

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED FIRST CONGRESS SECOND SESSION

ON
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JUDICIARY

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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Enclosed are the written responses of Dr. Alan Lourie, John S. Martin, Jr., and Judge Daniel B. Sparr to the questions of Senator Thurmond in connection with their nominations to the federal bench.

If we can provide any additional assistance, please let us know.

Sincerely,

A handwritten signature in cursive script that reads "Bruce C. Navarro".

Bruce C. Navarro
Acting Assistant Attorney General

Enclosures

cc: The Honorable Strom Thurmond
Ranking Minority Member

ANSWERS TO SENATOR THURMOND'S QUESTIONS FOR DR. ALAN LOURIE,
OF PENNSYLVANIA, TO BE A UNITED STATES CIRCUIT JUDGE FOR THE
FEDERAL CIRCUIT

1. Q. What is the proper application of stare decisis in constitutional law; specifically, what is the duty of a federal judge when confronted with a case in which the precedents of his court clearly conflict with the Constitution as that judge interprets it?
 - A. I believe the rule of stare decisis is so well established in our legal system and so important to the stability and predictability of the law that I cannot envision a set of circumstances in which I would deviate from it. It is not the province of an individual judge to impose his personal interpretation of the Constitution on the resolution of a particular case when there is clear precedent to the contrary. If a superior court believes a court's precedent is unconstitutional, it is the right and responsibility of that court to overrule that precedent in an appropriate case, rather than for an individual judge to refuse to follow it. Moreover, by following precedent, one supports the assumptions of the litigants when they undertook the behavior that led to the lawsuit.

2. Q. Do you feel that your lack of trial experience at the appellate level will in any way hinder you in the performance of your duties as a United States Circuit Judge for the Federal Circuit?
 - A. I do not believe my lack of trial experience will hinder me in the performance of my duties. First, I have had involvement in trial work. I have supervised litigation as house counsel. I have also personally argued appeals at the predecessor court of the Federal Circuit, the Court of Customs and Patent Appeals (CCPA). I have also read a large portion of the opinions of the Federal Circuit and the CCPA over the years. I have a good understanding of the appellate process and of the role of the appellate courts. Moreover, since I am well acquainted with the legal issues that are often raised in the major field of the court's jurisdiction, patent law, I feel I can effectively articulate legal doctrine, consistent with the court's precedents, for the guidance of the lower courts. Finally, a significant portion of my past work has involved reviewing facts and applying to them appropriate rules of law in order to advise the management of my company. Reviewing factual determinations of lower tribunals and applying proper legal precedents will not be too dissimilar. I feel I am well prepared for my new responsibilities.

- 2 -

3. Q. As a judge for the Federal Circuit you will be reviewing the decisions of judges from the district court, Claims Court, and the International Trade Court, what criteria do you intend to use in reviewing these decisions and trial records?
- A. Generally speaking, an Appellate Court should review lower court decisions by accepting factual findings unless they are clearly erroneous, but reversing where errors of law exist. Agency decisions are affirmed if substantial evidence exists in the record to support their findings. I will certainly follow these established legal criteria in reviewing decisions of lower tribunals.

March 23, 1990

RESPONSES OF MR. JOHN S. MARTIN, JR., OF NEW YORK, TO QUESTIONS
FROM THE SENATE JUDICIARY COMMITTEE

1. MR. MARTIN, YOU HAVE BEEN A PRACTICING ATTORNEY SINCE 1961, AND NOW YOU HAVE BEEN NOMINATED FOR THE POSITION OF UNITED STATES DISTRICT COURT JUDGE. DO YOU FORESEE ANY DIFFICULTY IN THE TRANSITION FROM ADVOCATE TO IMPARTIAL JURIST?

No. Having served as an advocate on both sides of criminal cases and in a wide variety of civil cases, I understand the role of the judge and how important it is for the judge to be impartial. In addition, I have served as an arbitrator and found that I had no problem in assuming the role of the impartial decision maker.

2. MR. MARTIN, I CONSIDER JUDICIAL TEMPERAMENT TO BE A PREREQUISITE FOR A FEDERAL JUDGE. WOULD YOU GIVE ME YOUR THOUGHTS ON THIS SUBJECT?

One of the most important characteristics of a good judge, in my view, is the willingness to treat all who appear in court with respect and dignity. It is most important that everyone who comes in contact with the judicial process -- litigants, attorneys, jurors and witnesses -- comes away from their experience with the perception that they have been treated fairly and courteously. As a member of the Mayor's Committee on the Judiciary in New York City, I have placed great emphasis on finding candidates for the bench who have proper judicial temperament.

3. MR. MARTIN, ARE THERE ANY CIRCUMSTANCES WHERE YOU WOULD CONSIDER IT APPROPRIATE TO DECIDE A CASE ON SOME BASIS OTHER THAN ONE WHERE THE INTENT OF THE FRAMERS OF LEGISLATION OR THE CONSTITUTIONAL PROVISIONS CAN BE DETECTED, EITHER THROUGH THE TEXT OF A PROVISION OR ITS SURROUNDING LEGISLATIVE HISTORY?

Since it is the duty of a judge to decide cases according to the intent of the framers of the legislation or the Constitutional provisions at issue in the case to be decided, I find it difficult to conceive of a situation in which a case could be decided on any basis other than that of the intent of those parties.

RESPONSES TO SENATOR THURMOND'S QUESTIONS FOR JUDGE SPARR, OF COLORADO, TO BE A UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLORADO

1. JUDGE SPARR, YOU HAVE SERVED AS A DISTRICT COURT JUDGE FOR THE SECOND JUDICIAL DISTRICT OF COLORADO SINCE 1978. DO YOU FORESEE ANY DIFFICULTY IN THE TRANSITION FROM YOUR PRESENT POSITION IN THE COLORADO'S SECOND JUDICIAL DISTRICT TO THAT OF TRIAL JUDGE AT THE FEDERAL DISTRICT LEVEL?

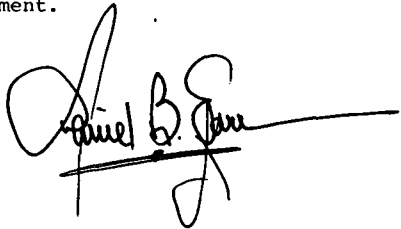
The Colorado Rules of Evidence and Procedure are almost identical to the Federal Rules. Although I would be dealing with some different statutes, I foresee no problems in the transition.

2. JUDGE SPARR, HOW DOES A RESPONSIBLE JUDGE GO ABOUT THE PROCESS OF INTERPRETING SUCH SEEMINGLY OPEN-ENDED CONSTITUTIONAL PROVISIONS AS THE DUE PROCESS OR EQUAL PROTECTION CLAUSES?

At the trial court level, as Oliver Wendell Holmes theorized, ". . .it is the judges job to follow the law . . ." A judge should follow precedent.

3. JUDGE SPARR, THE PHRASE "JUDICIAL ACTIVISM" IS OFTEN USED TO DESCRIBE THE TENDENCY OF THE JUDGES TO MAKE DECISIONS ON ISSUES THAT ARE NOT PROPERLY WITHIN THE SCOPE OF THEIR AUTHORITY. WHAT DOES THE PHRASE "JUDICIAL ACTIVISM" MEAN TO YOU?

The term "Judicial Activism" as used here implies to me a judge expanding his or her judicial power beyond that granted by Article III of the Constitution of the United States. This can occur when the judge creates hypothetical controversies or modifies clear legislative mandates based upon a judge's personal ideologies or beliefs. The judicial branch has specific enumerated powers under the Constitution of the United States, it is not proper for a member of the judiciary to expand that power to assume or usurp the powers of the other branches of government.



A handwritten signature in black ink, appearing to read "Daniel B. Sparr", with a long horizontal line extending to the right.

Senator THURMOND. Judge Stahl of New Hampshire and Judge Daniel Sparr of Denver, Judge John S. Martin of New York, Alan D. Lourie of Pennsylvania—we have studied the record, Mr. Chairman, of all of these people and we think they are all qualified. We think they possess the necessary qualifications and have the judicial temperament, integrity and the legal learning to make good judges and I expect to support all of them and I wanted to say this before I left.

Thank you very much.

Senator KOHL. Thank you, Senator Thurmond.

Thank you, Judge Sparr.

Judge SPARR. I thank the Chair for allowing me to appear today. It is a great honor.

Senator KOHL. It is an honor to have you, sir. Thank you.

Next, we will call John Martin.

Mr. Martin, do you swear that the testimony you give here today will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. MARTIN. I do, sir.

Senator KOHL. Take a seat, please.

TESTIMONY OF JOHN S. MARTIN, JR., OF NEW YORK, TO BE A U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Senator KOHL. Mr. Martin has been nominated to the District Court for the Southern District of New York, and we are delighted to have you with us today, Mr. Martin, and are glad to see that New York's bipartisan system of judicial nomination survives in an era of partisanship.

Mr. MARTIN. It has been a very good system and I think we are proud of it and proud of our Senators for supporting it. It worked, for the fact that I served as U.S. attorney, appointed by President Carter but served most of my term in the Reagan administration and I think it has worked well over the years.

Senator KOHL. Very good. Would you like to introduce to us any members of your family, sir?

Mr. MARTIN. I would. Unfortunately, my wife and children were caught in the spring vacation with some nonrefundable tickets, so they are not with me today.

I do have some support, my brother Frank, who is with the Justice Department, his son Zachery and his wife Sandra are here, my brother-in-law and my niece, Lee Motherhill, so I have bipartisan support from the family, both sides.

Senator KOHL. We are delighted to have you all here today.

Mr. Martin, you have litigated dozens of cases to verdict. By all accounts, you are an excellent lawyer and even opposing counsels speak very highly of you. My question is would you like to tell us about the milestones of your legal career, the things you have done and the things you are most proud of?

Mr. MARTIN. Well, unlike Mr. Stahl, who has spent his life with one firm, when you look at my résumé, it looks like I cannot hold a job. I started out my career as a law clerk to a Federal judge, Judge Leonard Moore.

To answer one of Senator Thurmond's questions, Judge Moore was someone who instructed me very early. It is very important that anyone who is a litigant leave the court feeling that they had been treated fairly.

After clerking for Judge Moore, I became an assistant U.S. attorney in the Southern District of New York and I served in that office from 1962 to 1966. I did a brief stint in private practice in a small town, Nyack, NY, about 20 miles north of New York City, where I practiced with a brother-in-law and a friend.

I then had the opportunity to serve in the Office of the Solicitor General of the United States and I served under both Dean Griswold and, at the outset, under Justice Marshall. After having spent 2 years there, I returned to New York and entered private practice, first as a sole practitioner, then started a firm, Martin and Obermaier, and that firm grew to about seven lawyers. I later joined my present firm, Schulte, Roth and Zabel, and in 1980 was recommended by Senator Moynihan to be U.S. attorney for the Southern District of New York. I served in that capacity until 1983, when I returned to private practice.

In 1986, I was appointed by Mayor Koch to head a commission to look into corruption in city contracts in New York and I served in that capacity, while remaining in private practice and I have stayed in private practice until today.

Senator KOHL. Very good. Mr. Martin, throughout your career as a private practitioner and a U.S. attorney, you have been an advocate. During that time, you have vigorously represented the interests of your clients, but a judge has a very different function and he must balance equities on both sides. My question is what, if any, difficulties do you anticipate in adapting to your new role?

Mr. MARTIN. Well, I don't anticipate any difficulties, Mr. Chairman, because I think, one, I have served as an arbitrator and seen the process from the more neutral standpoint of someone who has to decide the issue. I think my experience as U.S. attorney brings into play some of those same qualifications and qualities, because, as U.S. attorney, very often I would hear appeals by lawyers from decisions to prosecute. I had a staff of 115 lawyers. My door was always open to any lawyer who thought they were being treated unfairly or their client was being treated unfairly in a decision to prosecute. So, in that sense I have sat in a quasi-judicial capacity to try and decide. So I think I have had some experience, and it is something that I look forward to doing.

Senator KOHL. Mr. Martin, many opponents of judicial activism criticize courts which take over school systems or prisons to vindicate constitutional rights. Do you feel that Federal courts have sometimes gone too far in these types of cases?

Mr. MARTIN. I think those are always difficult cases. Every time a Federal court takes on the function of running some other institution that should be run by another branch of government, it is interfering to some extent with the rights of the people to have their government administered by those that they elect and those that the elected officials appoint.

On the other hand, you cannot walk away from the fact that if, as a judge, you are faced with a situation where some institution has been run in violation of the constitutional rights of inmates or

prisoners, then it may be necessary for the judge to take some action. But I think it has always got to be with the recognition that it should be the least intrusive possible action, recognizing the right of government to be run by those people who are elected by the citizens.

Senator KOHL. Several years ago, Congress established a commission that promulgated sentencing guidelines. These guidelines prescribe a range of sentences for every crime and set of circumstances. You have been highly critical of the guidelines. Several years ago, you stated, "I believe the basic concept of detailed sentencing guidelines is a mistake." Some questions: Do you still think the sentencing guidelines are misguided, now that we have some experience with them?

Mr. MARTIN. I would, as a legislator, still oppose the guidelines. However, if I was to be confirmed as a judge, I would apply the guidelines. I am not someone who believes that a judge can ignore those laws that he does not personally approve of. I think that the legislative judgment is one that the judge has to respect.

Senator KOHL. So, irrespective of your own personal opinions, you will not have any problem applying the guidelines?

Mr. MARTIN. Absolutely not.

Senator KOHL. Mr. Martin, I want to ask about club memberships. As I understand it, you resigned from the University Club in 1987, because it had a policy that discriminated against women, but until recently, you were a member of the Apawamis Country Club, which also treats women and men differently. My question is could you describe the membership policy of the Apawamis Club with respect to women, and why did it take you so long to resign from this club?

Mr. MARTIN. Well, I think that the Apawamis Club, looking at it very historically, has a provision that says that women are not admitted to a voting category. On the other hand, the way the club has been set up and has operated, women are members of the club, women may use all of the facilities. It also makes the facilities of the club available to women at a cost that is less than that of a man. And in an age where we had not yet really come to bring full equality to women in terms of compensation, the fact is that Apawamis makes the facilities, particularly the golf course, available to women who otherwise could not afford it.

One of the people that I play a lot of golf with is a woman who won the U.S. Amateur National Championship. That is a big part of her life and she can use that club because of this difference.

If one could simply say I could rewrite the charter, then it would make sense to say I would change it. The problem that you have as a member is, you start the process of change. The result of several hundred people voting may be to say we will make everything equal, that the women will pay what the men pay, and then you have done a disservice to people.

On the other hand, I have recognized now that if I am to be considered for a judgeship, there is a public perception problem created by having membership in a club where women are denied the right to vote and that was the reason I resigned.

Senator KOHL. But you belonged to the Apawamis Club?

Mr. MARTIN. Excuse me?

Senator KOHL. The country club that you belonged to——

Mr. MARTIN. That is right, I resigned from that recently, that is right.

Senator KOHL. You no longer belong to that club?

Mr. MARTIN. That is right.

Senator KOHL. And you resigned from that for the reason that you had been nominated for this position?

Mr. MARTIN. I think there is a public perception, as I said. I think you can go through a long explanation as to why I did not challenge it, which is true; I did not challenge it. This is because I felt it had never been challenged by a woman and to start the process could result in a change that would hurt some women.

However, being nominated for a Federal judgeship, the public perception of having a judge who may sit on a case involving women's issues, who belongs to a club that does not allow women to vote, I understand that and I think that people would look to that as being significant.

Senator KOHL. More than 20 years ago, you argued *Katz v. United States*. You lost that case, but it did confirm the principle that electronic surveillance of conversations could be constitutional, if authorized by a judicial order. In retrospect, do you think *Katz* was properly decided?

Mr. MARTIN. Well, in retrospect, yes, it was decided on the very technical grounds that there had been no warrant obtained. Justice Stewart's opinion in *Katz*, which really laid the framework for the 1968 legislation, said everything that the agents did in that case would have been constitutional had they gotten the authority of a magistrate by obtaining a warrant. Of course, there was no legislation at the time authorizing you to obtain a warrant, so that could not be done. So technically the decision was correct.

The resulting statute that was enacted following it had been upheld as constitutional. I think, as a former prosecutor, that it is one of the most effective tools that law enforcement has to deal with the highest levels of organized crime and major drug trafficking.

Senator KOHL. The law has evolved quite a bit since 1967, but new technologies have developed even more quickly, for example, cellular phones or even caller identification. Tell us how Congress and the courts approach balancing the privacy rights of individuals against the needs of law enforcement.

Mr. MARTIN. Well, without getting to specifics, I think that the guiding principles of the fourth amendment really do not change with technology. Justice Stewart wrote of people's reasonable expectations of privacy and the fact is that if you have a process that allows for law enforcement to obtain a warrant when they feel they are going to overhear conversations involving criminal activity, that same principle will apply, whether it is a phone in my home or a cellular phone I may use in my car or the portable cellular phone somebody may be carrying on the street.

Senator KOHL. Mr. Martin, there may be cases where, as a Federal judge, you will know or have some relationship with some of the parties or attorneys who come before you. In what circumstances do you feel that a Federal judge needs to recuse himself?

Mr. MARTIN. Well, certainly any case in which the judge has any financial interest and certainly any case where there is a perception that your judicial independence is going to be compromised. For example, I would not sit on a case involving my firm—I probably would not do that for 10 years. Also, in a court like the southern district, we do have the luxury of having a big bench, so that if a single judge disqualifies himself in a case, there is no problem with getting the case decided.

I think if I were sitting on a one-judge district or a small district, then there are real balances to be done if the judge steps aside to determine who is going to take his place. That is not an issue for someone sitting in the southern district, so that in those situations where I think there is any problem of appearance of a conflict, I can step aside, knowing that there are any number of judges who can take it up.

Senator KOHL. Is there any statement you would like to make before we excuse you, anything you would like to say?

Mr. MARTIN. Not at all, Senator. I appreciate your courtesy. It is obviously a privilege to appear before you.

Senator KOHL. It is a privilege to have you here, sir.

Mr. MARTIN. Thank you.

Senator KOHL. Thank you very much.

Our last nominee today is Dr. Alan Lourie, who has been nominated to be a judge on the court of appeals for the Federal circuit. Though Dr. Lourie now lives in Pennsylvania, it is clear that the seminal influence in his life was his stint at the University of Wisconsin, where he received his master's degree.

Dr. Lourie, I would like to administer the oath to you right now. Do you swear that the testimony you shall give today shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. LOURIE. I do.

Senator KOHL. Thank you, sir. Please be seated.

TESTIMONY OF ALAN D. LOURIE, OF PENNSYLVANIA, TO BE A U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Senator KOHL. We would be very pleased to meet the members of your family, Dr. Lourie.

Mr. LOURIE. This is my wife Liz. I have two daughters, Debbie Rappaport and Linda and my son-in-law, Aaron Rappaport, and Joshua Dean, my mother-in-law, Mrs. Henry Schwartz. And since there is no one left in the room, I want to introduce my friend Janice Williams, who has worked for me for many years, and Kurt Welmsley, who is the executive director of International Property Owners.

Senator KOHL. We are very glad you are all here. It is a pleasure to have you all.

Mr. LOURIE. Thank you.

Senator KOHL. Dr. Lourie, you are a man with a Ph.D. and several patents of your own. You, therefore, bring an unusual perspective to the field of patent law. In fact, you provided the committee with documents relating to two of your own patents. My question

is, in layman's terms, could you please tell us a little bit about these patents which you hold?

Mr. LOURIE. Those patents go back perhaps 30 years before I entered the field of patent law. They related to chemicals that I made when I was doing medicinal chemical research, in the hope that they would turn out to have some useful properties. They had sufficient use to justify the award of a patent but, upon further testing, they were not found to be of lasting value. I am afraid this often happens in the pharmaceutical field. We make many compounds, but few of them turn out to be important products.

Senator KOHL. Could you tell us why you left science for the law, Dr. Lourie?

Mr. LOURIE. I always felt that I was interested in science and I wanted to use science in a way outside the laboratory. I thought my skills were other than experimental skills. It took me a number of years before I found what I enjoyed and was skilled at doing and that was the law, in particular, patent law. As my questionnaire will indicate, I did my Ph.D. work part time, while I was working, first as a chemist and then I moved to Smith, Kline & French Laboratories and into the patent field, where I began, in effect, a training program, and then I knew I needed another degree, so I finished my Ph.D. work part time. I did my law work at night also.

Senator KOHL. When did you graduate from law school—how old were you?

Mr. LOURIE. I was 35.

Senator KOHL. Dr. Lourie, you spent most of your career in the highly specialized field of patent law, but while the court of appeals for the Federal circuit handles many patent cases, as you know, it also hears cases dealing with international trade law, public employees and government contracts. My question is how do you intend to get up to speed in these other areas of the law and do you feel that your experience has been varied enough to enable you to be an effective Federal judge.

Mr. LOURIE. I do. I feel as though the techniques and the processes of the law that I have been very well acquainted with all these years will stand me in good stead. International trade cases have some relation to the field of patents which are international. I have worked in the field of international trade, as an adviser to the USTR and the Commerce Department. I have read many of the opinions coming from the Federal circuit outside the field of patent law and I feel I will have no difficulty learning what I have to pretty quickly.

Senator KOHL. Dr. Lourie, your questionnaire indicates that you have traveled to China to advise the Chinese Government about revising its patent law. Does Chinese patent law award innovation in the way that ours does and, in your judgment, what are the prospects for change?

Mr. LOURIE. I am afraid China's patent law is not very effective, at least in the field of chemicals and pharmaceuticals, which are most patent-intensive, because they require the longest period of research and development.

The Chinese I think have a mentality that they are an underdeveloped country and that they cannot afford to support a system of innovation. In fact, the Chinese are brilliant people, they are very

creative, they have an industrial system that is growing very rapidly and I think it is in their interest, as well as in the interest of countries, inventors and companies in the United States and elsewhere, that they improve their own system.

We had thought the chances were very good until the problems of Tiananmen Square last June. I think that process has perhaps stalled. But the Chinese adopted a patent system almost from nowhere in the late seventies. I think it was in their own interest. I think fairly soon they will recognize they should provide solid patent protection for all kinds of inventions in their own interest and it will benefit our own inventors, as well.

Senator KOHL. Are they a rapidly evolving society or a slowly evolving society?

Mr. LOURIE. Well, they were rapidly evolving. I do not know enough to know how badly they have been set back, but certainly they were developing. Our company created a joint venture manufacturing plant in China and we had a lot of hope for the industrial development of China.

I have to believe, given the importance of China and the creativity of the people, that if they lighten up on their human rights treatment of their own people, that they will make rapid strides. But I am not an expert on China, I have to say.

Senator KOHL. Dr. Lourie, in one of your articles you said that it was unfortunate that Congress had overturned a patent decision by the court of appeals for the Federal circuit and you gave two reasons: First, you believed the decision was correct; second, you argued that the Federal circuit was a new court and you did not want to see its authority undermined.

Has the Federal circuit's prestige and authority survived intact and do you anticipate that its role will grow or change over the next few years, as it becomes more established?

Mr. LOURIE. The Federal circuit has done a wonderful job. Before the Federal circuit began its work in 1982, we did not know what the patent law was in the United States. The Supreme Court took very few cases. The law in the ninth circuit perhaps was different from the law in the second circuit and there was lots of forum shopping and struggling to have one's case in one or another court, depending upon whether one was for the patent or against the patent.

This really was not helpful to innovation and it did not encourage businessmen to invest in new inventions, because they did not know whether the patent would mean anything or not.

Since 1982, the Federal circuit has very greatly unified doctrine in the field of patent law and the district courts have quite well followed the legal thinking of the court and a lot of the disparities have been eliminated. I think the patent law in the United States is much better able to fulfill the congressional and, in fact, the constitutional purpose that it has to stimulate disclosure, creation and disclosure and investment in inventions.

In fact, I think the Federal circuit and the U.S. patent systems are models for the rest of the world. I think the court has succeeded extremely well and I am very honored and privileged, with your agreement, to have the prospect of helping to participate in the continued evolution of the law.

Senator KOHL. Dr. Lourie, as I understand it, you worked very hard to help enact the Patent Term Restoration Act. In part, this legislation permits some pharmaceutical patents to be extended when the regulatory approval process takes too long. Now, based on your experience, has the act been a success and has it encouraged innovation?

Mr. LOURIE. I think it has. On the one hand, though, it is almost too soon to have good data to prove that, because the benefits to innovative companies show up at the back-end when a patent would have expired, and so we really do not have a lot of evidence of how much benefit companies have obtained from that.

On the other hand, very clearly, when we begin the development of a compound, to know if it has just 6 years of patent life, we have the prospect of another 5. Having 11 years can make a difference in a businessman's decision of whether to invest in the development of a speculative compound. So, I think the law has clearly been a success, but it is a bit too soon to be able to document it.

Senator KOHL. I do not have any other questions. Do you have any statement or comments or suggestions of your own to make?

Mr. LOURIE. No, except to thank you for your courtesy, to state how pleased I am that President Bush has chosen to nominate me and that Senators Heinz and Specter have supported me and, if confirmed, I will do my very best to help serve the country in the cause of justice.

Senator KOHL. Thank you. It is very nice to have you here and the remaining members of the group that are here with you.

As it turned out, when I talked with Dr. Lourie before the hearing today, you find out what a small world it was. He went from Brookline to Harvard to Wisconsin, and I went from Wisconsin to Harvard to Brookline.

Mr. LOURIE. It is awfully nice to met you. Thank you very much.

Senator KOHL. It is very nice to see you, sir, and I wish you the best.

Mr. LOURIE. Thank you very much.

Senator KOHL. This concludes our hearing.

[Whereupon, at 3:21 p.m., the committee was adjourned.]

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Q. Full name (include any former names used).
 - A. Alan David Lourie
2. Q. Address: List current place of residence and office address(es).
 - A. Residence: 1549 Willowbrook Lane
Villanova, PA 19085
 - Office: SmithKline Beecham Corporation
One Franklin Plaza, P.O. Box 7929
Philadelphia, PA 19101
3. Q. Date and place of birth.
 - A. January 13, 1935, Boston, Massachusetts
4. Q. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
 - A. Married to Elizabeth S. Lourie, formerly Leah Elizabeth Duskin Schwartz, who is a French teacher at The Shipley School, Bryn Mawr, PA.
5. Q. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
 - A. Harvard College, 1952-1956, A.B. 1956
University of Wisconsin, 1957-58, M.S. 1958
University of Pennsylvania, 1960-65, Ph.D. 1965
Temple University, 1965-70, J.D. 1970
6. A. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
 - Q. 1957-1959: Monsanto Company
1959-1964: Wyeth Laboratories
1964-present: SmithKline Beecham Corporation (and predecessor companies)

7. Q. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.
- A. I have not had any military service.
8. Q. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.
- A. I have been awarded the following U.S. patents for research I performed:
- U.S. Patent 3,388,128 - Substituted
1,4-Diazabicyclo(4,4,0)decanes
U.S. Patent 3,131,194 - Substituted 2-Aminoisonicotinoyl
hydrazides
9. Q. 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.
- A. Philadelphia Patent Law Association: President, 1984-85; President-elect, 1983-84; Vice President, 1982-83; Board of Governors, 1981-86; Chairman, Publication Awards Subcommittee, 1977-78; Chairman, Chemical Practice Committee, 1974-76; Chairman, Food and Drug Subcommittee, 1972-74; Delegate to National Council of Patent Law Associations, 1985-87.
- American Intellectual Property Law Association: Member, Board of Directors, 1982-85; Chairman, Patent Term Extension Subcommittee, 1979-81.
- American Bar Association, Chairman, Subcommittee D on Experimental Use, Committee 101 of Patent, Trademark, Copyright Section, 1987-88.
10. Q. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.
- A. Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC 3) for the Department of Commerce and the Office of the U.S. Trade Representative: Vice Chairman, 1987-.
- Intellectual Property Owners: Member, Board of Directors, 1986-
- Association of Corporate Patent Counsel: Treasurer, 1987-89.

U.S.-Japan Business Council: Chairman, Task Force on Patent Harmonization, 1988-89.

Member, U.S. Delegation to Diplomatic Conference on the Revision of the Paris Convention, 1982, 1984.

Pharmaceutical Manufacturers Association: Chairman, Patent Committee, 1981-86.

Pacific Industrial Property Association: Chairman, Licensing Committee, 1981-82.

Interpat: Member of Liaison Committee, 1988-

Member, U.S. State Department Advisory Committee on International Intellectual Property, 1983-

American Chemical Society

Harvard Club of Philadelphia: Member of Executive Committee, 1986-88; Cochairman of Main Line Subcommittee of Schools Committee, 1984-89.

- 11.Q. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.
- A. Supreme Court of Pennsylvania, 1970
Court of Appeals for the Federal Circuit, 1982
(predecessor court, Court of Customs and Patent Appeals, 1970)
U.S. District Court for the Eastern District of Pennsylvania, 1973
Court of Appeals for the Third Circuit, 1980
United States Supreme Court, 1980
Admitted to practice in the U.S. Patent & Trademark Office, 1964
- 12.Q. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or

legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

- A. Journal of the Patent and Trademark Office Society, Vol. 71, No. 2, 171-176 (1989), A Review of Patent Term Extension Data.

ABA Section of Patent, Trademark, and Copyright Law, 1988 Annual Meeting Program Materials, 32-41, Licensing Issues of Joint U.S.-Canadian Concern, Including Compulsory Licensing.

Journal of the Patent and Trademark Office Society, Vol. 68, No. 11, 538-560 (1986), Patent Term Restoration -- The First Two Years.

AIPLA Bulletin, June-August 1986, 214-217, Pharmaceutical Patents and Compulsory Licensing; AIPLA Selected Legal Papers, Vol. IV, No. 1, C-1-7.

Food Drug Cosmetic Law Journal, 40, No. 3, 351-62 (1985), Patent Term Restoration: History, Summary, and Appraisal.

Drugs Made in Germany - International Views, 28, 120-26 (1985), United States Patent Term Restoration Act.

Die Pharmazeutische Industrie, 47, 8, 825-27 (1985), United States Patent Term Restoration Act - US-Gesetz zum Patentlaufzeitersatz.

Pharmaceutical Executive, 5, Jan. 46-48, Feb. 44-54 (1985), A Political History of Patent Term Restoration.

Journal of the Patent Office Society 56, 526-50 (1984), Patent Term Restoration.

Practicing Law Institute, Infringement of Patents, Contributory and Active Inducement of Infringement in Wake of Rohm & Haas Co. v. Dawson Chemical Co., 165-184 (1981).

U.S. Patent 3,388,128 - Substituted 1,4-Diazabicyclo-(4.4.0)decanes (1968).

Journal of Medicinal Chemistry 9, 311-315 (1966). The Synthesis and Hypotensive Activities of Some Substituted 1,4-Diazabicyclo(4.4.0)decanes.

U.S. Patent 3,131,194 - Substituted 2-Aminoisonicotinoyl hydrazides (1964).

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

A. My health is excellent. My last physical examination was in March 1989, and it was updated on October 26, 1989.

14.Q. 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.

A. I have not held judicial office.

15.Q. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for 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) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

A. I have not been a judge.

16.Q. 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.

A. I have not held public office, nor have I had an unsuccessful candidacy for such position.

17.Q. 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;

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- 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.
 - 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) non-jury.
- A. a. I attended law school in the evening while carrying on full-time professional employment as a patent agent at the then-named Smith Kline & French Laboratories, 1500 Spring Garden Street, Philadelphia, PA, and while married with a growing family. I had previously earned my Ph.D. part-time while working as a chemist and patent agent at Myeth Laboratories, Radnor, PA. Since I was already involved in legal practice when I graduated, I did not serve as a clerk to a judge. My practice consisted of the several types of legal work common to corporate patent practice, working for Smith Kline & French. First, I drafted patent applications and filed and prosecuted them in the U.S. Patent Office. A patent application, which is a combination of legal and scientific writing, has been described by the U.S. Supreme Court as one of the most difficult legal documents to draft. Its prosecution involves presentation of scientific and legal arguments to patent examiners in the United States and abroad. Briefs and affidavits are filed and oral arguments are

made at times before a Board of Appeals. This application work was my major activity for several years. In fact, I drafted and obtained the grant of over 150 patents. Second, I prepared and helped negotiate patent license agreements. These included in-licenses and out-licenses with both U.S. and foreign parties. Third, I advised our business and research people concerning the likely patentability of our inventions and the validity of possible adverse patents. Finally, I worked with outside counsel on litigation, advising our management concerning the prospects for success and instructing outside trial counsel as to the facts and legal theories supporting our positions.

- b. Following the above-noted intensive and broad-based patent practice, I was promoted in 1970 and given supervisory responsibility for other patent trainees and attorneys. Later, in 1976, I became head of the patent department for what was then SmithKline Corporation. My responsibility also expanded to include a group of in-house British (and a Belgian) patent agents. My role became one of direction of the worldwide program for patents (and later trademarks) for the corporation. This included the drafting, filing, and prosecution by others in my department of patent and trademark applications in over 40 countries; the drafting and negotiating of patent and technology license agreements with U.S. and foreign companies; and the conduct of litigation in a variety of countries, among which were the U.S., Japan, Italy, Scandinavia, and Canada.

More recently, I have expanded my activities to include legislative work in the U.S. and abroad. I have been a member of the U.S. delegation to the Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property, a worldwide treaty. I am Vice Chairman of the Industry Functional Advisory Committee on Intellectual Property for the U.S. Trade Representative and the Department of Commerce, on which I advise U.S. Trade and Commerce officials on aspects of U.S. and foreign patent law. I played the key attorney role in advising the Pharmaceutical Manufacturers Association on the pharmaceutical patent term restoration legislation which is now part of our law. I am generally regarded by patent attorneys as an authority on the patent aspects of this legislation and have written several papers and given a number of talks on the subject. I have advised Canadian pharmaceutical

company executives concerning revision of their law and met with Chinese government officials with respect to revision of their patent law. I have advised the U.S. Patent and Trademark Office and testified before Congress on issues of Japanese patent law. I regularly advise pharmaceutical trade association officials concerning U.S. and foreign law.

My sole client has been what is now SmithKline Beecham Corporation. I have specialized in worldwide pharmaceutical patent law. My subspecialty at one time was cephalosporin and penicillin antibiotic patents. Also pertinent to the question concerning who have been my clients, more recently, I believe it is not inaccurate to say that, since a client is one to whom one gives advice on legal matters, my clients have included the U.S. government, the Pharmaceutical Manufacturers Association, and worldwide patent attorneys who frequently consult me on the U.S. Patent Term Restoration Act, Canadian compulsory license patent law and U.S. and foreign law generally.

- c. 1. I argued appeals in court twice, in 1973 and 1977, and have since been in court to observe or advise outside trial counsel on at least two occasions, in 1979 and 1988.
2. These cases all were in federal courts.
3. This litigation was all civil.
4. I have not personally tried a lawsuit to verdict or judgment.
5. Not applicable.

18.Q. 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, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
- A. The most significant litigated matters in which I have personally participated are as follows:
1. SK&F Co. v. Premo Pharmaceutical Laboratories, Inc., 206 USPQ 233, 481 F. Supp. 1184 (D.Ct.N.J.1979); affirmed, 206 USPQ 964, 625 F2d 1055 (3rd Cir.1980); 206 USPQ 626 (D.Ct.N.J. 1980). This case involved the attempt by a generic pharmaceutical company to sell a copy of our then best selling product 'Dyazide' four months before the patent expired. We sued for patent infringement, adding an unfair competition claim based on their copying the trade dress of our product. I closely supervised and worked with trial counsel on this case. A preliminary injunction hearing was held in December 1979 and the court (Judge Blunno, D.Ct.N.J.) granted an injunction based on Section 43a of the Lanham Act. An injunction was later granted on the patent claim as well. The legal significance of the case is that, on appeal, the Third Circuit Court of Appeals affirmed the lower court and provided the strongest precedent to date for protecting the proprietary nature of the trade dress of prescription pharmaceuticals. Arguments had been advanced by others that, as a matter of public policy, copying of trade dress should be permitted to encourage use of generic drugs by letting patients feel they are still receiving the same medicine with the same appearance, even though from a different source. Our argument against permitting deception of the consumer prevailed. Donald R. Dunner and Charles Lipsey of Finnegan, Henderson, Farabow, Garrett & Dunner, 1775 K Street, Washington, D.C., 202-293-6850, were our trial counsel; David B. Kirschstein (Kirschstein, Kirschstein, Ottinger & Israel, 551 Fifth Avenue, New York, NY 10176, 212-697-3750) was opposing counsel. I was assisted in this case by one of my in-house lawyers, Janice E. Williams (SmithKline Beecham Corp., P.O. Box 7929, Phila., PA 19101, 215-751-5187).
 2. Eli Lilly v. SmithKline Corporation, D.Ct.E.D.Pa. (C.A. 71-1452) (Judge Lord and Judge Green). This case, filed in 1971, was a declaratory judgment action by Lilly for a determination that their use of an ester of a chemical intermediate called 7-ADCA was not an infringement of our patent claiming 7-ADCA itself. The case arose when senior management, without consulting counsel, wrote a threatening letter to Lilly, thereby creating a "case or

controversy" adequate for declaratory judgment jurisdiction. I was assigned to work with outside counsel, Dexter Shaw and Gordon Rogers, both now deceased. I learned unexpectedly from our files of the patent, which previously had not been part of my responsibility, that the patent had a serious weakness and that, moreover, our activities created a risk of infringing a separate Lilly patent. The case went through discovery on both sides, after which, with the approval of our management, I negotiated a cross license to settle the case. Opposing house counsel for Lilly was Everet Smith (Barnes & Thornburg, 1313 Merchants Bank Bldg., Indianapolis, IN), 317-638-1313; outside counsel was Dugald S. McDougall of McDougall, Hersh & Scott, 135 S. LaSalle Street, Chicago, IL 60603, 312-346-0338. The case has no special legal significance, but it represented a highly successful resolution of a complex and difficult problem and one for which I had substantial responsibility.

3. SmithKline Diagnostics, Inc. v. Helena Laboratories Corporation, 662 F. Supp. 622 (D.Ct.E.D.Tex. 1987), reversed in part, 8 USPQ 2d 1468, 859 F2d 878 (Fed. Cir. 1988), on remand for damages, 12 USPQ2d 1375 (D.Ct.E.D.Tex. 1989). This case was a patent infringement action against a company that copied our occult blood screening slide sold as 'Hemocult'. My role was to oversee an in-house patent lawyer (Stuart R. Suter, SmithKline Beecham Corp., P.O. Box 7929, Phila., PA 19101, 215-751-5186) working with trial counsel, Donald R. Dunner and Allen M. Sokal, of Finnegan, Henderson, Farabow, Garrett & Dunner, 1775 K Street, Washington, D.C. 20006 (202-293-6850). Opposing counsel is Jerold Schneider of Spencer & Frank, 1111 19th Street, N.W., Washington, D.C. 20036, 202-828-8000. Trial occurred in December 1985. The trial court (Judge Fisher) found that our patent was not infringed if held invalid and, if infringed, was not valid. We prevailed on appeal, the Federal Circuit holding that our patent was both valid and infringed. On remand for a determination of damages, the trial court awarded us damages amounting to a reasonable royalty. We have appealed, claiming that we are entitled to a larger award consisting of lost profits. The case has no special legal significance.
4. Smith Kline & French Laboratories v. A.H. Robins, 181 USPQ 12 (D.C.E.D.Pa. 1973, Judge Fogel). This case was, in essence, a patent infringement action brought against a company that was testing a pharmaceutical product that was metabolized into a compound covered by our patent. My role was as in-house attorney working with outside counsel, Donald R. Dunner of Finnegan,

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Henderson, Farabow, Garrett & Dunner, 1775 K Street, Washington, D.C. (202-693-6850). Opposing counsel was John Mackiewicz, of Woodcock, Washburn, Kurtz, Mackiewicz & Norris, 30 S. 17th Street, #1800, Phila., PA 19103, 215-568-3100. The case went through discovery and included a motion by Smith Kline to strike a defense of laches, which had been based on the argument that we had known of their testing for a period of time and had not acted on that knowledge. Our response was that pre-marketing testing was not infringement, so we could not have brought an action earlier. The court dismissed the motion as premature in view of the record, and the case was settled. For years, attorneys questioned me about the case because of the widespread concern over the issue of when premarketing activity becomes actionable infringement. The issue is still contentious in patent law; (see 35 U.S.C. 271(e)(1); Eli Lilly & Co. v. Medtronic, Inc., cert. granted, U.S. Supr. Ct. No. 89-243, 10/10/89).

5. In re Gardner, 177 USPQ 396, 475 F2d 1389; 178 USPQ 149, 480 F2d 879 (CCPA 1973). This case was an ex parte appeal from the Patent Office Board of Appeals to the Court of Customs and Patent Appeals, the predecessor court to the Court of Appeals for the Federal Circuit. I briefed the case and argued on appeal. The issues were whether our patent application (drafted by another attorney) contained an adequate description of the invention being claimed and whether all of the claimed compounds must have all the various uses stated in the application. The court (a five-person panel, consisting of Judge Markey, Judge Rich, Judge Baldwin, Judge Lane, and Judge Almond) held in our favor, and the case has been widely cited for the technical point that a claim to a specific group of chemical compounds is itself an adequate description of that invention, irrespective of whether it appears in haec verba elsewhere in the patent application. Moreover, the court found that language in the application indicating that the compounds possessed varying amounts of activity did not deprive them of sufficient utility to meet the statutory requirement for patentability since there is no requirement that all the compounds had to have the same degree of activity. This language also did not negate the positive assertion elsewhere in the patent specification that all of the compounds had at least one basic activity. The Patent Office petitioned for rehearing and reconsideration with respect to the court's holding that the claim itself was an adequate description of the invention. The court denied the petition.
6. Breuer et al. v. DeMarinis, 194 USPQ 308, 558 F2d 22 (CCPA 1977). This case was an inter partes interference proceeding involving a priority contest between two parties claiming the same invention. The Patent Office declared the interference, but immediately placed the other party under an order to show cause why priority should not be awarded to SmithKline Corporation. The record

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revealed that, based on a rule of reason approach to interpreting the acts performed abroad by the other party, the other party should prevail. In effect, the case was a contest between the Patent Office and the other party, with my company, as the party that would win the patent if the Patent Office were sustained, being brought in to defend their position. Since the subject matter was no longer of commercial importance to our company and we were anxious that the law develop in a sensible manner, I briefed and argued the case before the five-judge panel (Judge Markey, Judge Rich, Judge Baldwin, Judge Miller, and Judge Kashiwa, making our (and the Patent Office's) best argument, but trying to maintain salutary legal principles. The specific issue was whether, in a priority contest, a compound invented abroad is entitled to its date of importation for priority purposes when data confirming the identity of the compound were obtained abroad or whether the identity of the compound had to be confirmed in this country. The issue arose because of the statutory (35 U.S.C. 104) prohibition against reliance on foreign work to prove a date of invention. The court held that the information from abroad was adequate to prove the identity of the compound, thereby entitling applicants to the date of importation for priority purposes. The statute only precluded use of acts performed abroad to prove a date of invention when they were performed. Although we lost the case, by responsible argument we helped contribute to a sound patent law that permitted the patent to be awarded to the true first inventor. Counsel for the other party was Lawrence Levinson, now retired (4 Weidel Drive, Pennington, NJ 08534, 609-737-1820).

7. Ex parte Plotkin, 174 USPQ 39 (U.S. Patent Office Board of Appeals, 1971). This case involved an ex parte appeal to the Patent Office Board of Appeals from a rejection by the examiner of our application claiming a vaccine product. I briefed the case and argued before the three-person Board (Messrs. Magl, Gorecki & Schneider, Examiners-in-Chief) that a claim to the product of a particular process should be allowable notwithstanding that the process itself was obvious and hence unpatentable in and of itself. The examiner had considered that the unexpected properties of the vaccine entitled the applicant to claims to the method of use of the vaccine, but not to the product itself. Relying on case law precedent involving chemical compounds, I argued that the vaccine product itself was patentable. The Board agreed with my position. The Board did, however, newly reject the claims based on the technical ground of double patenting over an earlier patent, but that rejection was overcome upon resumption of prosecution before the examiner by filing a terminal disclaimer, limiting the term of the patent to that of the earlier patent.

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8. Warner-Lambert v. SmithKline Diagnostics, Inc. (Del. C.A. 87-143, Judge J. Farnan). This case, currently in progress, involves a claim by Warner-Lambert that SKD's 'Hemocult' occult blood screening slide infringes a patent purchased by Warner-Lambert from a Dr. William Friend. Dr. Friend had offered us a patented alternative to our product, but we turned it down. We had noticed that one or more claims of his patent could be argued to cover, not just his new invention, but the general use of a positive monitor for the slide, a feature possessed by our product. Upon careful evaluation, we concluded those claims were invalid over a prior publication and need not be of concern. Warner-Lambert later purchased the patent and, following a futile license discussion, sued us. Since this part of our business has since been distributed to our shareholders as part of a company with its own patent counsel, I no longer have responsibility for the matter. Our outside counsel were Donald R. Dunner and Allen M. Sokal of Finnegan, Henderson, Farabow, Garrett & Dunner, 1775 K Street, Washington, D.C. 20006, 202-293-6850. Our opposing counsel were Stephen Raines (now at Genentech, Inc., 460 Point San Bruno Blvd., South San Francisco, CA 94080), 415-266-1705, and Sidney David of Lerner, David, Littenberg, Drumholz & Mentlik, 600 South Avenue West, Westfield, NJ 07090-1497 (201-654-5000). Aside from the fact that this was the first time our company had been sued for patent infringement under my responsibility, the case has involved a significant legal issue. In discovery, we were asked to disclose our opinions of counsel on which we intended to rely in order to negate a charge of willful infringement. We refused, relying on the attorney-client privilege, but the court ordered disclosure. We appealed to the Federal Circuit, but that court declined to accept this interlocutory issue and the Supreme Court denied certiorari. We then divulged the opinions in order not to run the risk of increased damages.
9. I have had oversight responsibility for a number of patent infringement cases in Italy, Japan, Scandinavia, and in other foreign countries involving our major product, 'Tagamet'. Generally, these actions have had to be brought in countries where patents have not provided strong protection for pharmaceuticals. We have therefore had to press weak cases, but have won some and lost others. In each case, in-house subordinates, generally in the U.K., have had direct involvement with the cases, using outside counsel in each country.
- 19.Q. 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 this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

- A. One of the most significant legal activities in which I have participated was membership in the United States delegation to the Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property in Geneva, Switzerland in 1982 and 1984. I was a private sector delegate chosen to advise our government officials concerning aspects of the proposed revision of a worldwide patent and trademark treaty as they affected the pharmaceutical and chemical industries. The key issues related to the attempts of developing nations to weaken patent protection for innovators. This activity derived significance both because of the importance of the subject matter to U.S. industry and my personal satisfaction in being able to represent the United States at a diplomatic conference and advise our government.

A second significant legal activity was my role in being a patent law advisor to our trade association in its effort to persuade Congress to extend the term of U.S. pharmaceutical patents to restore some of the time lost to regulatory review and in generating data for that review. This effort spanned several years. I was among the original drafters of a bill suggested by industry to rectify the continued erosion in the effective patent life of regulated products. This activity was significant both because of the overriding importance of the issue of effective patent life to industry and to the innovation process and for the insight I gained into the details of the legislative process. During this process, I interacted with officials of the Pharmaceutical Manufacturers Association, the Patent and Trademark Office, and, on occasion, Congressional staff. I have written and spoken widely on the resulting legislation.

Another significant legal activity involved the enforcement of a patent on my company's then largest selling product against a company that attempted to sell a copy of the product during the final months of its patent life, in a formulation nearly identical to ours (but with several times the potency of our product), and without FDA approval. I managed the suit as house patent counsel, working closely with outside trial counsel. After a hearing on our request for a preliminary injunction, the trial court granted the injunction based on the infringer's copying our trade dress. The Third Circuit Court of Appeals affirmed the grant of the injunction in a decision that helped to clarify an uncertain legal situation.

A further significant legal activity was my playing a key role as part of an industry delegation to China, meeting with Chinese government officials, and advising them concerning their proposed revision of their patent laws. I was the senior patent attorney (one of only two attorneys) along with three business people from U.S. companies and my role was to explain the shortcomings of

Chinese law, compare it with that of other countries, make arguments justifying change, and suggest change. We have had reason to expect that some change would occur in 1990, but recent events in China may have affected this prospect.

A final activity to be mentioned is my membership on (and Vice Chairmanship of) the Industry Functional Advisory Committee on Intellectual Property and Trade for the Department of Commerce and U.S. Trade Representative. This statutory committee advises our government officials concerning positions to be taken in the current GATT negotiations involving intellectual property and potential actions under Section 301 of the Trade Act against countries failing to provide U.S. citizens with adequate intellectual property protection.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Q. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

A. From my employer, SmithKline Beecham Corp., I will receive the following: (1) soon after my resignation, a severance payment of approximately \$323,000 arising from an early retirement program plus unused vacation pay amounting to approximately \$25,000; (2) a continuing pension amounting to approximately \$68,000; (3) retiree medical and life insurance benefits if I choose to remain in the program and pay the necessary premiums; (4) the right to remain in the company's savings plan; and (5) the right to retain my incentive stock options and stock appreciation rights until six months after my retirement; these rights are currently worth approximately \$295,000.

2. Q. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these area of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

A. I will resolve any conflict of interest by recusing myself from the involved case. I expect to consult with other judges on the court in determining when to take this action. It is clear that any case involving my past employer, SmithKline Beecham, would present at least the appearance of impropriety and would require my recusal. I doubt that any other cases would arise since I have not been involved in litigation other than through my employer.

3. Q. 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.

A. I have no such plans, commitments, or agreements.

4. Q. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

A. Enclosed is the financial disclosure form.

5. Q. Please complete the attached financial net worth statement in detail

(Add schedules as called for).

A. Statement is attached.

6. Q. Have you ever held a position or played a 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.

A. I have never held such a position or played such a role.

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting LOURIC, ALAN D.	Date of Report JAN 23, 1990
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IV. REIMBURSEMENTS and GIFTS--transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

SOURCE	DESCRIPTION
<input checked="" type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

SOURCE	DESCRIPTION	VALUE
<input checked="" type="checkbox"/> NONE (No such reportable gifts)		
1		\$
2		\$
3		\$
4		\$
		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; see pp. 22-24 of Instructions.)

CREDITOR	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/> NONE (No reportable liabilities)		
1		
2		
3		
4		
5		
6		
7		

* VALUE CODES	J = \$0 to \$1,000 N = \$50,001 to \$100,000	K = \$1,001 to \$5,000 O = \$100,001 to \$250,000	L = \$5,001 to \$15,000 P = over \$250,000	M = \$15,001 to \$50,000
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AO-10
Rev. 1/89

FINANCIAL DISCLOSURE REPORT

Annual Report Due by May 15 from Judicial Officers and certain Judicial Employees. (28 USCA App. 1, §§ 301-09)

Person Reporting (Last name, first, middle initial) LOURIE, ALAN D.	Court or Organization COURT OF APPEALS FOR THE FEDERAL CIRCUIT	Date of Report JAN. 27, 1990
Title CIRCUIT JUDGE	Date of Entry/Nomination/Termination (only if initial or final report) JAN. 27, 1990	Reporting Period (Calendar year, or inclusive dates) JAN. 1, 1989 - JAN. 15, 1990
Home or office address 1549 WILLOWBROOK LANE VILLANOVA, PA 19085		

IMPORTANT NOTES: Please read the instructions accompanying this form. The report should include information pertaining to your spouse and dependent children, if any. Attach additional sheets if needed, identifying each attachment by showing your name, the date of the report, and the section(s) being completed. Complete all sections, checking the NONE box for each section where you have no reportable information. Compare and reconcile this report with last year's and list items in the same order as last year. Type or print clearly. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 15-17 of Instructions.)

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (No reportable positions)	
VICE PRESIDENT, CORPORATE PATENTS & TRADEMARKS CORP. AND ASSOCIATE GEN. COUNSEL	SMITHKLINE BEECHAM CORP. (NOW SMITHKLINE BEECHAM)
DIRECTOR	INTELLECTUAL PROPERTY OWNERS
TRUSTEE	ROSE H. LOURIE (HUTCH) TRUST OF 5/13/82

II. AGREEMENTS. (Reporting individual only; see p. 17 of Instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements)	
	MY CURRENT EMPLOYER, SMITHKLINE BEECHAM CORP., AFTER I RESIGN, WILL PROVIDE ME WITH (1) PERIODIC PENSION PAYMENTS, (2) RETIREE MEDICAL + INSURANCE BENEFITS, + (3) THE RIGHT TO RETAIN FUNDS IN THE COMPANY SAVING PLAN. I WILL RETIRE WITH A SEVERANCE PAYMENT OFFERED TO ALL CORPORATE STAFF EMPLOYEES AS PART OF AN EARLY RETIREMENT PROGRAM + WILL HAVE STOCK OPTION OR APPRECIATION RIGHTS THAT CAN BE EXERCISED UP TO 6 MONTHS AFTER RETIREMENT.

III. NON-INVESTMENT INCOME. (Partial disclosure for spouse; see pp. 18-20 of Instructions.)

DATE (Honoraria only)	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income)		
1	SMITHKLINE BEECHAM CORP. - SALARY + STOCK OPTION GAINS **	\$ 436,863.
2	SHIPLEY SCHOOL - SALARY (S)	\$
3		\$
4		\$
5		\$
	* 113396 ** 262467	\$

FINANCIAL DISCLOSURE REPORT (cont'd)	Name of Person Reporting LOURIE, ALAN D.	Date of Report JAN 23, 1990
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VII. INVESTMENTS and TRUSTS--Income, value, transactions. (Includes those of spouse; partial disclosure for dependent children; see pp. 24-35 of Instructions.)

A Description of Assets (including trust assets) <small>Place "X" after each asset except from prior disclosure.</small>	B Income during period		C Gross value at end of period		D Transactions during period (Reporting individual and spouse)				
					If not exempt from disclosure				
	Amt. Code (A-H)	Type (e.g., div.)	Value Code (J-K)	Value Method Code (Q-W)	Type (e.g., sold)	Date: Month-Day	Value Code (J-K)	Gain Code (A-F)	Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1 VANGUARD MUNICIPAL BOND FUND; MONEY MARKET PORTFOLIO	E	DIV.	O	T					
2 VANGUARD SPECIALIZED GOLD PORTFOLIO	B	DIV.	M	T					
3 MUTUAL SHARES FUND	D	DIV.	M	T					
4 VANGUARD SPECIALIZED HEALTH PORTFOLIO	B	DIV.	M	T					
5 VANGUARD PENNA. INSURED TAX-FREE FUND	E	DIV.	O	T					
6 T. ROWE PRICE NEW ERA FUND	B	DIV.	L	T					
7 T. ROWE PRICE HIGH YIELD FUND	D	DIV.	M	T					
8 TEMPLETON WORLD FUND	C	DIV.	M	T					
9 VANGUARD FIXED INCOME FUND HIGH YIELD PORTFOLIO	B	DIV.	M	T					
10 EVERGREEN TOTAL RETURN FUND	B	DIV.	L	T					
11 VANGUARD MUNICIPAL BOND FUND INTERMEDIATE PORTFOLIO	E	DIV.	O	T					
12 VANGUARD SPECIALIZED ENERGY PORTFOLIO	B	DIV.	L	T					
13 WINDSOR II FUND	C	DIV.	L	T					
14 VANGUARD MUNICIPAL BOND FUND INTERMEDIATE PORTFOLIO (S)	D	DIV.	M	T					
15 WINDSOR FUND (S)	D	DIV.	M	T					
16 VANGUARD FIXED INCOME FUND INVESTMENT GRADE PORTFOLIO (S)	C	DIV.	M	T					
17 GUARDIAN MUTUAL FUND (S)	D	DIV.	M	T					
18 COLLEGE RETIREMENT EQUITIES FUND (S)	A		L	T					
19 SMITHKLINE BEECHAM SAVINGS PLAN	F	INT. MATCHING	P	T					
20 HELLON BANK CHECKING ACCT	B	INT.	L	T					

1 Income/Gain Codes:	A = exempt (\$0 to \$100) E = \$5,001 to \$15,000 J = exempt (\$0 to \$1,000) N = \$20,001 to \$100,000	B = \$101 to \$1,000 P = \$15,001 to \$50,000 S = \$1,001 to \$5,000 Q = \$100,001 to \$250,000 R = Cost (real estate only) V = Other	C = \$1,001 to \$1,500 G = \$30,001 to \$100,000 L = \$5,001 to \$15,000 F = over \$250,000 S = Adjusted value W = Estimated	D = \$1,501 to \$5,000 H = over \$100,000 M = \$15,001 to \$50,000 T = Cash/market
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FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting LOURIE, ALAN D.	Date of Report JAN 23, 1990
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VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate section of Report.)

Check to affirm that differences in investments from those reported in prior year are exempt from disclosure.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

Signature Alan D. LouieDate Jan. 23, 1990

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:	
1. Mail signed original and 3 additional copies to:	Judicial Ethics Committee Administrative Office of the United States Courts Washington, DC 20544
2. Deliver one copy to the Clerk of the Court on which you sit or serve. (Judicial employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center, need not file a copy with any court.)	

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	14,695	Notes payable to banks—secured	
U.S. Government securities—odd schedule		Notes payable to banks—unsecured	
Listed securities—odd schedule	95,502	Notes payable to relatives	
Unlisted securities—odd schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—odd schedule	
Real estate owned—odd schedule-EST'D	300,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize: 30 DAY CHARGE ACCTS-EST'D	500
Autos and other personal property-EST'D	120,000		
Cash value—life insurance	19,347		
Other assets—itemize: GOLD COINS	9,995		
EMPLOYER SAVINGS PLAN-EST'D	602,265		
EMPLOYER UNREALIZED STOCK GAIN	295,000		
WIFE'S EMPLOYER SAVINGS PLAN	12,478		
		Total Liabilities	500
		Net worth	2,123,582
Total assets	2,123,092	Total Liabilities and net worth	2,123,092
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor-EST'D	14,700	Are any assets pledged? (Add schedule.)	N/D
On leases or contracts	0	Are you defendant in any suits or legal actions?	N/D
Legal Claims	0	Have you ever taken bankruptcy?	N/D
Provision for Federal Income Tax	55,000		
Other special debt	0		

* RESIDENCE
* DAUGHTER'S APT. LEASE

Alan D. Lourie-Schedule to Financial Statement

<u>Security</u>	<u>Value on Jan. 15, 1990</u>
Vanguard Municipal Bond Fund-Money Market	\$132494
Vanguard Gold Portfolio	20464
Mutual Shares Fund	29535
Vanguard Health Portfolio	16305
Vanguard Penna Municipal Bond Fund	179635
Price New Era Fund	6893
Price High Yield Bond Fund	20183
Templeton World Fund	23204
Vanguard High Yield Bond Fund	25113
Evergreen Total Return Fund	11783
Vanguard Municipal Bond Fund-IM	137947
Vanguard Energy Portfolio	7356
Windsor II Fund	14112
Vanguard Municipal Bond Fund-IM	37677
Windsor Fund	42384
Vanguard Fixed Inc-Invest Grade Fund	22523
Guardian Mutual Fund	23894
 Total	 751502

III. GENERAL (PUBLIC)

1. Q. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
 - A. I have been a corporate employee all my professional life, specializing in patent law for as long as I have been a lawyer. My specialty is not one which the disadvantaged can utilize and I have not been associated with a law firm which could provide support in other areas of law. I have, however, made regular financial contributions to charitable organizations serving the disadvantaged. In addition, I have spent considerable time in professional organizations advancing the purposes of the law in which I specialize, where my knowledge and background are helpful. Finally, one of my reasons for wishing to serve on the Federal Circuit is to engage in a more concentrated form of public service.

2. Q. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?
 - A. I do not currently belong, nor have I ever belonged, to any organization that so discriminates.

3. Q. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).
 - A. There is no selection commission to recommend candidates for nomination to the Federal Circuit. I had been encouraged to seek the nomination by a large number of lawyers from private law firms and in corporations, and

by leaders of several bar associations, trade associations, and corporations who believe that this court, which is in effect the national court of appeals in patent cases, ought to have a reasonable number of patent lawyers with scientific or technical background on its bench. Since I have been interested in the development of the law since I entered the profession and I have followed the decisions of the court and its predecessor for many years, I would like to serve on the court; I therefore wrote to the Attorney General and the Counsel to the President expressing my interest. I was interviewed and recommended by the Judicial Selection Committee of the Federal Circuit Bar Association. Letters of endorsement from chief executives of corporations, patent attorneys, bar associations, and trade associations advocated my appointment. I received the support of my Congressman and Senators as well as local political leaders. I was later interviewed by a number of officials of the Department of Justice and by a member of the American Bar Association's Standing Committee on Federal Judiciary.

4. Q. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.
- A. No one involved in the selection process has discussed any case, issue, or question with me in such a manner.
5. Q. 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 many 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.

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- 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.
- A. No doubt there have occurred examples of "judicial activism" in recent years. It would be surprising if this did not take place, given the number of cases involving important social issues that come before the courts and the diversity of views among the large number of judges that sit on the federal bench. I do not believe, however, that this is a serious issue for the Federal Circuit, whose jurisdiction is limited to several well-defined categories of cases involving patents, trademarks, international trade, government contracts, government employees, etc. It is not a court of general jurisdiction involving cases of broad social significance about which judges may be tempted to overreach. Where new issues arise, as they inevitably do, I believe that it is the role of the court to attempt to fit them within the relevant statutory framework.

I personally believe that it is not the role of the judiciary to legislate; it is to determine the facts which are disputed by the litigating parties and to apply the applicable statutory law. Moreover, an appellate court is limited in its scope of review and should not simply impose its view of the facts in reviewing a case that comes before it. Finally, I recognize the role that procedure plays in the judicial process. The orderly resolution of disputes requires that litigants, their lawyers, and the courts follow the rules we have established for the resolution of disputes, and much of the action of appellate courts must be governed by the procedural stage in which they receive a particular case. Their job is not to determine what the best result should be, but to review cases coming up on appeal from the lower tribunals, fully recognizing the procedural posture in which the cases present themselves. I, therefore, do not expect that "judicial activist" will be a label that will be applied to me should I be confirmed.

AFFIDAVIT

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

Jan. 24, 1990
(DATE)

Alan D. Lourie
(NAME)

Gertrude S. Halbherr
(NOTARY)

NOTARIAL SEAL
GERTRUDE S. HALBHERR, Notary Public
City of Philadelphia, Phila. County
My Commission Expires March 15, 1990