOUR CRITICAL YEARS was a comprehensive study of educational environments that, like Smith's study, concluded that the single-sex environment produced significant advantages for its students. In a more recent study, Professor Astin has suggested that "institutional type, as such, has little direct effect on student development." *See* A. ASTIN, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 323 (1993). Nevertheless, Astin still found that attending a women's college was positively associated with numerous factors including baccalaureate completion, satisfaction with faculty and overall quality of instruction, leadership measures, writing skills, analytical and problem-solving skills and critical thinking ability. *Id.* at 324. Most of these positive effects were "directly attributable to attending a women's college" and could not "be entirely explained or accounted for on the basis of other characteristics, such as small size, residential emphasis, and private control." *Id.* at 325.

Regardless of whether the positive effects identified in these studies are due to a weakened "adolescent climate," the presence of female role models, or other factors, the studies support the view that, at least during the critical developmental years that occur in late adolescence through college, some women benefit from a single-sex education.

2. *Single-Sex Education Has Been Linked With Greater Career Achievement*

In addition to those studies that measure achievement through questionnaire data, performance tests, and school records, there are also studies suggesting that women graduates of single-sex colleges are more likely than their peers at coeducational institutions to have been recognized for their career achievement.

In the first of these studies, Professor Elizabeth Tidball of George Washington University Medical Center analyzed a sample of randomly-selected women cited in "Who's Who of American Women." *See* Tidball, *Perspective On Academic Women and Affirmative Action*, 54 EDUC. REC. 130 (1973) (hereinafter "Tidball (1973)"). She concluded that, relative to the total number of their women graduates, the women's colleges produced a higher proportion of "achievers" than did the coeducational colleges. *Id.* at 132.

Some later studies have criticized the Tidball study on the ground that a disproportionate number of the "achievers" who had graduated during the years under study (1910 through 1940) were from the highly selective Seven Sisters Colleges (Barnard, Bryn Mawr, Radcliffe, Mount Holyoke, Smith, Vassar, and Wellesley).[5]

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[5] One study, for example, has suggested than many of the women who attended these highly selective colleges would have attended the Ivy League colleges had they been open to women during the years in question. *See, e.g.*, Oates & Williamson, *Women's Colleges and Women Achievers*, 3 SIGNS: J. WOMEN CULTURE & SOC'Y 795, 803 (1978).

Notwithstanding these criticisms, more recent studies have suggested that women's colleges may, in fact, play an important role in producing successful graduates. In one such study, Professor Tidball reanalyzed her own data and found that, relative to the total number of women graduates, "highly selective women's colleges were twice as likely to have produced achievers as were the highly selective coeducational colleges." *See* Tidball, *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: J. WOMEN CULTURE & SOC'Y. 504, 512 (1980). "Similarly, all other women's colleges were twice as likely to have produced achievers as were all other coeducational colleges." *Id.*

An even more recent study partially replicated Professor Tidball's results using data from women achievers who had graduated in more recent decades. Rice & Hemmings, *Women's Colleges and Women Achievers: An Update*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y 546 (1988) (hereinafter "Rice & Hemmings"). The study's purpose, in part, was to investigate whether "the tumultuous decade of women's college closings has had an effect on the number of women achievers who have graduated from women's colleges, as compared to coeducational institutions." *Id.* at 552. Although the results were not statistically significant, the sudy found that in proportion to the total number of women graduates women's colleges had one and one-half as many graduates who were achievers as did the coeducational colleges during the decade of the 1970's. *Id.* at 556.[6]

The success of women's colleges in producing a high rate of women achievers has been the subject of much discussion. Professor Tidball attributed her results to the

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[6] Although some commentators have questioned whether being listed in "Who's Who of American Woman" is the most reliable measure of career success, Rice and Hemmings have observed that the publication "provides a readily available compilation of women who have achieved career accomplishments in a broad range of fields." Rice & Hemmings, 552.

prevalence of female faculty role models and mentors at women's colleges. She found that, for both single-sex and coeducational colleges, the number of "career-successful women graduates" increased as the ratio of women faculty members to women students increased. Tidball (1973), 135. Other researchers have similarly concluded that "[t]here seems little question that an environment in which many women teachers and mentors provide traditional and nontraditional examples of achievement is an advantage to young women." Rice & Hemmings, 558.[7]

The presence of female mentors and role models may not be the sole explanation for the beneficial effect of women's colleges. After conducting his own review of the literature, Professor Ashton Trice of Mary Baldwin College has recently concluded that "the best interpretation of these studies is that special advantages accumulate for women educated at *academically rigorous* women's colleges." Trice, *Advantages of the Women's College: What Research Has To Tell Us*, MARY BALDWIN MAG., April 1991, at 10, 12 (emphasis in original). In addition to the prevalence of women role models, these special advantages may include a greater attention to women's development in mathematics and science, greater opportunities to assume leadership roles, and a more relaxed atmosphere due to the absence of men. *Id.* at 13-14.

While it may be difficult to isolate the specific reasons why women's colleges have been successful in producing a high rate of women achievers, these studies indicate that women's colleges offer significant advantages over coeducational institutions.

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[7] Other types of studies support the importance of same-sex role models. One study has found that "[f]emale graduate students identifying female professors as role models viewed themselves as more career oriented, confident, and instrumental than did female students identifying male role models." *See* Gilbert, Gallessich & Evans, *Sex of Faculty Role Model and Students' Self Perceptions of Competency*, 9 SEX ROLES 597, 604 (1983).

B. Single-Sex Education's Role in Encouraging Women to Pursue Male-Dominated Careers

A diverse body of literature suggests that women attending single-sex schools may be even more likely than their peers at coeducational schools to pursue male-dominated careers.

Following her pioneering study on women achievers in 1973, Professor Tidball performed three additional studies to examine the baccalaureate origins of scientists and scholars, men and women entering medical school, and men and women with natural science doctorates. *See* Tidball & Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 198 SCIENCE 645 (1976); Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. HIGHER EDUC. 385 (1985); Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 57 J. HIGHER EDUC. 606 (1986). In each of these studies, Professor Tidball found that, relative to the total number of women graduates, the women's colleges produced a significantly higher proportion of graduates in these fields of study than did coeducational colleges.

In yet another study, Professor of Sociology Marvin Bressler of Princeton University and his collegue Peter Wendell explored the impact of single-sex and mixed-sex colleges on career aspirations. *See* Bressler & Wendell, *The Sex Composition of Selective Colleges and Gender Differences In Career Aspirations*, 51 J. HIGHER EDUC. 660 (1980). Analyzing responses to a national survey of male and female undergraduates enrolled in single-sex and coeducational colleges, the study concluded that between freshman and senior year, there was a significant increase in the number of women from single-sex colleges who intended to pursue more "masculine" vocations. *Id.* at 660. The greatest effect was found in the number of women who intended to become college professors or lawyers.[8] *Id.* In contrast, the coeducational colleges had "no

[8] Among the other "masculine" professions included in the study were physician, accountant, business executive, business owner, engineer, scientific researcher, and religious occupations.

appreciable demonstrable influence on the career ambitions of either sex." *Id.* at 662. Based on these results, the researchers suggested that "sexual parity in the occupational domain might be better served if larger numbers of young women were to enroll in single-sex colleges." *Id.*[9]

An even more recent study analyzing questionnaire data from college women has suggested that single-sex education along with family structure plays an important role in influencing career choice. *See* Rubenfield & Gilroy, *Relationship Between College Women's Occupational Interest and a Single-Sex Environment*, 40 CAREER DEV. Q. 64 (1991). The study found that college women who had attended single-sex high schools and had brothers were more likely to choose nontraditional careers compared to their peers who had attended mixed-sex high schools, regardless of sibling gender. The study suggests that, although there are numerous factors that might affect a woman's career choice, "the opportunity to interact in a single-sex environment is important at some stage of a young woman's life, if she is to develop nontraditional interests." *Id.* at 70.[10]

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[9] Lee and Marks similarly found that women who attended single-sex secondary schools were more likely than their peers from mixed-sex schools to consider application to law school. *See* Lee & Marks, 586. While not all studies have reported these significant effects on career choice, *see, e.g.*, Stoecker & Pascarella, *Women's Colleges and Women's Career Attainments Revisited*, 62 J. HIGHER EDUC. 394 (1991), the great weight of the research is in favor of women's colleges.

[10] A recent British study of secondary school students has concluded that, whether at home or at school, "increased contact" with the opposite sex has *not* led to a "breakdown in sex stereotypical attitudes but, if anything, the reverse." *Id.* at 138. *See* Lawrie & Brown, *Sex Stereotypes, School Subject Preferences and Career Aspirations as a Function of Single/Mixed-Sex Schooling and Presence/Abence of an Opposite Sex Sibling*, 62 BRIT. J. EDUC. PSYCHOLOGY 132 (1992). The study suggested that girls "in sexually homogeneous environments" might have "some slight advantage over their peers in more heterogenous settings." *Id.* at 138.

These studies on career choice are consistent with other studies demonstrating that women who attend single-sex colleges or high schools have less stereotypical views about gender roles than do women attending coeducational schools. Professor Lee and her colleagues have shown that women who attend single-sex high schools or single-sex colleges have less stereotypical views about the compatibility of work and motherhood, and the traditional role of men as achievers. Lee & Bryk (1986), 389; Lee & Marks, 584-85. Similarly, Professor Riordan demonstrated that women graduates of single-sex colleges and high schools hold "more liberal attitudes toward working women" and "much stronger views toward equal sex roles" than their peers at single-sex schools. *See* RIORDAN (1990), 110, 133-134.

Yet another body of research has indicated that single-sex education may have a positive effect on women's participation and interest in the traditionally male-dominated fields of mathematics and science.[11] One study, for example, concluded that single-sex high school physics classes had a "statistically significant, positive influence upon girls' interest in physics-related careers, while mixed-sex classes may have had a slight negative influence." Stowe, *Should Physics Classes Be Single Sex?*, PHYSICS TEACHER, September, 1991, at 380.

A similar study of single-sex classes in post-primary schools in Australia concluded that "students in single-sex classes indicated significantly higher gains in confidence over time than those in mixed-sex classes" and

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[11] A substantial number of studies have shown that girls generally participate less, receive less teacher attention, and show less interest and confidence than do boys in the subjects of mathematics and science. *See, e.g.*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 24-30 (1992); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, SHORTCHANGING GIRLS, SHORTCHANGING AMERICA 12-14 (1991); Becker, *Differential Treatment of Females and Males in Mathematics Classes* 12 J. RES. MATHEMATICS EDUC. 40 (1981).

that this confidence "significantly increased the likelihood" of "subsequent participation" in mathematics. Rowe, *Single-Sex and Mixed-Sex Classes: The Effects of Class Type on Student Achievement, Confidence and Participation in Mathematics*, 32 AUSTRALIAN J. EDUC. 180, 195-96 (1988).[12] These findings may be of critical importance given a recent study indicating that adolescents who like math and science "express stronger desires for careers as teachers, doctors and scientists" and "are more likely to aspire to careers as professionals." AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, SHORTCHANGING GIRLS, SHORTCHANGING AMERICA 15 (1991).

Viewed as a whole, these studies demonstrate that there may be a significant link between single-sex education and nontraditional career choice. If greater equality between the sexes is one of the goals of education today, single-sex schools may be a valuable tool in accomplishing this end.

C. Single-Sex Education As a Beneficial Alternative to a Coeducational Environment

The studies that demonstrate the benefits of single-sex education in terms of academic achievement, self-esteem and career choice are consistent with a related body of research indicating that some women may suffer disadvantages in a coeducational setting. This related body of research may explain, in part, why some women perform better in a single-sex setting. It also offers an additional reason why single-sex education should be preserved as an option to coeducation.

In a recently published study commissioned by the American Association of University Women, researchers

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[12] Another study has similarly concluded that single-sex education, although not a sole-factor, is a "contributory factor . . . for ensuring that girls continue in mathematics and science." Jones, *Outcome of Girls' Schooling: Unravelling Some Social Differences*, 34 AUSTRALIAN J. EDUC. 153, 161 (1990).

at the Wellesley College Center for Research on Women concluded that "[t]here is clear evidence that the educational system is not meeting girls' needs." AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 2 (1992). Although "[g]irls and boys enter school roughly equal in measured ability . . . . [t]welve years later, girls have fallon behind their male classmates in key areas such as higher-level mathematics and measures of self-esteem." *Id.* Among the study's findings were that girls participate less and receive less teacher attention and encouragement than do boys, and are discouraged from pursuing careers in science. *Id.* at 28, 68-69.

Several studies have reported that women suffer similar disadvantages at the college level. *See, e.g.*, R. HALL & B. SANDLER, THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN? PROJECT ON THE STATUS AND EDUCATION OF WOMEN (1982); Hall, *Classroom Climate for Women: Tip of the Iceberg*, 51 A. FOR COM. ADMIN. BULL. 64 (1985). A recent review of this literature has concluded that the women's lack of participation might be due to the "lack of female role models and gender biased classroom behavior on the part of the professors." Williams, *Is The Post-Secondary Classroom a Chilly One for Women? A Review of the Literature*, 23 CANADIAN J. HIGHER EDUC. 29, 40 (1990).

Although some studies have challenged the view that coeducational college classrooms present a "chilly climate" for women,[13] the fact that the issue has been the subject of controversy is testimony to the need for continued experimentation on the relative values of single-sex and mixed-sex education.

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[13] *See, e.g.*, Heller, Puff & Mills, *Assessment of the Chilly College Climate for Women*, 56 J. HIGHER EDUC. 446 (1985); Constantinople, Cornelius & Gray, *The Chilly Climate: Fact or Artifact?*, 59 J. HIGHER EDUC. 527 (1988).

II. THE CURRENT STATE OF THE LAW CASTS DOUBT ON THE CONSTITUTIONAL VALIDITY OF SINGLE-SEX EDUCATION AND THEREFORE THREATENS WOMEN'S COLLEGES

The implications for women's colleges of the Fourth Circuit's decision in this case are uncertain but potentially very troubling. Although the court of appeals purported to recognize "that single-sex education is pedagogically justifiable" (Pet. App. 17a), it nevertheless held that the school could not continue to exist as a single-sex institution unless an *identical* program for the other sex was provided.

As discussed above, a substantial body of literature demonstrates that women can benefit from a pre-professional school education that is separate from, and in some respects different from, a coeducational institution. This literature is not based on outmoded stereotypes about the "proper" roles of men and women. To the contrary, it suggests that through single-sex education women achieve enhanced performance in careers and particularly in male-dominated careers. Women should not be denied these educational benefits if men do not benefit from or choose to attend identical institutions, or if government support for identical male-only institutions is not equal to the support given women's institutions.

The decision of the court below only enhances the doubt about the legal viability of single-sex education for women engendered by this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Even though the Court did not purport in that case to decide that single-sex education never can be justified, the majority's failure to acknowledge any benefits to women from single-sex education leaves uncertain the Court's willingness to consider those benefits.[14] As one commenta-

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[14] As indicated by the discussion in the preceding sections of this brief, studies published subsequent to the decision in *Hogan* provide even more solid support for the benefits of single-sex education for women than the studies available at the time of the *Hogan* decision.

tor has stated: "Given the uncertain scope and symbolic significance of its holding, the majority's cursory evaluation of the merits of single-sex education remains troubling." Rhode, *Association and Assimilation*, 81 NW.U.L. REV. 106, 140 (1986).

Although *amici* all are private women's colleges, the uncertain constitutional status of single-sex education threatens these institutions. Several commentators have concluded that courts probably "will reach the conclusion that government may not provide direct financial support to institutions which practice discrimination prohibited to government by constitutional standards of equality." Gallagher, *Desegregation: The Effect Of The Proposed Equal Rights Amendment On Single-Sex Colleges*, 18 ST. LOUIS.U.L.J. 41, 67 (1973). *See* Feldblum, Krent & Watkin, *Legal Challenges To All-Female Organizations*, 21 HARV.C.R.-C.L. L.REV. 171, 196 (1986) (hereinafter "Feldblum") (discussing strategies for suit against a government official who disbursed funds to a single-sex organization that received the funds "and discriminated on the basis of sex in that program"); Miller, *The Future Of Private Women's Colleges*, 7 HARV.WOMEN'S L.J. 153, 158-161 (1984) (hereinafter "Miller") (discussing the availability of a challenge to Title IX funding of single-sex schools). The commentators find support for this conclusion in the Supreme Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973):

> Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967).

Id. at 465.[15]

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[15] See also *Cooper v. Aaron*, 358 U.S. 1, 19 (1958):

> [S]tate support of segregated schools through any arrangement, management, funds or property cannot be squared with the

Commentators also have postulated the threat of a cut-off of tax exemptions for private single-sex schools. "Should the Supreme Court rule as it has done with respect to race that separation by sex in education is inherently unequal, the IRS would not only be justified in denying tax exempt status to private schools with sex-resrictive admissions policies but it might well be forced to do so." Dubnoff, *Does Gender Equality Always Imply Gender Blindness? The Status Of Single-Sex Education For Women*, 86 W. VA. L. REV. 295, 310 (1984) (hereinafter "Dubnoff") (analyzing the implications of *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), for single-sex schools' tax exemptions). *See also* Miller, 163-165. While the Fourth Circuit's opinion in this case does not go so far as to hold that separation by sex is inherently unequal, it takes a significant step in that direction by apparently banning single-sex institutions for which a mirror image version of the institution does not exist for the other sex.

The threat of a challenge to a private single-sex college's tax-exempt status is not an idle one.[16] State tax assessors sought to challenge Smith College's tax exemption on the ground that the women's college "was not entitled to an exemption because it engaged in sex discrimination in violation of Federal and State law." *Trus-*

[Fourteenth] Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

[16] A 1977 IRS letter ruling concluded that a donor's limitation of scholarships to male donees "is not a bar to charitable deduction . . . [because] classification based on sex is not against declared Federal public policy and is educationally and socially beneficial to the community at large." IRS Letter Ruling (Technical Advice Memorandum) 7744007 (1977). This ruling, however, has been severely criticized as "flagrantly disregard[ing] or misconstru[ing] pertinent federal judicial and legislative pronouncements . . . ." Ginsburg, *Sex Discrimination In The IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27 (1980).

tees of Smith College v. Bd. of Assessors, 385 Mass. 767, 768, 434 N.E. 2d 182 (1982).[17]

Potential direct challenges to the existence of private, single-sex colleges have been discussed by commentators as well.[18] But a challenge to the funding or tax-exempt status of a women's college is itself likely to threaten the existence of the school. "Since most private colleges and universities receive financial support from the government and benefit greatly from tax exempt status, the threat of withdrawal of these privileges along with the likely ineligibility of students to receive government assistance means that these institutions must in practice comply with constitutional restrictions." Dubnoff, 298.

Currently there are approximately 56 women's colleges enrolling about 64,000 students and only eleven men's colleges enrolling about 11,000 students. Pet. App. 52a. None of these women's colleges is in a position to provide an equivalent education for men or to assure that the government equally supports identical all-male institutions. Moreover as a practical as well as a legal matter these women's colleges cannot continue to function if the legal system refuses to recognize the legitimacy

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[17] The Massachusetts Supreme Judicial Court did not reach the merits, as it held that the tax assessors were not vested with authority to raise the constitutional challenge.

[18] *See, e.g.*, Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & EDUC. 171, 195, 205 (1982) (suggesting that courts may decline to enforce the decisions of educational institutions unless they conform to constitutional standards and reviewing the arguments of "numerous commentators . . . for application of equitable principles to private institutions of higher learning"); Feldblum, 199 (even though "under current doctrine most private organizations are unlikely to be found to be 'state actors,'" "creative litigation" strategies may expand cases where state action is found); Miller, 158 (noting that despite the current scope of the state action doctrine, "[c]ivil rights advocates continue to demand that private institutions adhere to basic norms of fair and equal treatment").

of the benefits of single-sex education for women. The uncertainty of the current state of the law encourages the sort of legal challenges attempted in the *Smith* case. Even if unsuccessful, such legal challenges strain the resources of private institutions. In addition, public officials may be affected in their legislative judgments by the courts' failure to affirm the constitutional validity of single-sex education for women.[19]

This country faces an educational crisis. Studies strongly suggest that single-sex education for women furthers the academic and career achievements of women. This country cannot afford to cut off even potentially effective educational programs. This Court should speak to uphold the constitutionality of single-sex education for women before legal uncertainty becomes a tool to eliminate those institutions.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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[19] The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701, 1703(c), has been held to prohibit assignment of pupils to public single-sex schools. *United States v. Hinds County School Bd.*, 560 F.2d 619 (5th Cir. 1977).