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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1.personal data questionnaire	re Antonin Scalia (9 pp.)	n.d.	~~P6~~ B6
2.Questionnaire	re Antonin Scalia. part IV confidential (4 pp.)	n.d.	~~P6~~ B6 CC3 1/3/01

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

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

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

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THIS FORM MARKS THE FILE LOCATION OF ITEM NUMBER 1 LISTED ON THE WITHDRAWAL SHEET AT THE FRONT OF THIS FOLDER.

QUESTIONNAIRE

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name:

Antonin Scalia.

2. Address:

Office: United States Court of Appeals for the
District of Columbia Circuit
United States Courthouse; Room 3836
3d Street & Constitution Avenue, N.W.
Washington, D.C. 20001

Home: 6713 Wemberly Way
McLean, Virginia 22101

3. Date and place of birth:

March 11, 1936; Trenton, New Jersey.

4. Marital Status. Wife's maiden name and occupation:

Marital status: Married.
Wife's maiden name: Maureen McCarthy.
Wife's occupation: Homemaker.

5. Education:

College:

Georgetown University College of Arts and Sciences Washington, D.C.	1953-57	A.B. 1957
University of Fribourg Fribourg, Switzerland	1955-56	Junior Year Abroad Progr. No Degree

Law School:

Harvard Law School Cambridge, Massachusetts 02138	1957-60	LL.B. 1960

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

Dates	Firm, Agency or University	Position
Summer 1960 and Summer 1961 to Summer 1967	Jones, Day, Cockley & Reavis 1700 Union Commerce Building Cleveland, Ohio 44115	Associate
Summer 1967 to January 1971 (then on leave until resignation September 1974)	School of Law University of Virginia Charlottesville, Virginia 22901	Associate Professor and Professor of Law
January 1977 to June 1977	Georgetown University Law Center 600 New Jersey Avenue, N.W. Washington, D.C. 20001	Visiting Professor of Law
January 1977 to September 1977	American Enterprise Institute 1150 Seventeenth Street, N.W. Washington, D.C. 20036	Resident Scholar
September 1977 to 1982 (on leave academic year 1980-81)	The Law School University of Chicago 1111 East 60th Street Chicago, Illinois 60637	Professor of Law
September 1980 to June 1981	The Law School Stanford University Stanford, California 94305	Visiting Professor of Law
Fall Semester 1983-84 Spring Semester 1984-85 Spring Semester 1985-86	School of Law University of Virginia Charlottesville, Virginia 22901	John A. Edward, Jr. Distinguished Visiting Professor

7. Military Service: Have you had any military service?

No.

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

Full Tuition Scholarship, Xavier High School

Full Tuition Scholarship, Georgetown University, College of Arts & Sciences

Sheldon Fellow, Harvard University (1960-61)

Note Editor, Harvard Law Review

Order of the Coif

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

Currently:

Advisory Council
American Enterprise Institute Legal Policy Studies Program

National Advisory Board
Journal of Law and Politics, University of Virginia

Senior Conference Fellow
Administrative Conference of the United States

Constitutional Commemorative Committee
Tulane Law School

Formerly:

American Bar Association
- Member, Special Commission on Association Governance, 1983-84
- Chairman, Conference of Section Chairmen, 1983-84
- Section of Administrative Law
  - Chairman, 1981-82
  - Chairman-Elect, 1980-81
  - Chairman, Committee on Judicial Review, 1979-80
  - Council Member, 1974-77

Federal Bar Association
- Council on Federal Law, Agencies and Practice
  - Deputy Chairman, 1972-75
- Continuing Education Board
  - Member, 1976-77

Federal Communications Bar Association

Virginia State Bar

Cuyahoga County, Ohio, Bar Association

National Institute for Consumer Justice
- Board of Directors, 1972-73

J. Reuben Clark Law School, Brigham Young University
- Board of Visitors, 1979-81

Association of American Law Schools

Board of Directors, National Center for Administrative Justice

Member, Council on the Role of the Courts

The Justinian Society

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational, "public interest" law, etc.).

Capitol Hill Squash & Nautilus Club
The Langley Club, Inc. (swimming & tennis)

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Ohio; May 16, 1962

United States District Court, Northern District of Ohio; December 5, 1963

Supreme Court of Appeals of Virginia; October 7, 1970

Supreme Court of the United States; January 12, 1976

United States Court of Appeals for the Ninth Circuit; April 17, 1980

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy.

Please note: The following listing of published materials includes only signed pieces. I had been associated with Regulation magazine (bi-monthly, American Enterprise Institute, Washington, D.C.) since its inception in July 1977, first as a member of the Board of Editors, later as Co-Editor, and finally as Editor. In those capacities (and especially as Co-Editor and later Editor) I participated to varying degrees in the writing of the Perspectives portion of the publication, which consists of four or five unsigned pieces. In most cases it would be difficult to say which of those pieces were "mine," and to what degree. I also wrote some unsigned and collaborative pieces as an editor of the

Harvard Law Review in 1959-60. In addition to the following listing of published materials (some of which were originally speeches), I am attaching copies of six unpublished speeches.

Rights, Citizenship and Responsibilities, PROC. FREEDOMS FOUND. SYMP. ON CITIZEN RESP. (1986).

Morality, Pragmatism and the Legal Order, 9 HARV. J.L. & PUB. POL. 123 (1986).

Historical Anomalies in Administrative Law, Y.B. 1985, SUP. CT. HIST. SOC'Y 103.

Economic Affairs as Human Affairs, 4 CATO J. 703 (1985).

The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U.L. REV. 881 (1983).

Support Your Local Professor of Administrative Law, 34 AD. L. REV., Spring 1982 at v.

The Freedom of Information Act Has No Clothes, REG., Mar.-Apr. 1982.

Separation of Functions: Obscurity Preserved, 34 AD. L. REV., Winter 1982 at v.

Regulation -- The First Year: Regulatory Review and Management, REG., Jan.-Feb. 1982.

The First (and Last?) Published Opinion of the Intelligence Court, ABA INTELLIGENCE REP., Dec. 1981.

Parties and the Nominating Process: The Legal Framework for Reform, COMMONSENSE 1981.

Chairman's Message, (Concerning Regulatory Reform Legislation), 33 AD. L. REV., Fall 1981 at v.

Back to Basics: Making Law Without Making Rules, REG., July-Aug. 1981.

On Making It Look Easy by Doing It Wrong: A Critical View of the Justice Department, in PRIVATE SCHOOLS AND THE PUBLIC GOOD 173 (E.M. Gaffney ed. 1981).

Regulatory Reform -- The Game Has Changed, REG., Jan.-Feb. 1981.

On Saving the Kingdom: Federal Trade Commission and Federal Communications Commission, REG., Nov.-Dec. 1980.

The Judges Are Coming, PANHANDLE, Spring 1980, reprinted at 126 CONG. REC. 18,920 (1980).

A Note on the Benzene Case, REG., July-Aug. 1980.

The ALJ Fiasco -- A Reprise, 47 U. CHI. L. REV. 57 (1979).

The Legislative Veto: A False Remedy for System Overload, REG., Nov.-Dec. 1979.

The Disease as Cure: "In order to get beyond racism, we must first take account of race," 1979 WASH. U.L.Q. 147 (1979).

Vermont Yankee: The APA, the D.C. Circuit and the Supreme Court, 1978 SUP. CT. REV. 345.

Guadalajara! Regulation by Munificence, REG., Mar.-Apr. 1978.

The Judicialization of Standardless Rulemaking: Two Wrongs Make a Right, REG., July-Aug. 1977.

Oversight and Review of Agency Decisionmaking -- the Legislative Veto, 28 AD. L. REV. 684 (1976) (Published Proceedings of Bicentennial Institute of ABA Section on Administrative Law).

Procedural Aspects of the Consumer Product Safety Act, 20 U.C.L.A. L. REV. 899 (1973).

Don't Go Near the Water (A Proposal Concerning the FCC's Fairness Doctrine), 25 FED. COM. B.J. 111 (1972).

The Hearing Examiners Loan Program, 1971 DUKE L.J. 319 (1971).

Appellate Justice: A Crisis in Virginia?, 57 VA. L. REV. 3 (1971).

Sovereign Immunity and Nonstatutory Review of Federal Administrative Action, 68 MICH. L. REV. 867 (1970).

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

Excellent. June 23, 1986.

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

Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit; appointed August 6, 1982; general federal appellate jurisdiction.

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

(1) My most significant opinions would be those majority opinions considered important enough to be reviewed by the Supreme Court, and those dissents relating to majority opinions so reviewed. The next most significant would be those opinions written in cases important enough to be decided by the full en banc court. The citations for those cases are as follows:

Church of Scientology v. IRS, No. 83-1856 (D.C. Cir. May 27, 1986) (en banc) (majority)

United States v. Foster, 783 F.2d 1082 (D.C. Cir. 1986) (en banc) (majority)

Securities Industry Association v. Comptroller of the Currency, 758 F.2d 739, 740 (D.C. Cir. 1985) (concurring in part, dissenting in part), cert. denied, 106 S. Ct. 2662 (1986) (No. 85-392 (filed by Securities Industries Association)), cert. granted, 106 S. Ct. 1259 (1986) (Nos. 85-971 & 85-972 (filed by Security Pacific National Bank & Comptroller of the Currency))

*Ollman v. Evans & Novak, 750 F.2d 970, 1036 (D.C. Cir. 1984) (en banc) (concurring in part, dissenting in part), cert. denied, 105 S. Ct. 2662 (1985)

*Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984) (majority), rev'd, No. 84-1602 (U.S. June 25, 1986)

*United States v. Byers, 740 F.2d 1104 (D.C. Cir.) (en banc) (majority), cert. denied, 464 U.S. 1046 (1984)

*United States v. Cohen, 733 F.2d 128 (D.C. Cir. 1984) (en banc) (majority)

*Ramirez v. Weinberger, 724 F.2d 143 (D.C. Cir. 1983) (panel) (majority), vacated, 745 F.2d 1500, 1550 (D.C. Cir. 1984) (en banc) (dissent), vacated and remanded for reconsideration, 105 S. Ct. 2353

(1985), dismissed as moot on remand, 788 F.2d 762 (D.C. Cir. 1986)

Chaney v. Heckler, 718 F.2d 1174, 1192 (D.C. Cir. 1983) (dissent), rev'd, 105 S. Ct. 1649 (1985)

*United States v. Richardson, 702 F.2d 1079, 1086 (D.C. Cir. 1983) (dissent), rev'd, 468 U.S. 317 (1984)

*Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622 (D.C. Cir. 1983) (en banc) (dissent), rev'd, 468 U.S. 288 (1984)

Community Nutrition Institute v. Block, 698 F.2d 1239, 1255 (D.C. Cir. 1983) (concurring in part, dissenting in part), rev'd, 104 S. Ct. 2450 (1984), on remand, 742 F.2d 1472 (D.C. Cir. 1984)

In addition, I wrote the majority opinion in the following case in which the Supreme Court has not yet granted certiorari, but has noted probable jurisdiction over an appeal in a related case from another Circuit:

*Block v. Meese, No. 84-5318 (D.C. Cir. June 18, 1986) (majority). (Supreme Court has noted probable jurisdiction in Keene v. Smith, 619 F. Supp. 1111 (E.D. Cal. 1985), see 54 U.S.L.W. 3697 (U.S. Apr. 21, 1986) (No. 85-1180).)

(2) One decision in which I wrote the court's opinion, and one decision in which I joined the majority opinion of another judge, have been reversed by the Supreme Court. Citation and description of those cases follow.

(a) Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984). I filed the opinion in this case, joined by Circuit Judge Edwards of the D.C. Circuit Court and District Judge Harris of the D.C. District Court. Among other things, we held that the magnitude of a party's ultimate burden of proof on an issue did not affect the showing necessary to avoid summary judgment on that issue. Thus, in the libel case before us, we held that, although the plaintiff would ultimately be required to establish actual malice by clear and convincing evidence, the question on summary judgment was whether a reasonable jury could find the existence of actual malice.

In Anderson v. Liberty Lobby, Inc., No. 84-1602 (U.S. June 25, 1986), the Supreme Court, over a dissent by Justice Brennan and a dissent by Justice Rehnquist joined by Chief Justice Burger, vacated and remanded our decision. The majority held that the question on summary judgment was "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Id., maj. op. at 13 (footnote omitted).

(b) International Union, UAW v. Donovan, 746 F.2d 839 (D.C. Cir. 1984). Senior Circuit Judge Haynsworth of the Fourth Circuit Court, sitting by designation, filed the opinion in this case, in which I joined and from which Circuit Judge (now Senior Circuit Judge) Wright of the D.C. Circuit Court dissented. This suit was brought by the UAW, suing as a representative of its members, and several UAW members, suing individually. The individual plaintiffs had unsuccessfully requested benefits from various state agencies responsible for the administration of a program established by the Trade Act of 1974, 19 U.S.C. § 2101 et seq. (1982), to assist workers displaced by foreign competition. The plaintiffs contended that the state agencies were withholding benefits on the basis of an inaccurate interpretive handbook issued by the Department of Labor. Among other things, we held that the UAW lacked standing to sue as a representative of its members, because many of its members had not been injured at all, and those who had been would need to adduce individualized proof to establish the extent of their injuries. We also held that dismissal of the individual suits was required by 19 U.S.C. § 2311(d), which provided that judicial review of a decision of a state agency administering the Trade Act program could be obtained only in the manner and to the extent authorized by applicable state law. Since the law of the various states from which the individual suits arose required that the relevant state agencies be joined as defendants in suits challenging actions taken by those agencies, and since plaintiffs had joined only the Department of Labor, we concluded that dismissal was required.

In International Union, UAW v. Brock, No. 84-1777 (U.S. June 25, 1986), the Supreme Court, over a dissent by Justice White, joined by Chief Justice Burger and Justice Rehnquist, and a dissent by Justice Powell, reversed and remanded our decision. Treating the suit not as a challenge to adverse benefit determinations but rather as a challenge to the Department of Labor handbook that was alleged to have resulted in those adverse determinations, the Supreme Court held that the UAW had standing to sue as a representative of its members, since such a suit required no individualized proof. The Court also held that, when the suit was understood as a challenge to the Department of Labor handbook rather than to the state agencies' adverse benefit determinations, joinder of the state agencies was required neither by 19 U.S.C. § 2311(d) nor by FED. R. CIV. P. 19(b).

(3) Of the opinions set forth in response to question (1) above, those marked with an asterisk involved constitutional issues.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions

were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

General Counsel
Office of Telecommunications Policy
Executive Office of the President
appointed by Director of OTP
January 1971 to August 1972

Chairman
Administrative Conference of the United States
appointed by President with advice and consent of Senate
August 1972 to September 1974

Assistant Attorney General of the United States
Office of Legal Counsel
United States Department of Justice
appointed by President with advice and consent of Senate
September 1974 to January 1977

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Summer 1960 and Summer 1961 to Summer 1967:
Associate
Jones, Day, Cockley & Reavis
1700 Union Commerce Building
Cleveland, Ohio 44115

Fall 1960 to Spring 1961:
Sheldon Fellow of Harvard University
Traveled and studied in Europe

Summer 1967 to January 1971 (then on leave until resignation in September 1974):
Associate Professor and Professor of Law
School of Law
University of Virginia
Charlottesville, Virginia 22901

Summer 1970:
Summer Faculty Member
Office of Hearing Examiners
United States Civil Service Commission
Washington, D.C. 20415

January 1971 to September 1972:
General Counsel (initially consultant pending appointment)
Office of Telecommunications Policy
Executive Office of the President
1800 G Street, N.W.
Washington, D.C. 20502

September 1972 to August 1974:
Chairman
Administrative Conference of the United States
2021 L Street, N.W., Suite 500
Washington, D.C. 20037

August 1974 to January 1977:
Assistant Attorney General
Office of Legal Counsel
United States Department of Justice
Washington, D.C. 20530

January 1977 to June 1977:
Visiting Professor of Law
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

January 1977 to September 1977:
Resident Scholar
American Enterprise Institute
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

September 1977 to August 1982 (on leave academic year 1980-81):
Professor of Law
The Law School
University of Chicago
1111 East 60th Street
Chicago, Illinois 60637

September 1980 to June 1981:
Visiting Professor of Law
The Law School
Stanford University
Stanford, California 94305

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

From the summer of 1960 until the summer of 1967 (with about nine months' leave from September 1960 to May 1961 for a Sheldon Fellowship from Harvard University), I was engaged in a general corporate practice. I avoided specialization and handled a wide variety of matters, including litigation, antitrust, real estate, tax, labor law, commercial law, private international law (EEC), wills and contracts. Major clients for which I worked included Sears, TRW, Ohio Bell, East Ohio Gas, Cleveland Cliffs Iron Ore Co., Toledo Scale, Ohio Brass Co., Cleveland Trust Co., Automatic Sprinkler Co., The Protane Corp., Warner & Swasey Co., Firestone Tire & Rubber Co., and Chrysler Corp.

From January 1971 to January 1977, I was in government service, in three separate posts. All were of a legal nature, but they were quite different. The Office of Telecommunications Policy, for which I served as the first General Counsel (January 1971 - September 1972), was a new agency charged with the principal responsibility for developing Executive Branch policy in the field of telecommunications, by coordinating the activities and positions of Executive Branch agencies, preparing legislative proposals, and presenting analyses and formal proposals to the FCC. I was responsible for the legal aspects of policy formation concerning such matters as the regulatory regimes that should govern commercial broadcasting, domestic satellites, specialized communications carriers, public television, land-mobile communications, telecomputers, and cable television (including copyright payments). My work involved almost exclusively federal and public international communications law.

In my next governmental post, as Chairman of the Administrative Conference of the United States (September 1972 - August 1974), I was head of an independent agency charged with studying administrative procedure throughout the federal government, and making recommendations to Congress and the President for its improvement. The Assembly of the Conference is composed of federal officials (all lawyers -- most general counsels) and public members (almost all private attorneys specializing in administrative practice). The principal task of the Chairman is to identify fruitful areas of study, to supervise research through a small staff and a large body of academic consultants, and to assist the committees of the Conference in bringing recommendations based upon this research before the semi-annual Plenary Sessions. The Chairman also presides at the Plenary Sessions and seeks implementation of the Conference's recommendations, within the agencies and in the Congress. During this period, of course, I specialized in issues of administrative procedure arising throughout the federal government.

In my final executive post, as Assistant Attorney General for the Office of Legal Counsel (September 1974 - January 1977), I was legal advisor to the Attorney General and (through him or directly) to the Executive Branch. The Office of Legal Counsel drafts the Attorney General's opinions and (much more frequently) issues its own opinions, under the Attorney General's delegated authority, to the White House and all executive agencies. The questions I dealt with were multifarious, covering all aspects of federal constitutional and statutory law -- from whether the General Services Administration could sell several million barrels of sperm whale oil it possessed when the Endangered Species Act was passed (it could not) to whether the President could send armed troops to evacuate United States personnel in Saigon without violating the War Powers Resolution (he could). The job also involved a substantial amount of congressional testimony (on such issues as executive privilege and the legislative veto) and occasional special assignments such as developing the Executive Branch legislative proposal to "bail out" New York City. During this period I argued in the Supreme Court the case of Alfred Dunhill of London, Inc. v. Republic of Cuba, described in part 3 of my response to question 18.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;
(c) other courts.
3. What percentage of your litigation was:
(a) civil;
(b) criminal.
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
5. What percentage of these trials was:
(a) jury;
(b) nonjury.

During my years in private practice (1960-67), I engaged in a substantial amount of litigation in United States District Court and Court of Appeals, in Cuyahoga County and Geauga County Courts of Common Pleas, in the Ohio Supreme Court and Court of Appeals for the Eighth District, and in various municipal courts in the Cleveland area. Most of the cases, however, were settled before trial, defaulted, or were already at the appellate stage, so that my involvement usually consisted of preparing pleadings, motions and briefs, and taking depositions. The only court appearances I now recall were the jury trial in federal district court described in part 2 of my response to question 18 (in which I was associate counsel), several municipal court actions (one with res judicata effect upon a related common pleas case) in which I was sole counsel, a pretrial conference in common pleas court, and oral argument before the Ohio Court of Appeals for the Eighth District. These were all civil matters.

I did not appear in court during my years on the faculty of the University of Virginia (1967-71).

My only court appearance during my years in government (1971-77) was the Supreme Court argument described in part 3 of my response to question 18.

During my years on the faculty at the University of Chicago immediately prior to becoming a judge (1977-82), my appearances in court were limited to one civil case in which I argued against a default judgment motion under the Foreign Sovereign Immunities Act in federal district court, and then argued to sustain the judgment for defendants in the circuit court of appeals. The case is described in part 5 of my response to question 18.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

[Note: The following answer, which may be more expansive than is necessary for the Committee's purposes, is that which I provided in response to the same questions in the American Bar Association questionnaire in 1982, with case histories updated as appropriate.]

1. Electrical Equipment Antitrust Cases

From 1961 to 1964 I was associate counsel in the nationwide litigation that came to be known as the "electrical equipment antitrust cases." These consisted of more than 1,800 Clayton Act treble-damage actions, involving some 25,000 claims, filed in 35 federal judicial districts. The suits covered nineteen product lines of electrical equipment, the combinations of defendant-manufacturers varying from product to product. All the suits in each product line were based upon the same alleged price-fixing conspiracy, which had been the subject of an earlier criminal prosecution under the Sherman Act to which all defendants had pleaded guilty or nolo contendere. Plaintiffs were principally municipally-owned utilities, REA co-operatives and investor-owned utilities.

Among the defendants in various product lines were two clients of my firm, Ohio Brass Company and the Clark Controller Company. They were sued in cases numbering, if I recollect correctly, in the hundreds, in more than twenty federal district courts throughout the country. In addition to representing these two clients nationally, our firm served as local counsel (and I as associate counsel locally) for a number of other defendants (including, I believe, McGraw-Edison Co., A. B. Chance Co., and H. K. Porter Co.) with regard to the suits filed in the Northern District of Ohio.

I did not appear in court in connection with these cases. (During the time of my participation, I recall

only one of them -- not involving our clients -- that went to trial: Philadelphia Electric Co. v. Westinghouse Electric Corp., Civil Action No. 30015 (E.D. Pa. 1961, William H. Kirkpatrick, J.). The rest were settled.) But my participation was an intensive education in pre-trial practice, including pleadings, motions, interrogatories and depositions. I prepared our clients' answers and objections to the complaints, requests for admissions, and interrogatories, and prepared interrogatories, requests for admissions, motions of various sorts and briefs in support of and opposition to motions. I assisted in preparing our clients' witnesses for deposition and in preparing for deposition of the plaintiffs.

The chief counsel with whom I worked on these matters was:

Robert W. Poore
Jones, Day, Cockley & Reavis (now Jones, Day, Reavis & Pogue)
1700 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939

The only opposing counsel I recall was counsel in the so-called "lead case" that went to trial, cited above:

Harold E. Kohn
Kohn, Savett, Marion & Graf, P.C.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-9900

Counsel for other defendants, and who represented our clients, with our guidance, in other cities, included:

Miles W. Kirkpatrick
Morgan, Lewis & Bockus
123 South Broad Street
Philadelphia, Pennsylvania 19109
(215) 875-5000

Edward R. Johnston
Jenner & Block
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Charles A. Bane
Isham, Lincoln & Beale
42nd Floor
One First National Plaza
Chicago, Illinois 60603
(312) 833-9730

2. Sears Roebuck & Co. v. The Cleveland Trust Co.

This was an action for damages brought in the United States District Court for the Northern District of Ohio, Eastern Division, Civil Action No. C62-503. The gravamen of the complaint was the collapse of a ceiling in a Sears store. The ceiling plaster applied to diamond-mesh wire lath had collapsed on June 29, 1960, injuring customers and merchandise and causing Sears loss of profits during the repair period. In a separate case, Sears was sued by the injured customers and impleaded its landlord, Cleveland Trust. The instant case was a separate suit against Cleveland Trust for the damage to merchandise and loss of profits; its outcome, of course, would be res judicata as to impleader in the other suit.

Sears had occupied the store in 1935, pursuant to a lease which obligated Cleveland Trust to construct a building according to particular plans and specifications (not including the details of ceiling construction), and to "deliver possession of said premises to [Sears] in good condition and repair." In addition, the landlord was to keep the building in good condition during the term of the lease. The original term was ten years; it had been extended from time to time pursuant to the same terms (other than rental), and was in effect on June 29, 1960 when the ceiling collapsed. Suit was brought on June 25, 1962.

Investigation by counsel disclosed that the diamond-mesh lath which held the plaster (and which fell together with it) had been attached to the wooden joists with a nail significantly shorter and thinner than the metal lath trade associations standards in 1935 would have permitted. On the basis of that fact and of engineering studies, Sears contended that there had been a violation of the covenant to deliver and keep the building in good condition and repair, and that the landlord was also liable on theories of negligence and res ipsa loquitur.

Trial was to a jury on April 8-15, 1964, Chief Justice James C. Connell presiding. At the conclusion of the evidence, the judge eliminated the negligence and res ipsa counts, and submitted the case to the jury solely on the issue whether defendant had breached its

convenant to deliver the building in good condition and repair. The jury found for the plaintiff, and awarded damages in the amount of $29,119.09.

Cleveland Trust appealed to the United States Court of Appeals for the Sixth Circuit. The most significant basis of appeal was an issue that had been argued and decided in the lower court -- application of the Ohio statutes of limitations. These provided that "an action upon a speciality or agreement, contract, or promise in writing shall be brought within fifteen (15) years after the cause thereof accrued"; and that "an action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose." Sears contended that even if the former statute applied, the breach of covenant to deliver in good condition and repair had occurred less than fifteen years before the suit, at the last renewal of the lease, at which time the building had been "constructively redelivered"; and that the covenant to keep in good condition and repair was continually violated. But Sears' main argument on this point was that forms of action had been abolished in Ohio; that the statute governing "an action for . . . injuring personal property" applied to all actions seeking damages for such injury, whether the complaint sounded in contract or in tort; and that such a cause of action "arises" when the injury to property occurs -- which in this case was less than two years before suit was filed. (The language of Ohio cases supported this theory, but the cases all involved situations in which the effect of applying the two-year statute was to shorten, rather than lengthen, the time available for suit.)

The Sixth Circuit, in an opinion published at 355 F.2d 705 (1966) (Weick, Chief Judge, Celebrezze, Circuit Judge, and Machrowicz, District Judge) agreed with the latter theory, and affirmed the judgment below. The separate personal injury suit against Sears, in which Sears had impleaded Cleveland Trust, was thereafter settled on terms favorable to Sears.

Though I was not lead counsel, I participated actively in all aspects of this case (and the related personal injury action), including its trial. Development of the legal theories underlying the case -- in both trial and appellate briefs -- was largely my work.

Lead Counsel for Sears

James C. Sennett
Jones, Day, Cockley & Reavis (now Jones, Day, Reavis & Pogue)
1700 Union Commerce Building
Cleveland, Ohio
(216) 696-3939

Counsel for Defendant Cleveland Trust

Michael R. Gallagher
Edward J. Cass
Hauxhurst, Sharp, Cull & Kellogg (now Gallagher, Sharp, Fulton, Norman & Mollison)
630 Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310

3. Alfred Dunhill of London, Inc. v. Republic of Cuba

This case arose in a factual and legal context that the Supreme Court's opinion characterized as "rather involved," and took five pages to describe. I shall only sketch those elements that are necessary for an understanding of my participation.

In 1960, the Cuban government expropriated the business and assets of leading cigar manufacturers, and appointed "intervenors" to take over their management. United States importers who had been doing business with the companies continued to do so. The former owners sued three of these importers (including Dunhill) in various actions in the United States District Court for the Southern District of New York, claiming (ultimately) the right to payment for cigar shipments that occurred both before and after the expropriation. These actions were consolidated for trial; and the intervenors and the Republic of Cuba -- who claimed the right to payment for the post-expropriation shipments (they had already received payment for the pre-expropriation shipments) -- intervened.

The district court held that the act of state doctrine, which prevents our courts from examining the validity of acts of foreign governments done within their jurisdiction, precluded any questioning of the expropriation, insofar as the post-expropriation shipments were concerned, and that the importers were liable to the intervenors for the amounts due on post-expropriation shipments. As to the pre-expropriation shipments, however, it held that the accounts receivable for those owing at the time of expropriation had their situs in the United States (with the importer-debtors); that Cuba's dispositions with regard to them were not protected by the act of state doctrine; that the

attempted expropriation without compensation would not be honored by United States courts; and that the importers therefore owed payment for these pre-expropriation shipments to the former owners.

Since the importers had already made payment for these shipments to the wrong party (the intervenors), they asserted a right of set-off and counterclaim against the intervenors for the quasi-contractual debt arising from the mistaken payment. The intervenors responded that any such quasi-contractual debt had its situs in Cuba, and that their refusal (as agents of the Cuban government) to honor the obligation -- evidenced by the statement of counsel at trial that Cuba and the intervenors denied liability and refused to make payment -- constituted a second act of state which could not be questioned in United States courts. The district court held that the situs was in the United States and that, in any event, no act had occurred which would constitute an act of state, and gave judgment for the importer-debtors on the counterclaim.

The Court of Appeals for the Second Circuit affirmed the decision of the district court except that portion pertaining to the counterclaim. It held that the situs of the quasi-contractual debt was Cuba, that the repudiation was an act of state, and that all portions of the debt beyond what could be obtained by way of set-off against intervenors' recovery from the importers could not be recovered. (It held that First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), eliminates act of state as defense to a set-off.)

Certiorari was sought by Dunhill, the only importer not made whole by set-off. It was granted, and the case was briefed and argued in the Supreme Court's 1974 Term. It was restored to the calendar for reargument in the 1975 Term, and at this stage the United States filed a brief and argued as amicus curiae, urging that the judgment of the court of appeals should be reversed insofar as it denied petitioner full recovery of its counterclaim. I was at the time Assistant Attorney General for the Office of Legal Counsel, and argued the case on behalf of the United States. The United States was interested in establishing the following propositions:

1) That the act of state doctrine could not be invoked by a governmental act no more formal than the mere refusal to pay an obligation, or the announcement of that refusal in court.

2) That the act of state doctrine in any event does not apply to commercial acts -- an exception similar to the "commercial act" exception from the doctrine of sovereign immunity, at the time generally acknowledged

though not yet affirmed by the Supreme Court. (It has since been embodied in the Foreign Sovereign Immunities Act.)

The State Department would also have liked the Court to reverse the principle established in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), so as to permit domestic courts to examine acts of state in violation of international law. That issue, however, did not have to be reached and was not briefed or argued by the United States, although the State Department's letter setting forth its views was appended to the Solicitor General's brief.

In its opinion reported at 425 U.S. 682 (1976), the Supreme Court reversed the court of appeals' disallowance of the counterclaim by a 5-4 majority. Five of the Justices agreed with the Government's position on point (1) above, that under the circumstances no act of state had occurred. Four of the Justices agreed with the Government's position on point (2), and affirmed a "commercial act" exception to the act of state doctrine; a fifth Justice did not reach that issue; and the four dissenters, while also not deciding it, displayed reluctance to accept it. The case remains the Supreme Court's only pronouncement on the "commercial act" exception to either sovereign immunity or the act of state doctrine. It is frequently misdescribed, by the way, as approving the exception, though as noted above only four of the Justices did so.

Counsel for United States

Robert H. Bork, Solicitor General
Rex E. Lee, Assistant Attorney General
Keith A. Jones, Deputy Solicitor General
Stephen L. Urbanczyk, Assistant to the Solicitor General
Bruno A. Ristau, Attorney
United States Department of Justice
Washington, D.C. 20530
(202) 633-2007

Michael Sandler
Attorney
Department of State
Washington, D.C. 20520
(202) 655-4000

Counsel for Respondents Republic of Cuba and Intervenor

Victor Rabinowitz
Michael Krinsky
30 East 42nd Street
New York, New York 10017
(212) 697-8640

Counsel for Petitioner Dunhill

Victor S. Friedman
Fried, Frank, Harris, Shriver & Jacobson
120 Broadway
New York, New York 10005
(212) 964-6500

4. Securities and Exchange Commission v. Dresser Industries, Inc.

This case arose out of the SEC's 1975 Voluntary Disclosure Program, which urged SEC registrants voluntarily to investigate and disclose bribery payments to foreign nationals, even though such disclosures would not be "material" in the securities law sense. Dresser was concerned about the effect of publishing its employees' disclosures upon their safety in foreign countries. Dresser asserted that it was induced to make an internal investigation by a commitment on the part of SEC staff that copies of Dresser documents and notes would not be taken; and an SEC staff member admitted by affidavit that at least a commitment had been made to conduct an initial review of the documents on Dresser's premises, and that any notes taken at that time would not include the names of individuals or foreign countries.

In May of 1976, a Task Force on Transnational Payments was formed within the Department of Justice, with staffing that included two SEC attorneys, to investigate criminal violations of the federal securities and other United States laws arising from the voluntary disclosures by corporations in the SEC programs. Dresser, unadvised of this pending criminal inquiry, commenced and completed its internal inquiry. It found no violations of United States laws, but did find foreign payments that could properly be described as extortionate. It reported the results of this inquiry to the SEC on Form 8-K.

In the spring of 1977, in violation of what Dresser asserted to be the confidentiality commitment, the SEC demanded the documentation underlying Dresser's internal inquiry. Dresser declined to provide it, except on the confidential basis earlier agreed. In August, the SEC transmitted the SEC's investigative file on Dresser and all other corporations that had made disclosures of overseas payments to the Department of Justice Task Force, following which the Task Force commenced a criminal investigation and presented Dresser's case to a grand jury. In April 1978, Dresser's documents were subpoenaed by the grand jury, and were provided under a protective order -- meeting Dresser's concern that disclosure of names might endanger the lives of its overseas employees.

A few days after the grand jury subpoena, the SEC issued its own subpoena, demanding documents regarding the same matter -- i.e., Dresser's internal inquiry into foreign payments. Dresser moved to quash this subpoena in the United States District Court for the District of Columbia. The motion was denied, and the district court ordered Dresser to comply with the subpoena. Dresser appealed to the Court of Appeals for the District of Columbia, urging a number of grounds for reversal, the most significant of which (in descending order of importance) were the following:

(1) That under the Supreme Court's decision in United States v. LaSalle National Bank, 437 U.S. 298 (1978), a case involving the Internal Revenue Service, once the SEC referred the matter to the Justice Department it was obliged to terminate its own investigation.

(2) That the SEC's sharing the product of its investigation with the Justice Department infringed on the grand jury's exclusive control of its own investigation, and violated Rule 6(e) of the Federal Rules of Criminal Procedure, pertaining to grand jury secrecy.

(3) That the SEC was bound by its original commitments of confidentiality and of preliminary investigation without disclosure.

The panel opinion of the court of appeals (Bazelon, Robb and Bryant, JJ.) gave Dresser much of what it sought. It did not disallow enforcement of the SEC's subpoena entirely, but required the SEC to withhold from the Justice Department "the fruits of the Commission's civil discovery" in order to "maintain the integrity of the criminal discovery process." Dresser petitioned for rehearing, seeking complete quashing of the subpoena. The SEC, and the United States (which applied for intervention at this stage), also petitioned for rehearing, with suggestion for rehearing en banc. The panel opinions were vacated, and the decision of the full court eliminated the restriction upon SEC use of the subpoenaed material which the panel had imposed. 628 F.2d 1368 (1980). It found that parallel civil and criminal investigations are not generally proscribed, and that the LaSalle case hinged upon the peculiar statutes applicable to the agency there involved (the IRS). It found that the proposed cooperation between the SEC and Justice involved no violation of Rule 6(e) or impairment of grand jury authority. And it found adequate evidence to support the district court's finding that the SEC had made no agreement precluding the subpoena. Dresser applied for and obtained in the Supreme Court a stay of the court of appeals mandate; but its petition for certiorari was ultimately denied. 449 U.S. 993 (1980).

My participation in this litigation was of counsel to Baker & McKenzie, attorneys for Dresser; I entered the case at the court of appeals stage. I assisted in the development of Dresser's legal arguments, and participated in the drafting of petitions and briefs in the court of appeals and the drafting of the stay application, petition for certiorari and reply brief in the Supreme Court. I also assisted counsel in preparing for oral argument before the court of appeals. Counsel in the case were as follows (only counsel for Dresser have knowledge of my participation):

Counsel for Dresser

David R. MacDonald
Francis D. Morrissey
Paul McCarthy
Edward E. Dyson
Baker & McKenzie
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-8000

Counsel for the SEC

Ralph C. Ferrara, General Counsel
Paul Gonson, Solicitor
John P. Sweeney, Assistant Attorney General
Mitchell D. Dembin, Attorney
Securities and Exchange Commission
Washington, D.C. 20549
(202) 272-2454

Counsel for the United States

Philip B. Heymann, Assistant Attorney General
Irvin B. Nathan, Deputy Assistant Attorney General
Stephen G. Milliken, Attorney
United States Department of Justice
Washington, D.C. 20530
(202) 633-2007

5. International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries

This was an action for treble damages and injunctive relief under Section 1 of the Sherman Act, brought in the United States District Court for the Southern District of California. Plaintiff claimed that OPEC and its member nations violated the Sherman Act by agreeing to adopt and by implementing increases in the price of crude oil; and that the price increases were passed on to it as a purchaser of refined petroleum products.

Service upon OPEC could not be obtained. The individual sovereign defendants who received notice pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA) declined to appear on grounds of sovereign immunity; and as is the diplomatic practice in such cases, some of them protested the attempted assertion of jurisdiction to the Department of State. Section 1608(e) of the FSIA, 28 U.S.C. § 1608(e), provides that a default judgment cannot be entered against a foreign sovereign unless "the claimant establishes his claim or right to relief by evidence satisfactory to the Court." Accordingly, an evidentiary hearing was held before the court, A. Andrew Hauk, J., presiding, from morning through evening of three days, August 20-23, 1979; and oral argument from morning through evening of a fourth day, August 24, 1979. Granted leave to appear at that hearing and to file brief and argue as amicus curiae on behalf of defendants was The Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry, a private association organized in Indonesia. The Republic of Indonesia was one of the defendants, and the amicus's interest lay in the feared disruption of trade and commercial relations which issuance of the injunction could produce.

The case for defendants had two principal aspects, one dealing with the Sherman Act and the other with the Foreign Sovereign Immunities Act and the act of state doctrine. The former consisted primarily of the arguments (1) that a foreign sovereign is not a "person" within the meaning of the provision of the Sherman Act that renders any "person" who violates the Act liable to suit; (2) that insofar as money damages are concerned, the Supreme Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), prevents recovery by indirect purchasers except in narrow circumstances not applicable here; and (3) that insofar as injunctive relief is concerned, plaintiff failed to demonstrate proximate causal connection between defendants' activities and higher prices paid by the plaintiff. On the FSIA aspect of the case, the principal argument in support of defendants was that a government's establishing the terms for extraction of depletable natural resources from its territory was not a "commercial act," and suit based upon such activity would therefore not avoid the normal rule of sovereign immunity which the FSIA provides. The act of state argument was that even if sovereign immunity did not exist, the validity of the acts in question could not be examined by United States courts, because they were official acts taken within the foreign states' jurisdiction and because no "commercial act" exception was applicable. (There were other more technical points I will not describe here.)

In an opinion published at 477 F. Supp. 553 (1979), the district court dismissed the complaint, finding for

defendants on all the points above except that pertaining to the act of state doctrine, which it did not reach. Plaintiff appealed. The Indonesia-U.S. Business Committee again moved to file a brief and argue as amicus curiae, which motion was granted. After argument held on November 5, 1980, the United States Court of Appeals for the Ninth Circuit (in a panel composed of Judges Herbert Y. C. Choy, Dorothy W. Nelson, and Adrian A. Spears (Senior U.S. District Judge, W.D. Tex., sitting by designation)) affirmed the district court, but on the alternate ground of act of state. The court of appeals opinion is published at 649 F.2d 1354 (1981). Plaintiff sought certiorari in the Supreme Court. The Indonesia-U.S. Business Committee moved for leave to file brief as amicus curiae. On January 11, 1982, the motion was granted and the petition for certiorari denied. 50 U.S.L.W. 3548 (1982).

My participation in this litigation was as follows: In the district court, I was of counsel to attorneys for the amicus. I attended the evidentiary hearing (amicus did not examine witnesses), and argued those portions of the case dealing with FSIA and act of state. In the court of appeals I was again of counsel, and took a large part in writing those portions of the brief dealing with FSIA and act of state; I presented oral argument on the entire case, including the Sherman Act aspects. In the Supreme Court I was attorney of record for the amicus, and had a substantial hand in the entire brief.

Counsel for Indonesia-U.S. Business Committee in District Court and Court of Appeals, of Counsel in the Supreme Court:

Philip F. Belleville
Joseph A. Wheelock, Jr.
Latham & Watkins
555 South Flower Street
Los Angeles, California 90071
(213) 485-1234

Counsel for Plaintiff, International Association of Machinists, in District Court, Court of Appeals, and Supreme Court:

James H. Davis
727 West Seventh Street, Suite 600
Los Angeles, California 90017
(213) 625-0711

James H. Ackerman, Esq.
Ackerman, Ling & Russell
444 West Ocean Boulevard, Suite 1000
Long Beach, California 90802
(213) 436-9911

Benjamin F. Schwartz, Esq.
1880 Century Park East, Suite 1212
Los Angeles, California 90067
(213) 277-1226

Amicus in Pro. Per. on Behalf of Plaintiff (in District Court and Court of Appeals):

Richard I. Fine
Arthur Soll
Richard I. Fine, P.C.
10100 Santa Monica Boulevard, Suite 250
Los Angeles, California 90067
(213) 277-5833

Barry Cohen
Memel, Jacobs, Pierno & Gersh
1801 Century Park East, 25th Floor
Los Angeles, California 90067
(213) 566-2000

Amicus in Pro. Per. on Behalf of Plaintiff (in District Court Only):

S. C. Yuter
Yuter, Rosen & Dainow
489 Fifth Avenue
New York, New York

Counsel for Amicus Concerned Black Americans in Support of Africa and the Middle East on Behalf of Defendants in District Court and Court of Appeals):

Khalid Abdullah Tariq Al Mansour
601 California Avenue
San Francisco, California
(415) 981-0296

6. Payton v. Abbott Labs

This litigation, originating in the United States District Court for the District of Massachusetts, Civil Action No. 76-1514 (1979), was a class action brought against some (but not all) pharmaceutical companies that manufactured and marketed diethylstilbestrol (DES), a drug prescribed as a preventive for miscarriages which proved to cause abnormalities in the reproductive organs of women exposed in utero. The plaintiff class certified by the district court under Fed. R. Civ. P. 23(c)(4)(A) included all women whose exposure to DES in utero occurred in Massachusetts, who were born in Massachusetts, who were domiciled there when they received notice of the lawsuit, and who had not developed the type of vaginal cancer asserted to be the most severe effect of the drug. 83

F.R.D. 382, 386 (1979). Plaintiffs sought damages for the physical and emotional injury caused by the defendants' alleged negligence.

The distinctive feature of the case, and of a number of other DES cases around the country, was that most of the plaintiffs were unable to identify the particular manufacturers whose product caused their particular injuries. Plaintiffs urged, however (among other theories of recovery), that since the product was a standard chemical compound, and since all the manufacturers were negligent in marketing it, each defendant should be held to a proportion of the total damages which corresponded to its respective market share. (Plaintiffs were vague as to what the relevant market might be.)

This theory of so-called "market share liability" has been rejected by some states, but was accepted by the California Supreme Court in Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924 (1980). The federal district court in Payton, having determined (with agreement of the parties) that the action was governed by Massachusetts law, certified the following questions (among others) to the Supreme Judicial Court of Massachusetts:

> 4. Assuming that the evidence does not warrant a conclusion that the defendants conspired together, or engaged in concerted action, or established safety standards through a trade association, may the defendant manufacturers, who probably supplied some of the DES ingested by the mothers of the plaintiff class, be held liable to members of the plaintiff class when neither plaintiffs nor defendants can identify which manufacturer's DES was ingested by which mothers?
>
> 4A. If the answer to question 4 is affirmative, what are the incidents of such liability with respect to allocation of damages among defendants, defenses available to defendants, allocation of the burden of proof, rights of contribution among defendants and rights of contribution by named defendants against unnamed pharmaceutical manufacturers who may have supplied some of the DES ingested by the plaintiffs' mothers?

The defendants filed a joint brief on the certified questions. Counsel for one of the defendants, Merck and Co., Inc., felt that a separate brief should be filed on the issues of state and federal constitutional law that "market share liability" would present. I was retained of counsel to prepare such a brief. Its substance was entirely my work. In addition to writing the brief, I discussed the oral argument on the constitutional point with the attorney who presented the case for all defendants, and prepared for

his use a precis of possible argument.

In Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982), the Supreme Judicial Court of Massachusetts rejected the theory of market-share liability espoused by the plaintiffs, on the grounds that that theory might have resulted in awards against defendants in excess of the harm that they had caused, and that it would have improperly precluded defendants from offering evidence that they had not been responsible for a particular plaintiff's injury.

Counsel for Merck

National Counsel:
Thomas F. Campion
Richard A. Levao
Shanley & Fisher
550 Broad Street
Newark, New Jersey
(201) 643-1220

Boston Counsel:
Walter G. Murphy
Joseph B. Bertrand
Murphy and Mitchell, P.C.
Four Faneuil Hall Marketplace
Boston, Massachusetts 02109

Counsel for Plaintiffs

Jeanne Baker
David J. Fine
Baker & Fine
133 Mt. Auburn Street
Cambridge, Massachusetts 01128
(617) 354-2937

David Rosenberg
89 Wendell Street
Cambridge, Massachusetts 02138

Counsel for Other Defendants (who argued case and prepared a joint brief addressing other issues)

Marshall Simonds
Goodwin, Proctor & Hoar
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

7. Immigration and Naturalization Service v. Chadha

This case involved the constitutionality of congressional action taken pursuant to section 244 of the Immigration and Naturalization Act, 8 U.S.C. § 1254, which purported to authorize either House of Congress, by simple resolution, to veto decisions of the Attorney General suspending the deportation of deportable aliens. The Attorney General had suspended the deportation of Mr. Chadha, a native of Kenya, but the House of Representatives passed a resolution vetoing that suspension. Chadha brought suit challenging the constitutionality of that legislative veto. The Ninth Circuit held the veto unconstitutional and ordered the Immigration and Naturalization Service to cancel Chadha's deportation. 634 F.2d 408. The Supreme Court granted certiorari.

Administrative law practitioners were concerned about the effect of legislative veto mechanisms on the administrative process; the American Bar Association's Commission on Law and the Economy had questioned their constitutionality and disapproved their use. For these reasons, the American Bar Association, at the instance of the Section of Administrative Law and the Coordinating Committee on Regulatory Reform, filed an amicus brief in the Supreme Court, supporting the judgment of the Ninth Circuit. As Chairman of the Section of Administrative Law, I was responsible for the preparation of that brief, jointly with Richard B. Smith, Esq., Chairman of the Coordinating Committee on Regulatory Reform. The initial draft of most (but not all) of its text was my work.

The brief argued that all legislative veto provisions were unconstitutional, principally because they permitted legislative interference in executive functions and purported to authorize the legislature to take acts of legislative character and effect without following the procedures mandated by the Constitution. The Supreme Court, in an opinion that has been understood to invalidate all legislative veto provisions, held that the House's legislative veto of the suspension of Chadha's deportation was unconstitutional, because it was an act of legislative character and effect taken without recourse to the constitutionally required procedures. 462 U.S. 919 (1983).

Counsel in the Supreme Court were as follows:

For the Immigration and Naturalization Service

Rex E. Lee, Solicitor General
Theodore B. Olson, Assistant Attorney General
Kenneth S. Geller, Deputy Solicitor General
Larry L. Simms, Deputy Assistant Attorney General
Edwin S. Kneedler and David A. Strauss, Assistants to the Solicitor General
Thomas O. Sargentich, Beth Nolan and Michael A. Fitts, Attorneys
United States Department of Justice
Washington, D.C. 20530
(202) 633-2217

For Jagdish Rai Chadha

Alan B. Morrison
John Cary Sims
Suite 700
200 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

John Pohlman
Pohlman & Heckel
654 Sacramento Street
San Francisco, California 94111
(415) 433-7654

For the United States House of Representatives

Eugene Gressman, Special Counsel
School of Law
University of North Carolina
Chapel Hill, North Carolina 27514
(919) 962-5106

For the United States Senate

Michael Davidson, Senate Legal Counsel
M. Elizabeth Culbreth, Deputy Senate Legal Counsel
Charles Tiefer and Morgan J. Frankle, Assistant Senate Legal Counsels
1413 Dirksen Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Co-Counsel for *Amicus* ABA

Richard B. Smith, Esq.
Davis, Polk & Wardwell
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4066

8.-10. Administrative Law Litigation

Although the question evidently is limited to participation in court litigation, it may not be amiss, given my practice specialty and the particular court of which I am a member, to note briefly my participation in several significant litigated matters before federal agencies.

(A) In 1972, as general counsel of the Office of Telecommunications Policy, I took part in the formulation of comments filed by that agency with the Federal Communications Commission in its Docket No. 16495, and made oral argument before the full Commission on May 1, 1972. That highly important docket concerned the rules which the Commission was to adopt for authorization of domestic communications satellites operated by nongovernmental entities. OTP urged technical and policy arguments in favor of an "open skies" policy whereby, subject to the availability of orbital "slots," all responsible entities would be permitted to enter the field. This was in opposition to the position of some participants in the proceedings that the Commission should select or prescribe one system (either a single applicant, such as Comsat, or an enforced consortium of all applicants) or should choose one or more systems through comparative hearings. In the Commission's Second Report and Order, 35 F.C.C.2d 844 (1972), the OTP position was substantially adopted, and remains the basis of domestic satellite policy.

(B) In November and December of 1978, I advised the Bureau of Competition of the Federal Trade Commission regarding trial of their "shared monopoly" case under § 5 of the Federal Trade Commission Act against the largest United States cereal manufacturers, In the Matter of Kellogg Co., General Mills, Inc. and General Foods Corp., FTC Docket No. 8883. After that case had been pending for about six years, and in hearing for about two years (with 250 days and 36,000 pages of testimony), with the hearing about 90 percent completed, the presiding administrative law judge had decided to retire. The FTC had rehired him as a consultant (at a significantly higher salary) to complete the hearing and render the initial decision. Respondents moved pursuant to Rule 3.42(g) of the FTC Rules of Practice to disqualify him on the ground that his new status violated the requirements of independent salary and tenure set forth in the Administrative Procedure Act, 5 U.S.C. §§ 556(b), 3105, 5362 & 7521. It was also their position that the entire proceeding would have to be retried.

It was fairly clear that disqualification was necessary. I was consulted by the FTC's trial staff on the point whether there was any statutory or constitutional objection to appointing a substitute ALJ to take up the case in medias res, so to speak; and whether any or all of the

evidence would have to be reheard. My written and oral advice to the Bureau of Competition was used in formulating the complainant counsel's Memorandum in Support of Motion to Direct the Designation of an Administrative Law Judge, and in his oral argument on that issue.

The Commission's action, taken by order of December 8, 1978, was to appoint a substitute ALJ without requiring rehearing, but directing the new ALJ to determine which particular legal and factual matters ought to be reheard. The Kellogg case continued for another several years and was finally dismissed by the Commission.

(C) In August and September of 1980, I advised the Bureau of Consumer Protection of the Federal Trade Commission regarding the issue of what further quasi-formal rulemaking proceedings would be required in connection with its trade regulation rule governing proprietary, vocational and home study schools. The rule initially promulgated had been developed in proceedings that complied with the provisions of the so-called Magnuson-Moss Act, which requires limited cross-examination and other formal procedures beyond the normal notice and written comment prescribed by the Administrative Procedure Act. That rule, published at 16 C.F.R. § 438, had been set aside by the Second Circuit Court of Appeals because of specified deficiencies. Katharine Gibbs School (Inc.) v. FTC, 612 F.2d 658 (1979).

The important issue upon which the Commission sought my advice was whether, upon remand, it might alter portions of the rule that had not been invalidated by the court without repeating the cumbersome and time-consuming rulemaking proceeding; or rather whether, once promulgated, the rule had to be considered final insofar as the Commission was concerned, so that any changes not mandated by the court would demand a new rulemaking. My written opinion was used by the Bureau of Consumer Protection and by the Commission's General Counsel in preparing his presentation to the Commission.

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

Since the court on which I now sit decides many matters of national importance, my decisions and opinions over the past four years are unquestionably the most significant legal activities I have pursued.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I shall recuse myself from any case in which a conflict of interest exists -- except, of course, where the conflict applies to the entire Court, so that the case could not be decided without my participation. See, e.g., United States v. Will, 449 U.S. 200 (1980) (constitutional issues pertaining to judicial salaries must be decided by the Supreme Court, pursuant to the so-called Rule of Necessity). I shall consider a conflict of interest to be present whenever the circumstances described in 28 U.S.C. § 455 exist. I shall keep myself informed about my financial interests, and those of my wife and children residing at home.

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

I would like to continue to engage in some teaching, lecturing and publishing, as time permits and to the extent not inconsistent with my judicial responsibilities. My only current plans are for a lecture and seminar at Macalester College in September of 1986, a workshop and lecture on American constitutional doctrine at the University of Puerto Rico, Rio Piedras, Puerto Rico, January 23-24, 1987, and three weeks of teaching at Tulane Law School's summer session in Rhodes, Greece, in July of 1987.

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

No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

Not applicable.

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

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

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

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

I have reviewed the response to the question which I gave the Committee in 1982, and find that it is still an accurate expression of my views -- and I hope a reflection of what my opinions since then have sought to achieve. That response was as follows:

I agree with the general tenor of the statement, and am perhaps the author of some of the academic criticism to which it refers. Two qualifications, however, are appropriate:

(1) Most of the issues are questions of degree. To take part (a) of the question as an example: A judicial opinion that does nothing but resolve the particular grievance ("A wins") is hardly tolerable. A function of the courts, and especially of appellate courts, is to provide a principled statement of <u>why</u> A wins. This provides guidance that will enable similar grievances to be resolved in the future without resort to the courts; and assures that other parties who later come before the courts will receive equal justice. But a principled statement requires generalization -- that is, consideration of the more general "problem" in private or governmental relationships of which the particular grievance before the court is just one manifestation. To that extent, "problem-solving" is an inevitable part of the judicial role. A good judge, however, ordinarily proceeds to as low a level of generality

(to as small a "problem," if you will) as will suffice to provide a principled and useful resolution of the particular controversy -- which is what is meant by a "narrow" decision. Perhaps the fundamental difference between a good judge and what I would consider an unduly "activist" judge is that the one regards general principles as necessary to decide the case, and the other regards the case as an occasion for setting forth general principles.

(2) I do not subscribe to the conspiracy theory of judicial activism, which characterizes the judges as willful and malevolent flouters of the public will. Until very recent years, their activism has generally been approved and encouraged by the society at large -- or at least by the political and intellectual leaders of society who account for what is called "informed opinion." The blame (for those of us who regard it as blame) rests as much upon my profession of law teaching as anywhere else, since we have found it stimulating to teach the judicial process as essentially a process of governance rather than dispute resolution. Moreover, activism has not been entirely a self-acquired judicial trait, but in many cases has been mandated by law. For example, the erosion of the doctrines of standing and ripeness to which part (d) of the question refers is largely the product of legislation enacted over the past two decades. In short, judicial activism has not been the brain-child of only the judges, but of the society as a whole. I believe we have come to see the problems it creates for democratic self-government; and I believe that society's views, and then the judges', will change.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

I hope that my opinions over the past five years reflect a zeal to apply the law uniformly, without regard to the identity of the litigants. With regard to my activities before coming to the bench, I again find my response to this question in 1982 an accurate expression of my current evaluation -- except that my reference to eliminating "the last vestiges" of the doctrine of sovereign immunity should have been more modestly cast (since the doctrine has some continuing application, e.g., to money claims against the United States). The 1982 response was as follows:

I have devoted most of my professional life to public service in the federal government and to legal teaching and scholarship. My fields of specialty have been administrative law and constitutional law, precisely because there the problems of securing equal justice -- of reconciling majoritarian rule with individual rights and equal treatment -- are most immediately addressed.

As Chairman of the Administrative Conference of the

United States (1972-74), most of my energy was devoted to the development and implementation of administrative procedures, throughout the government, that would ensure fairer treatment of all persons by federal agencies.

As Assistant Attorney General for the Office of Legal Counsel (1974-77), I was instrumental in drafting, securing Justice Department support for, and advocating enactment of, legislation which eliminated the last vestiges (at the federal level) of a doctrine which has been the cause of much of the government's ability to apply unequal standards -- the doctrine of sovereign immunity. (In recognition of my efforts, I was presented with a copy of the enrolled bill, S. 800, 94th Cong., 2d Sess.).

As a member of the National Institute for Consumer Justice (1972-73), I participated in the supervision of studies and the development of recommendations aimed at providing realistic means for the redress of a class of grievances that often go unremedied because of economic inequality -- consumer grievances.

In all of my professional activities, I have regarded it as the supreme rule of our system that each individual is of equivalent worth, and must be treated by the government accordingly. In my personal life, my religious beliefs impose the same view.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS *			LIABILITIES		
Cash on hand and in banks	12,389 00		Notes payable to banks—secured		
U.S. Government securities—add schedule			Notes payable to banks—unsecured		
Listed securities—add schedule			Notes payable to relatives 4	31,878 00	
Unlisted securities—add schedule			Notes payable to others		
Accounts and notes receivable:			Accounts and bills due 5	2,000 00	
Due from relatives and friends 1	2,735 00		Unpaid income tax		
Due from others e2	2,500 00		Other unpaid tax and interest 6	2,111 00	
Doubtful			Real estate mortgages payable—add schedule 7	107,000 00	
Real estate owned—add schedule 3	350,000 00		Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize:		
Autos and other personal property e	30,000 00		Life Ins. - NW Mut. Life Ins. Co.	524 00	
Cash value—life insurance	1,207 00				
Other assets—itemize:					
Cash or death value, retirement annuities as of 5/31/86	198,431 00				
Deposit on summer cottage	400 00		Total liabilities	143,513 00	
IRA money market acc't, Charles Schwab & Co	14,934 00		Net worth	469,083 00	
Total assets	612,596 00		Total liabilities and net worth	612,596 00	
CONTINGENT LIABILITIES			**GENERAL INFORMATION**		
As endorser, comaker or guarantor	none		Are any assets pledged? (Add schedule.)	no	
On leases or contracts			Are you defendant in any suits or legal actions?	no	
Legal Claims			Have you ever taken bankruptcy?	no	
Provision for Federal Income Tax					
Other special debt					

e = estimate

1. Expenses incurred as Executor of Estate of S. Eugene Scalia
2. Travel expenses not yet paid
3. Estimated FMV of residence at 6713 Wemberly Way, McLean
4. Owed to estate of father, S. Eugene Scalia
5. VISA charges
6. Fairfax County real estate tax due July 28, 1986
7. Purchase money mortgage. Payable to Mrs. Alice McGowan

* Note: Assets do not include value of life insurance and estate of father, S. Eugene Scalia. Estate is still in probate. Estimated value of insurance and estate is under $300,000.

AFFIDAVIT

I, Antonin Scalia, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

July 1, 1986
(Date)

Antonin Scalia

(Notary)

My Commission Expires October 14,

RONALD W. REAGAN LIBRARY

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