People For the American Way Report:

Carolyn Kuhl's Hearing Strengthened the Case Against Her Confirmation

People For the American Way
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INTRODUCTION

Even before the April 1, 2003 hearing on Carolyn Kuhl's nomination by President Bush to the United States Court of Appeals for the Ninth Circuit, significant opposition to Kuhl's confirmation had arisen because of her troubling record as a lawyer and judge. Throughout her career — as a lawyer in the Reagan Administration Justice Department, in private practice, and as a state judge — Kuhl has followed a legal philosophy harmful to the rights and interests of ordinary Americans. This is particularly true in three areas: women's rights and reproductive freedom, other civil rights, and access to justice.

Kuhl's hearing on April 1 not only failed to dispel the serious concerns that had been raised about her record, but in fact reinforced them. At her hearing, Kuhl refused to answer certain questions (such as those relating to her jurisprudential views of Roe v. Wade), she changed the subject and avoided answering other questions, and, whether intentional or not, her responses to a number of questions asked by Senators regarding troublesome aspects of her record were untrue and misleading in critical respects.

For example, in a landmark sexual harassment case decided by the Supreme Court, Kuhl as a Reagan Justice Department official had urged the Court to rule in favor of the employer, under a definitional standard that would have made it very difficult for women to prove sexual harassment in the workplace. The Court did not adopt Kuhl's standard and ruled unanimously for the female employee. Nonetheless, when questioned about this case at her hearing, Kuhl called her disagreement with the Court "technical" and sought to portray the ruling as a victory for her position.

In another Supreme Court case, Kuhl had filed a brief urging the Court to overturn the important and well-settled doctrine of associational standing, which allows organizations to file suit on behalf of their members and thus facilitates access to justice by ordinary Americans. When asked about this case at her hearing, Kuhl stated that her name was not on the brief, thereby deflecting questions about her extreme views. Kuhl's response was flatly incorrect. Although Kuhl has since acknowledged the error in her testimony, she has never answered Senators' fundamental concerns about the "frontal attack" that her own former supervisor says she launched in this case against the doctrine of associational standing.

These and other disturbing aspects of Kuhl's hearing testimony are further discussed below with respect to each of the three fundamental areas of concern about Kuhl's record: women's rights and reproductive freedom; other civil rights issues; and access to justice. Combined with the concerns already raised by Kuhl's record, it is clear that her confirmation should be rejected.

- **Kuhl's record on women's rights, including reproductive freedom**

  - Trying to overturn *Roe v. Wade*

Senators' concerns: When Kuhl served as Deputy Assistant Attorney General, she specifically urged that the Department of Justice seek to have the Supreme Court overturn Roe v. Wade.

According to Charles Fried, Acting Solicitor General at the time, Kuhl was the co-author of "[t]he most aggressive memo" to him from within the Justice Department urging the Department to file an amicus curiae brief in the Supreme Court in the Thornburgh case calling for "outright reversal of Roe."[1] Kuhl then co-authored precisely such a brief, which contended that Roe was "so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided."[2] The Supreme Court rejected Kuhl's attack on Roe.

Kuhl's testimony: In response to questions about her role in the Thornburgh case, Kuhl attempted to deflect Senators' concerns about her troubling position by asserting that she was merely representing a client, President Reagan, who believed that Roe should be overruled.[3] Kuhl specifically and repeatedly declined to answer Senator Feinstein's question as to whether she believes that Roe was correctly decided. Kuhl Hearing, at 45-47.

The facts: To the extent Kuhl claimed that as a Justice Department attorney she was representing the President in Thornburgh, the same could be said of every attorney in the Justice Department, including everyone who weighed in with Acting Solicitor General Fried as to whether the government should even file an amicus brief in this case (since it was not a party), let alone what position it should take. The fact remains that, as reported by Fried — who was the recipient of all of those memos — "[t]he most aggressive memo came from my friends Richard Willard and Carolyn Kuhl in Civil, who recommended that we urge outright reversal of Roe."[4] Notwithstanding Kuhl's refusal now to disclose her views, it is clear that she went far beyond her role as a Justice Department attorney in her "aggressive" efforts to overturn Roe v. Wade.

- Continuing her anti-choice advocacy

Senators' concerns: In private practice, Kuhl filed an amicus curiae brief in Rust v. Sullivan on behalf of an anti-choice group in support of the federal "gag rule" that prohibited family clinics getting federal aid from discussion abortion with patients. Although Kuhl's brief primarily addressed First Amendment issues, she began the brief with a free standing quotation that attacked the Court's decisions upholding a women's right to choose abortion as causing a "major distortion in the Court's constitutional jurisprudence."[5] Referring to this brief, Senator Feinstein asked Kuhl whether it was fair to say that at the time Kuhl wrote it she was "still a critic of the Supreme Court's jurisprudence on abortion?" Kuhl Hearing, at 49.

Kuhl's testimony: Kuhl again deflected efforts by Senator Feinstein to learn her jurisprudential views of the Court's abortion decisions, stating that her brief in Rust v. Sullivan was written "on behalf of a client" and also that it "primarily addresses the First Amendment issue there. . ." Kuhl Hearing, at 50.

The facts: Kuhl was correct in her overall description of her brief, which makes the free standing quote with which she began the brief all the more indicative of her disagreement with the Court's decisions protecting a woman's reproductive freedom. Indeed, Kuhl never actually answered Senator Feinstein's question or explained why she began a brief about a First Amendment issue with a free standing quote attacking the Court's abortion decisions.

- Seeking to limit sexual harassment protections

Senators' concerns: As Deputy Solicitor General, Kuhl co-authored an amicus curiae brief for the United States and the EEOC in the Supreme Court supporting the employer in the landmark sexual harassment case of Meritor Savings Bank v. Vinson. The plaintiff, Mechelle Vinson, a bank employee, alleged that her supervisor had forced her to submit to unwelcome sexual advances over a number of years, during which time she was afraid that she would lose her job if she refused. The position that Kuhl took, had it been adopted by the Court, would have made it more difficult for women to prove sexual harassment in the workplace. Specifically, as Senator Feinstein observed, Kuhl's brief "took the side of the employer" and "argued in support of the District Court's ruling that what occurred was simply a voluntary personal relationship between coworkers and that that would not be actionable under Title VII of the Civil Rights Act." As Senator Feinstein further observed, Kuhl's brief "ignored the power held by a supervisor over [a] subordinate in these circumstances . . . ." Kuhl Hearing, at 51. Senator Feinstein asked Kuhl if she had been involved in the decision to file a government brief taking the side of the employer in this case. Id. at 51-2.

Kuhl's testimony: While Kuhl acknowledged that she had been involved in that decision, she then immediately tried to deflect Senator Feinstein's concerns about the position she had taken in favor of the employer. According to Kuhl, "the Supreme Court's decision in Meritor closely tracked the brief that we filed. The reasoning is nearly identical to what we were urging on the Court." Id. at 52. Kuhl further testified that "[t]he only reason" the Department had urged a "reversal" of the ruling below in favor of Ms. Vinson had to do with what she called "the very technical interpretation of the Court's findings of fact," namely, that the trial court had found any sexual relationship between Ms. Vinson and her supervisor to be "voluntary." Id. According to Kuhl, this was "a technical issue on which the Supreme Court and we disagreed" and that the Justice Department was "happy with the decision" in this case. Id.

The facts: Kuhl's testimony was astonishing in light of the fact that her amicus brief had urged the Court to overturn the Court of Appeals' decision and to rule against Ms. Vinson, while the Court, in an opinion by then-Justice Rehnquist, unanimously ruled in favor of Ms. Vinson. In addition, what Kuhl called a "technical" disagreement — defining "voluntary" or "consensual" conduct to preclude any finding that the conduct was "unwelcome" — in fact went to the very crux of what an employee needs to prove in order to establish a claim for sexual harassment based on a hostile work environment, and formed the basis upon which the Court ruled in favor of Ms. Vinson. Rehnquist's opinion flatly rejected Kuhl's position, holding that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII."[6] Kuhl's assertion that the Court's ruling tracked the government's brief and the implication in her testimony that it was a victory for the government appears to be confirmation spin by Kuhl intended to deflect the fact that her brief had unsuccessfully urged a far tougher standard for proving sexual harassment generally, as well as a ruling for the employer in this specific case.

Senator Feinstein, appropriately "puzzled" by Kuhl's testimony concerning this case,[7] asked Kuhl in post-hearing questions for a further explanation, as did Senator Biden. In her replies, Kuhl continued to maintain that the Court's unanimous ruling for Ms. Vinson was in line with Kuhl's brief in support of the employer. According to Kuhl, her brief "argued for a standard

based on whether sexual advances made in the workplace were 'unwelcome.' . . . The Supreme Court accepted the United States' argument that the appropriate standard was whether the advances were unwelcome."[8] What Kuhl does not state, however, is that her brief defined "unwelcome" sexual advances in such a manner that non-forcible sexual conduct — "voluntary" or "consensual" in the words of Kuhl's brief — would not be considered "unwelcome."[9] The Supreme Court, as discussed above, unanimously rejected such a narrow definition of "unwelcome," holding that a woman need not have been "forced to participate [in sexual activity] against her will" in order to establish sexual harassment.

- Supporting sex discrimination in education

Senators' concerns: In 1993, Kuhl co-authored an amicus curiae brief in the Supreme Court for three private women's colleges in support of a petition for a writ of certiorari filed by the Virginia Military Institute, a public all-male college in Virginia. In a lawsuit brought by the United States, the United States Court of Appeals for the Fourth Circuit had held that VMI's denial of admission to women violated the Equal Protection Clause. In an effort to continue to deny admission to women but remain a public institution, VMI filed a cert. petition with the Supreme Court, asking the Court to overturn the Fourth Circuit's ruling. Senator Feinstein asked Kuhl about her brief. Kuhl Hearing, at 61.

Kuhl's testimony: Kuhl testified that her brief "was not a brief in support of the constitutionality of VMI. . . It was a brief in support of the petition for certiorari." Id. She said that her brief was narrowly focused on the importance of women's colleges and asked that the Court "take that case so as to clarify that all-women's schools could — were not unconstitutional essentially." Id.

The facts: Kuhl's brief was filed on behalf of three private women's colleges. VMI, by contrast, was (and still is) a state-supported public institution, and the constitutionality of private single-sex schools was not at issue in the case. Moreover, while it is true that Kuhl's brief did not expressly defend the constitutionality of allowing VMI to continue to deny admission to women yet remain a public institution, it is equally true that Kuhl's brief stated that it was filed "in support of petitioners" — VMI — and that it specifically urged that "the petition for certiorari should be granted."[10] VMI's cert. petition, in turn, expressly asked the Court to "grant certiorari and reverse the decision of the court of appeals . . ."[11]

According to contemporaneous press reports, Kuhl's brief was filed as part of VMI's campaign to enlist private women's colleges in its effort to continue to exclude women.[12] As Kuhl admitted at her hearing, the colleges that signed her brief were referred to her through "counsel who was representing VMI." Kuhl Hearing, at 62. In fact, VMI's counsel of record on its cert. petition was Richard Willard, Kuhl's former colleague at the Department of Justice (and co-author with her of the "most aggressive" memo to Fried in the Thornburgh case urging that the Department argue for Roe v. Wade to be overturned).

In her written answers to post-hearing questions from Senator Kennedy, Kuhl attempted to dispel concerns that her brief supported VMI's efforts to continue to exclude women by stating that the brief "did not express a view as to how the Supreme Court should rule with respect to the constitutionality of VMI's program."[13] However, if Kuhl had been concerned at the time that her

brief not imply support for VMI, she could have stated in the brief that the private women's colleges took no position as to the constitutionality of VMI's exclusion of women; Kuhl failed to do so.

- Dismissing claim of egregious privacy violation

Senators' concerns: Much of the questioning of Kuhl at her April 1 hearing focused on her disturbing 1999 ruling dismissing invasion of privacy claims brought by Azucena Sanchez-Scott, a recovering breast cancer patient, whose doctor had brought another professionally attired man into the examination room without disclosing that the man was not a medical professional but a drug company salesman. The man then witnessed an examination of Ms. Sanchez-Scott's breasts and abdomen during which she was half-naked. In a recent letter to Senator Hatch opposing Kuhl's confirmation, Ms. Sanchez-Scott explained that "I felt violated because I had disrobed for my examination. . . As a cancer survivor, I trusted that my doctor would make decisions in my best interest."[14] Senator Durbin told Kuhl that he considered the Sanchez-Scott case "the most troubling of anything you have been involved in." Kuhl Hearing, at 72. Senator Schumer stated, "I don't think I have seen a more disturbing ruling from a judicial nominee since I have been in the Senate." Id. at 108.

Specifically, Ms. Sanchez-Scott filed suit against the doctor, the drug company, and the salesman for invasion of privacy, with an additional claim against the doctor for professional negligence. Judge Kuhl granted a motion by the defendants to dismiss Ms. Sanchez-Scott's invasion of privacy claims outright, effectively holding that there was no set of facts that Ms. Sanchez-Scott could prove that would entitle her to any relief on the invasion of privacy claims and precluding her from presenting those claims to a jury. According to Judge Kuhl's ruling from the bench, since Ms. Sanchez-Scott had not specifically objected to the man's presence, "I think it cannot be said that there was a reasonable expectation of privacy."[15]

The California Court of Appeal unanimously reversed Kuhl's ruling, holding that Ms. Sanchez-Scott's complaint had alleged "highly offensive conduct," and making it clear that she had a well established right to privacy.[16] The court specifically noted that "[n]o decisional authority supports" the assertion that Ms. Sanchez-Scott had no legal grounds for her invasion of privacy charge.[17] In other words, Judge Kuhl had no legal basis for throwing out Ms. Sanchez-Scott's claim.

In light of these facts and the Court of Appeal's unanimous reversal of Kuhl's ruling, Senator Durbin asked Kuhl to explain her "concept of privacy, as it applies to that fact situation." Kuhl Hearing, at 73. Senator Schumer, after reviewing the facts with Kuhl, stated that "I think most Americans would be horrified to hear that your view of privacy rights, particularly in that situation, depended on someone who was scared and upset having to ask questions." Id. at 108. He asked Kuhl, "How do you explain the ruling issued in this case, and what can you tell us to assuage so many of my colleagues' concerns that you have too narrow a view of privacy rights?" Id.

Kuhl's testimony and the facts: Kuhl's oral and written testimony about the Sanchez-Scott case reinforces the Senators' concerns:

1. Although she denied this at her hearing, Kuhl has now admitted that she did in fact dismiss invasion of privacy claims against the doctor

At her hearing, Kuhl did not answer the critical questions about her ruling and her troubling view of privacy rights. Rather, she testified that Ms. Sanchez-Scott had not asserted any invasion of privacy claims against the doctor and that she had not dismissed Ms. Sanchez-Scott's privacy claims against him.[18] This testimony was completely incorrect, as Kuhl admitted a month later in a brief letter to Senator Hatch.[19] Through this testimony, however, Kuhl had deflected Senators' serious concerns about her disturbingly narrow and legally erroneous views of a medical patient's privacy rights. Thus, to this day, Kuhl has not answered, for example, Senator Durbin's question about her "concept of privacy, as it applies to" the facts of this case, or Senator Schumer's question asking "what can you tell us to assuage so many of my colleagues' concerns that you have too narrow a view of privacy rights?"

In addition, as Kuhl now admits in her letter to Senator Hatch, she indeed threw out of court in their entirety Ms. Sanchez-Scott's invasion of privacy claims against all of the defendants — the doctor, the drug company, and the drug salesman. Had Kuhl's ruling not been reversed on appeal, two of the wrongdoers, the drug company and the salesman, would have avoided all liability to Ms. Sanchez-Scott for their unconscionable actions, and the doctor likewise would not have been held liable on the invasion of privacy claim.

2. Kuhl created the misimpression that she had affirmatively "allowed" a claim against the doctor to go forward

At Kuhl's hearing on April 1, Senator Sessions asked, "you allowed the lawsuit to go forward against the physician, but did not allow it to go forward against the third party who the doctor had allowed to come into the room." Kuhl replied, "Yes, Senator." Kuhl Hearing, at 80. In fact, the additional claim against the doctor for professional negligence was not the subject of the motion to dismiss before Kuhl, and Kuhl therefore had no choice as to whether that claim proceeded. It was thus misleading for Kuhl to testify that she had "allowed" that claim against the doctor to go forward in the sense that Kuhl had some choice or that she had affirmatively ruled in favor of Ms. Sanchez-Scott.[20]

Moreover, while Kuhl never mentioned this in her testimony or in her post-hearing answers, the remaining claim against the doctor for professional negligence was stayed during Ms. Sanchez-Scott's appeal of her dismissal of the privacy claims,[21] which took more than a year.[22] Thus, not only would Kuhl's ruling have eliminated Ms. Sanchez-Scott's privacy claims in their entirety, but that ruling also substantially delayed the case and was a significant obstacle to Ms. Sanchez-Scott's ability to obtain justice.

3. Kuhl's testimony as to why she did not follow relevant precedent conflicts with her ruling in this case

In her testimony on April 1 and also in her April 15 letter to Senator Specter, Kuhl fostered the misimpression that California privacy law was unclear at the time of her ruling dismissing Ms.

Sanchez-Scott's claims. For example, she testified at her hearing that "I was trying to interpret California law. What was being cited to me was Michigan precedent [i.e., the Michigan Supreme Court's decision in DeMay v. Roberts, in which a doctor brought along a man not connected with the medical profession to assist him in a childbirth]. I think that the Court of Appeal has clarified the law in this area." Kuhl Hearing, at 74.[23] The implication of Kuhl's testimony, that there was no California case law to follow and that she did not follow the "Michigan precedent" that was being cited to her because it would not help "interpret California law," cannot withstand scrutiny.

In Kuhl's ruling from the bench dismissing Ms. Sanchez-Scott's privacy claims, Kuhl in fact acknowledged that the Michigan case had already been recognized by the California Supreme Court. As Kuhl stated, "[i]t's a much more important case and much more significant case that the Supreme Court — our Supreme Court has picked it up and cited it. There's no question about it." Sanchez-Scott Transcript, at 8. Kuhl's "problem" with the Michigan case at the time was not that it was from Michigan but that she considered it factually distinguishable; according to Kuhl, "[t]he patient there was in labor, not undergoing a more routine medical examination . . . ." Id. at 3. In sharp contrast, the unanimous Court of Appeal decision reversing Kuhl not only found that "this case [Sanchez-Scott] is very much like the 1881 seminal case of DeMay v. Roberts . . . which first recognized a tortious invasion of privacy," but also noted that "DeMay has been relied on by several California courts, including the Supreme Court, in analyzing propositions concerning the intrusion tort." 86 Cal. App. 4th at 374.

4. Kuhl's misplaced reliance on a letter from Justice Paul Turner

At her hearing on Apri1 1 and in her letter to Senator Specter, Kuhl cited a letter favorable to her sent to members of the Judiciary Committee by Justice Paul Turner, the author of the Court of Appeal's decision that unanimously reversed her dismissal of Ms. Sanchez-Scott's common law invasion of privacy claim. While it is not surprising that Justice Turner may now want to assist his judicial colleague in her quest for a lifetime seat on the federal bench, his letter is erroneous in significant respects and the best evidence of what he thought about this case and Kuhl's ruling remains his own contemporaneous opinion overturning Kuhl's ruling on behalf of a unanimous Court of Appeal.

Turner's letter now suggests that Kuhl's ruling was "a trial judge making a tough call in the context of competing legal interests . . . . "[24] Significantly, however, Kuhl's ruling never identified any such "competing legal interests." Her ruling was based solely on her belief that Ms. Sanchez-Scott had no claim for invasion of privacy as a matter of law because she had never asked why the unidentified man was there or objected to his presence. Sanchez-Scott Transcript, at 2, 3. As Justice Turner's opinion for the unanimous appellate court demonstrates, neither he nor his colleagues had any problem overturning Kuhl's ruling; there was no dissent, and no indication in the opinion that it was a "tough call."

To the contrary, the Court of Appeal's opinion made clear that every patient has a "legally well-established expectation of privacy," and further noted that the defendants had failed to cite "any authority which permits a male drug salesperson to be present in an examination room during the examination of a partially disrobed woman." 86 Cal. App. 4th at 375-76 (emphasis added). In

great contrast to his recent letter, Turner's ruling for the Court of Appeal never identified or sought to balance a so-called "competing legal interest" to Ms. Sanchez-Scott's privacy rights. In the plainest of language belying any claim now that this case was a "tough call," Justice Turner wrote in the court's decision:

> A breast cancer patient who goes into an oncologist's office to be examined does not, nor should she, take a risk that what goes on in the examination room will be seen or heard by anyone other than medical personnel. She does not take a risk that a drug salesperson will be a part of the process during which her breasts will be examined.

86 Cal. App. 4th at 376. The Court of Appeal's opinion reversing Kuhl continued, "we conclude that jurors could conclude a breast cancer patient such as plaintiff had an objectively reasonable expectation of privacy in the medical examination room of her oncologist. No decisional authority supports a contrary conclusion." Id. (emphasis added).

The Turner letter ends by asserting that "Judge Kuhl concluded that the mentorship program, which was designed to improve treatment for breast cancer patients, was a sufficient justification for allowing the drug salesperson to be present during the examination... [A] strong argument can be made that she correctly assessed the competing societal interests the California Supreme Court requires all jurists in this state to weigh in determining whether the tort of intrusion has occurred." Turner Letter, at 2-3. This statement has no basis whatsoever in Judge Kuhl's ruling or that of the Court of Appeal.

As the transcript of the hearing before Kuhl makes clear, Kuhl never "assessed" any "competing societal interests" nor discussed the purpose of the drug company's so-called "mentorship program" that put its salesman in the exam room. To the contrary, Kuhl's ruling was premised solely on her legally erroneous belief that there could be no invasion of privacy as a matter of law because Ms. Sanchez-Scott had not affirmatively objected to the man's presence or asked why he was there. Sanchez-Scott Transcript, at 2. As far as Judge Kuhl was concerned, the man could have been a janitor in a white lab coat.

Justice Turner's opinion for the Court of Appeal likewise did not "assess" "competing societal interests" or evaluate the purposes of the "mentorship program," which was factually irrelevant to the Court of Appeal's ruling. There was no legitimate purpose for the salesman to be in the exam room, and the court's opinion never identified one. To the contrary, Justice Turner's opinion states that "[w]hen the totality of the circumstances of the intrusion is examined . . . we conclude that the complaint alleges highly offensive conduct involving a cancer patient whose breasts were observed by a drug salesperson, whose occupation was never disclosed, during an examination inside the confines of a physician's office. It bears emphasis that there are specific allegations that plaintiff was never advised as to [the drug salesman's] role, other than that he was there to watch." 86 Cal. App. 4th at 377-78 (emphasis added). Justice Turner's opinion reversing Kuhl's ruling in Sanchez-Scott remains the best evidence of his and the Court of Appeal's view of the law and of Kuhl's unjustifiable dismissal of Ms. Sanchez-Scott's privacy claim.

- **Kuhl's record on other civil rights issues**

- Crusading for a tax exemption for Bob Jones University

Senators' concerns: As Senator Leahy observed (Kuhl Hearing, at 37), Kuhl was identified as one of a "band of young zealots" within the Department of Justice who were the architects of the Reagan Administration's decision to reverse long-standing IRS policy that denied tax-exempt status to Bob Jones University and other racially discriminatory private schools.[25] In particular, Kuhl and another Justice Department colleague wrote a 40-page memorandum to Assistant Attorney General William Bradford Reynolds strenuously arguing that the IRS should "reverse its position" in the case and "accord tax-exempt status" to Bob Jones.[26] Reynolds accepted the memorandum and forwarded it to the Attorney General. The Department's radical reversal of civil rights policy championed by Kuhl ignited a firestorm of criticism and was repudiated by the Supreme Court in an 8-1 ruling in the Bob Jones case. Senator Leahy asked Kuhl to address her role in this matter, specifically noting how much opposition there was in the Department at that time to the reversal of this civil rights policy. Kuhl Hearing, at 37.

Kuhl's testimony: Kuhl testified that, for two reasons, "I regret having taken the position that I did in support of the government's change of position. . . ." Kuhl Hearing, at 37. The first was that "I did not at that time understand the traditional role of the Justice Department, which is to defend the positions of the agencies as long as there is a reasonable argument that can be made in defense of those agencies. . . ." Id. at 39. (At this, an incredulous Senator Leahy stated, "But that is almost hornbook law. . . .You didn't learn that in law school?" Id.) The second, according to Kuhl, was that the decision "did not properly put the nondiscrimination principle that should have been primary in this decision first." Id.

The facts: As Senator Leahy suggested (id. at 41), this testimony appears to be a confirmation conversion. While Kuhl has previously indicated that she came to believe the government's reversal of course in Bob Jones was wrong, she has never before, to our knowledge, stated the basis for that belief as one grounded in the importance of enforcing the civil rights laws and putting the principle of nondiscrimination first. To the contrary, both of the two public explanations that have previously been given for Kuhl's asserted change of mind are grounded in political error, not concern about the primacy of the civil rights laws.

First, in June 2001, on the eve of the announcement of Kuhl's nomination, she responded to a written question from Senator Boxer about Bob Jones by stating that she believed the government's decision to reverse position in the Bob Jones case was wrong "in part because it appeared insensitive to minorities, regardless of the nondiscriminatory motives of those involved in the decision."[27] This is similar to an explanation given in January 2003 by former Solicitor General Charles Fried in support of Kuhl's nomination. According to Fried, by 1985, "I knew she had come to believe (as did I) that she had been wrong, if for no other reason than seeming to side with Bob Jones confused the Reagan administration's message that we were strongly committed to civil rights and racial equality while opposed to quotas."[28]

At Kuhl's confirmation hearing, Senator Kennedy, like Senator Leahy, also sought to learn whether Kuhl, prior to her nomination, had ever expressed the sort of substantive regret about her position in Bob Jones that she seemed to be stating at her hearing. Senator Kennedy quoted

the foregoing statement by Fried and observed that, according to Fried, Kuhl had told him she had come to believe she was wrong on Bob Jones "politically because it sent the wrong message." Kuhl Hearing, at 86 (emphasis added). Kuhl admitted that she and Fried did discuss the fact that "taking that position had really been a disaster for the Reagan administration, absolute disaster," and that she did not know whether she had "expressed this to" Fried that they had "the wrong focus" and that "the policies of nondiscrimination should have come forward. . . ." Id.

The second reason given by Kuhl in her testimony on April 1 for her asserted "regret" about Bob Jones is that the government should have defended the IRS policy because a "reasonable argument" could have been made to support it. Kuhl Hearing at 39. Significantly, nowhere in the critical 40-page memorandum that Kuhl and Cooper wrote at the time does the memo even suggest the existence of a "reasonable argument" in defense of the IRS policy, let alone that the Department of Justice should defend it. To the contrary, the memorandum concludes by stating that "[f]rom the foregoing, it is clear that the Service's interpretation of Section 501(c)(3) of the 1954 Code is at odds with the statute's language and legislative history . . . ."[29] It is also significant to note that under questioning from Senator Leahy, Kuhl stated that she could not think of any other case during her entire tenure in the Justice Department in which she had recommended that the government confess error in the Supreme Court except for Bob Jones. Kuhl Hearing, at 42.

At Kuhl's hearing, Senator Hatch elicited from Kuhl the testimony that she had no "decision-making authority" at this time in the Justice Department. Id. at 15. This of course is beside the point, as Senator Kennedy noted. Id. at 83. The concern is not that Kuhl herself made the ultimate decision to reverse long-standing policy denying tax exemptions to Bob Jones University and other racially discriminatory private schools, but that she believed this was the right thing to do and played a major role in bringing about that disturbing decision.

- Opposing affirmative action, trying to restrict discrimination remedies, and criticizing protection of workers

Referring specifically to Kuhl's statement in an article that she had written while in private practice that she considered affirmative action to be "a divisive societal manipulation," Senator Durbin asked Kuhl "have you changed your position on that?" Kuhl Hearing, at 71. Kuhl did not answer Senator Durbin's question nor a similar written question from Senator Kennedy.[30] Instead, she testified that "the primary thrust of that article was to state the importance of individual remedies and of putting persons who have been discriminated against back in the place where they should have been, absent that discrimination, and that was the thrust of that article." Kuhl Hearing, at 71-72. The problem, of course, as Kuhl well knows, is that in many instances of discrimination, such as when people are intentionally kept out of unions and apprenticeship programs on the basis of race for years on end, the actual victims may not be identifiable. Only by requiring some form of affirmative action can the situation be remedied, as was the case in Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC, 478 U.S. 421 (1986). Nonetheless, Kuhl filed a brief in that case taking the position that relief under Title VII could be granted only to identifiable victims of discrimination,[31] a position that the Supreme Court rejected.

In Kuhl's post-hearing answers, she tried to dispel concerns about her opposition to affirmative action by stating that the article about which Senators had questioned her — the article in which she had called affirmative action "a divisive societal manipulation" — was written "before the Supreme Court settled" the issue of affirmative action in its 1995 decision in the Adarand case.[32] However, Kuhl's article was written after the Court's decision upholding affirmative action in the Local 28 case (indeed, she refers to that decision in her article[33]), which means that there was already established law in this area and that she was critical of it.

Kuhl was also questioned about another article she had written, "Employment at the Will of the Courts,"[34] which, as Senator Edwards described it, focused on "the costs to employers and society of the laws against unfair treatment of workers. . ."[35] In response to Senator Edwards' question as to why she had chosen to focus on such matters rather than on the "costs to workers and society of discrimination on the basis of race, sex, or other arbitrary factors or other forms of unfair treatment of workers,"[36] Kuhl stated that she "disagree[d] with the question's characterization of the article," and attempted to portray her article in a light more favorable to the legal protection of workers.[37] The fact remains, however, that Kuhl's article appeared to disapprove of the trend in the law away from the doctrine of "employment at will" and toward protecting employees from adverse employment decisions that are not based on "good faith and fair dealing."[38] According to Kuhl, "[t]he practical effect of this jurisprudence and of the destruction of the doctrine of employment at will is to inhibit employer action and to decrease labor mobility."[39] The article also appears to question some of the positive effects of anti-discrimination laws:

> [I]f a member of a protected class is fired, and if the employer has no credible explanation for his treatment of the employee . . . a finder of fact may well conclude that the unexplained motivation is in reality an unlawful one (race, sex, age, etc.). . . Employers must act toward employees in the protected classes in such a way that they can explain the fairness of their actions toward the employee. If an employer cannot do so, he risks the expense of a lawsuit and statutory penalties.[40]

Most Americans would likely conclude that this is a good thing; Kuhl did not say that it is.

- Other aspects of her record on civil rights matters

In post-hearing questions, Senator Leahy observed that "[m]any Americans would not be comfortable with a judge whose intelligence and reason were not tempered by experience and compassion," and asked, "Can you please give us an example of a situation in which you displayed, as a lawyer, understanding for the human situation, such as the sting felt by women or minorities victimized by discrimination?"[41]

In her response, Kuhl did not cite a single instance pertaining to her career "as a lawyer." Instead, Kuhl focused on two rulings she has issued as a judge, the same two rulings she has cited repeatedly in other written answers and in her testimony on April 1 in an effort to dispel the serious concerns about her record on civil rights raised by her years in the Reagan Administration and in private practice.[42] Apart from the fact that Kuhl has only been able to cite

two rulings in her more than seven years as a state judge that she believes speak favorably to her record on civil rights, a review of these cases indicates that they do not in negate the serious concerns her record has raised.

In one of those cases, Iwekaogwu v. City of Los Angeles, 75 Cal. App. 4th 803 (1999), Kuhl, sitting by designation on the Court of Appeal, wrote a decision upholding a judgment in favor of an African American employee who had been unlawfully retaliated against by his employer when he complained that he had been subjected to employment discrimination on the basis of race and national origin. As recounted in Kuhl's decision, the facts presented a clear case of retaliation, and the Court of Appeal was unanimous in its ruling. The issues involved in this case were totally different from those presented, for example, in Bob Jones, and Kuhl's ruling in this clear-cut case of retaliation does not in any way change the fact that, in the Bob Jones matter, she urged that the IRS policy be reversed and a tax exemption given to a private school that practiced blatant race discrimination.

In the other case repeatedly cited by Kuhl, Grobeson v. City of Los Angeles, No. BC150151 (L.A. Superior Court, June 29, 1998), Kuhl overturned on due process grounds disciplinary action taken against an openly gay police officer because the police department had failed to give the officer proper notice of the charges against him. Kuhl's ruling did not turn on the officer's sexual orientation or in any way affirmatively protect the officer from discrimination on the basis of sexual orientation.

Neither of these cases repeatedly cited by Kuhl dispels the serious concerns raised by her actions in such cases as Bob Jones or other civil rights matters.[43]

- **Kuhl's record on access to justice**

    - Seeking to curtail citizens' access to the courts

Senators' concerns: As Deputy Solicitor General, Kuhl aggressively sought to restrict access to the federal courts, co-authoring a brief and arguing before the Supreme Court in a case in which she urged the Court to abandon the doctrine of associational standing, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 477 U.S. 274 (1986). Associational standing is a well-recognized and important doctrine that permits organizations to file lawsuits on behalf of their members, making it easier for them to vindicate their common legal rights and interests. At Kuhl's hearing, Senator Feinstein specifically questioned Kuhl about the Brock case and asked Kuhl to explain her opposition to the doctrine of associational standing. Kuhl Hearing, at 53-57.

Kuhl's testimony: In response to Senator Feinstein's question, Kuhl testified, "[t]he position of the United States in UAW v. Brock I believe was set before I came to the Solicitor General's Office. I argued that case. I had just recently come to the office and I argued it, but I am not on the brief. If you look at the brief in that case, I am not on the brief. . . I didn't have any trouble arguing the position. It was a position that – well, the government had won in the court below, so we were defending a winning argument in the court below in that case." Kuhl Hearing, at 54-55 (emphasis added).

The facts: Kuhl's testimony that her name was not on the government's brief in this case was demonstrably incorrect, as Senator Leahy pointed out in post-hearing questions to Kuhl.[44] Although Kuhl has since admitted that her testimony was incorrect,[45] her erroneous testimony at her hearing left unanswered Senators' concerns about what Charles Fried himself described as Kuhl's "frontal attack" on the doctrine of associational standing.

Moreover, Kuhl's testimony about this case was inconsistent with the facts in another critical respect. Kuhl's Supreme Court brief marked the first time in the case that the government had taken the position that the doctrine of associational standing should be overturned; this argument was not the basis on which the government had prevailed in the court of appeals,[46] and Kuhl's testimony that she was merely "defending a winning argument in the court below" by urging that associational standing be overturned cannot withstand scrutiny.

The court of appeals had ruled in favor of the government, holding that the UAW lacked standing under the facts of this particular case and the requirements for associational standing.[47] Defending that "winning argument" is a far cry from urging the Supreme Court to overturn the doctrine of associational standing altogether. Indeed, the government's brief to the Supreme Court opposing the UAW's petition for a writ of certiorari — a brief on which Kuhl's name does not appear — in fact acknowledged that the doctrine of associational standing was well-settled and did not ask the Court to overrule it.[48]

The argument for overturning associational standing was made only in the later brief bearing Kuhl's name. According to Charles Fried, Kuhl's boss at the time, it was "my Deputy and Counselor, Carolyn Kuhl" who "launched a frontal attack" in Brock, "arguing that groups should not have standing to make claim except as they could show themselves to be representatives of classes of individuals in traditional class actions." Order and Law, at 207, n.5 (1991).

In fact, Kuhl's argument was so extreme, procedurally as well as substantively, that it prompted numerous organizations, including the Chamber of Commerce and the AMA, to oppose not only the government's legal position in the Supreme Court but also to criticize its "litigating tactics" for raising such an important matter for the first time at that juncture in the case.[49]

As with Thornburgh, Kuhl has sought to minimize the extremism of the position that she advocated by claiming that she was merely a government lawyer doing her job representing the government.[50] But so were all of the other government attorneys who had litigated this case before Kuhl got involved, and who had not advocated that the doctrine of associational standing be overturned. Moreover, in her written answers to Senator Leahy, Kuhl went a step further and suggested that this extreme position was not necessarily her own view.[51] However, just as it was Kuhl, as Fried recounts, who in Thornburgh wrote "the most aggressive memo" advocating reversal of Roe v Wade, so too it was Kuhl, as Fried also recounts, who in Brock launched the "frontal attack" on the doctrine of associational standing.

- Trying to limit protection for whistleblowers

Senators' concerns: In a unanimous ruling strongly critical of Judge Kuhl in Liu v. Moore, the California Court of Appeal reversed Kuhl's ruling that prevented a whistleblower from getting monetary relief under California's anti-SLAPP law, explaining that Kuhl's decision was an improper "nullification of an important part of California's anti-SLAPP legislation." 69 Cal. App. 4th 745, 748 (1999). In this case, a plaintiff had sued Deborah Moore, a whistleblower, causing her to incur substantial legal expenses, and then voluntarily dismissed the complaint before Kuhl could rule on Ms. Moore's motion for legal costs to which she was entitled under the anti-SLAPP law. At Kuhl's hearing, Senator Feinstein asked Kuhl about this case, noting that, according to Ms. Moore's attorney, her ruling would have prevented Ms. Moore from pursuing her right under the law to recover the nearly $40,000 in legal costs that she had incurred. Noting the harsh language of the Court of Appeal's decision reversing Kuhl's ruling, Senator Feinstein asked Kuhl to respond to the Court of Appeal's criticism of her decision and a letter she had received from Ms. Moore's attorney. Kuhl Hearing, at 58.

Kuhl's testimony: Kuhl claimed that the issue before her was "an issue of first impression," and that she had "struggled a good bit" with the question of what jurisdiction remained with the court when the party suing the whistleblower dismissed the complaint before the court could rule on the whistleblower's motion for legal costs. Kuhl Hearing, at 58-59.

The facts: In its sharply worded, unanimous decision reversing Kuhl's ruling, the Court of Appeal "struggled" not at all with the issue of jurisdiction, disposing of it in a footnote. 69 Cal. App. 4th at 751, n.3.[52]

- Seeking to invalidate *qui tam* access to the courts to combat fraud

Senators' concerns: In private practice, Kuhl had urged the federal courts to strike down the qui tam provisions of federal law that allow private citizens to file suit to combat fraud against the government. The federal courts rejected such arguments and upheld the law. Additional information about Kuhl's efforts in this regard emerged after Kuhl's hearing. Specifically, according to written questions posed by Senators Grassley and Schumer, Kuhl had attached to a brief that she filed in the Ninth Circuit in 1993 arguing the unconstitutionality of the qui tam provisions a copy of a memorandum written four years earlier by the Department of Justice Office of Legal Counsel, opining that "[t]he Office of Legal Counsel believes the qui tam provisions of the False Claims Act are patently unconstitutional." Kuhl told the court that the OLC memorandum had recently been "released for publication" by the Department of Justice, but did not affirmatively tell the court that the OLC memorandum did not represent an official position of the Department.[53] In light of this, Senator Schumer, noting the ethical obligation of all lawyers "to refrain from acts which mislead the court," asked Kuhl whether she had "fulfilled [her] obligation to be candid with the court."[54]

Kuhl stated that she did not believe that "reference to the position of the Office of Legal Counsel in the brief was misleading to the court."[55] Apparently, however, the Department of Justice did not agree, for it took what Senator Schumer called "the unusual step of submitting a letter to the court clarifying the government's position."[56] In that letter to the court, the Justice Department stated that it had come to its attention that the OLC memorandum of 1989 had been submitted to

the court and was writing "to make clear to the Court" that the OLC memorandum "was never adopted by the Attorney General, and does not represent the position of the United States."[57]

CONCLUSION

As the foregoing makes clear, Kuhl's testimony at her confirmation hearing raised serious credibility concerns in addition to the other significant concerns already raised by her record. As the *New York Times* recently explained:

> Carolyn Kuhl . . . seems to have undergone a classic confirmation conversion. As a lawyer and as a California state court judge, she advocated objectionable positions on civil rights, abortion and privacy. But at her confirmation hearings, she backpedaled furiously. Her testimony may have been tactically shrewd, but it failed to allay serious concerns about how she would perform as a judge. The Senate should not confirm her. . .
>
> Under questioning by the Senate Judiciary Committee, Judge Kuhl repeatedly retracted or minimized her positions. . . Judge Kuhl's many shifts are suspect because of their timing. It is also clear, given this administration's track record, that she was chosen precisely because of the actions she now seeks to distance herself from. The White House can tell from her record that she shares its conservative agenda, including opposition to abortion rights and skepticism about civil rights. It is unlikely that when she spoke with the administration she was as quick to renounce her past as she was before the Senate.

"Another Unworthy Judicial Nominee," *The New York Times* (Apr. 24, 2003).

As documented here and in our initial report opposing Kuhl's confirmation, Kuhl's record simply does not support giving her a lifetime appointment to the federal court of appeals, the court of last resort for most Americans. Far from meeting the burden of demonstrating a record of commitment to "protecting the rights of ordinary Americans" and to "the progress made on civil rights, women's rights and individual liberties" — important criteria for confirmation — Kuhl has tried to turn back the clock on these significant matters. Her hearing and her subsequent written answers to Senators' questions served to reinforce this conclusion. The Senate Judiciary Committee should reject Carolyn Kuhl's confirmation.

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1 Charles Fried, Order and Law: Arguing the Reagan Revolution – A Firsthand Account, at 33 (1991) (hereafter "Order and Law").

2 Brief for the United States as *Amicus Curiae* in Support of Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, at 10 (July 15, 1985) (LEXIS pagination).

3 Committee on the Judiciary, Nomination of Carolyn B. Kuhl of California to be Circuit Judge for the Ninth Circuit, Unofficial Transcript of Proceedings (Apr. 1, 2003) (hereafter "Kuhl Hearing"), at 46; 118.

4 Order and Law, at 33.

[5] Brief of the American Academy of Medical Ethics as Amicus Curiae in Support of Respondent, Rust v. Sullivan, at 1 (LEXIS pagination; quoting Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting)).

[6] Meritor Savings Bank v. Vinson, 477 U.S 57, 68 (1986) (emphasis added).

[7] Senator Feinstein's post-hearing questions to Kuhl (ques. 2).

[8] See Kuhl's answers to Senator Feinstein's post-hearing questions (ans. 2a) (Apr. 9, 2003). See also Kuhl's answers to Senator Biden's post-hearing questions (at 5-6) (Apr. 29, 2003).

[9] See Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae*, Meritor Savings Bank v. Vinson, at, e.g., 3 (Dec. 11, 1985)(LEXIS pagination).

[10] See Brief of Mary Baldwin College, et al., as *Amici Curiae* in Support of Petitioners, Virginia Military Institute v. United States, No. 92-1213, at 1, 20 (Mar. 24, 1993).

[11] See Petition for Writ of Certiorari, Virginia Military Institute v. United States, United States Supreme Court, October Term 1992, at 23.

[12] See, e.g., "VMI Case Makes Odd Bedfellows Women's Colleges Allies," *Roanoke Times & World News* (Apr. 11, 1993), 1993 WL 4411514. Others rejected VMI's efforts. For example, "Jedwiga Sebrechts, executive director for the Women's College Coalition in Washington, said that 20 women's colleges contacted her office after being approached by VMI lawyers to join in the briefs. The coalition was approached, too, she said. . . 'What we found was, of all the attorneys we sought opinions from, not one of them shared the perspective advanced by VMI attorneys that the current opinion of the Fourth Circuit was an opinion that put women's colleges in jeopardy.'" Id.

[13] Kuhl's Answers to Senator Kennedy's post-hearing questions (ans. 2a) (Apr. 29, 2003).

[14] Letter from Azucena Sanchez-Scott to Senator Orrin Hatch (Mar. 3, 2003). Ms. Sanchez-Scott's letter goes on to state that she was "shocked and dismayed" by Judge Kuhl's ruling. Id.

[15] Reporter's Transcript, Azucena Sanchez-Scott v. Alza Pharmaceuticals, No. BC 214585 (LA Superior Court, Oct. 12, 1999) (hereafter "Sanchez-Scott Transcript"), at 3.

[16] Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal. App. 4th 365, 375-78 (2001).

[17] Id., 86 Cal. App. 4th at 376.

[18] For example, Kuhl testified that "[t]he claims against the doctor were tort claims for failure to obtain consent from the woman in the examining room that was the doctor's examination room. . . . And the claim against the third party who came into the room was an invasion of privacy claim." Kuhl Hearing, at 123. And Kuhl answered "[t]hat is correct" when Senator Hatch asked her "It is my understanding that the particular motion to dismiss that you had granted had nothing to do with the claims against the doctor and that your ruling would have allowed the claims against the doctor to go forward. Is that right?" Kuhl Hearing, at 122-23 (emphasis added). Similarly, in a post-hearing letter to Senator Arlen Specter dated April 15, 2003, Kuhl described the invasion of privacy claim against the drug company as a "separate claim" from the claim against the doctor. Letter from Carolyn B. Kuhl to Hon. Arlen Specter (Apr. 15, 2003)(hereafter "Kuhl Letter to Sen. Specter"), at 2.

[19] Letter from Carolyn B. Kuhl to Hon. Orrin B. Hatch (Apr. 29, 2003), at 1 (hereafter "Kuhl Letter to Sen. Hatch").

[20] In her April 15 letter to Senator Specter, Kuhl stated "It is very important to note that my decision allowed that claim [the "tort action against the doctor"] to proceed." Kuhl Letter to Sen. Specter, at 2. In her more recent letter to Senator Hatch, Kuhl more accurately stated that her dismissal of the privacy claims "left the tort claim for failure to obtain consent against the doctor remaining for trial." Kuhl Letter to Sen. Hatch, at 1.

[21] See Superior Court Case Summary, available at http://www.lasuperiorcourt.org/civilCaseSummary/CaseSummary.asp?Referer=index&Case=BC214585.

[22] Kuhl dismissed Ms. Sanchez-Scott's privacy claims on Oct. 12, 1999; the Court of Appeal's decision reversing that ruling was issued on Jan. 17, 2001.

[23] Similarly, in her letter to Senator Specter, Kuhl stated, "I had to determine [Ms. Sanchez-Scott's] rights under California law. California law clearly gave her a tort action against the doctor whose responsibility it was to obtain her consent before he invited any other person into the examining room. . . Regarding the separate claim against the drug company representative, the law was less clear . . ." Kuhl Letter to Sen. Specter, at 2.

[24] Letter from Justice Paul Turner to Senator Patrick J. Leahy (Mar. 17, 2003) (hereafter "Turner Letter"), at 1.

[25] Anthony Lewis, "Abroad at Home; The Court Says No," *New York Times* A27 (May 26, 1983).

[26] Memorandum from Charles J. Cooper, Special Assistant to the Assistant Attorney General, and Carolyn B. Kuhl, Special Assistant to the Attorney General, to Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division (Jan. 5, 1981 [sic; date is 1982]), at 40, reprinted in "Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools," Hearing before the Committee on Ways and Means, House of Representatives, 97th Cong., 2d Sess. (Feb. 4, 1982) (hereafter "Bob Jones Hearing"), at 549-88.

[27] Kuhl's answers to Senator Boxer's question 3 (June 1, 2001).

[28] Charles Fried, "Time-Traveling to Thwart a Judge," *Los Angeles Times* (Jan. 17, 2003).

[29] Bob Jones Hearing, at 588 (emphasis added).

[30] Kuhl's answers to Senator Kennedy's post-hearing questions (ans. 1C) (Apr. 29, 2003).

[31] See Brief for the Equal Employment Opportunity Commission, Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC, (Dec. 9, 1985).

[32] See Kuhl's answers to Senator Kennedy's post-hearing questions (ans. 1A) (Apr. 29, 2003).

[33] See Carolyn Kuhl, Comment for BNA Special Report, in BNA Special Report on Affirmative Action Today: A Legal and Practical Analysis, 157-59 (1986).

[34] Carolyn Kuhl, "Employment at the Will of the Courts," in Law, Economics, & Civil Justice (1994), 185-89.

[35] Post-hearing questions of Senator Edwards (ques. 1A).

[36] Id.

[37] Kuhl's answers to Senator Edwards' post-hearing questions (ans. 1A) (Apr. 29, 2003).

[38] Carolyn Kuhl, "Employment at the Will of the Courts," in Law, Economics, & Civil Justice (1994), 185-89.

[39] Id. at 188.

[40] Id. at 187.

[41] Senator Leahy's post-hearing questions to Kuhl (ques. 4; emphasis added).

[42] See, e.g., Kuhl Letter to Sen. Specter (Apr. 15, 2003).

[43] Disturbing information about Kuhl's pro bono record also emerged at her hearing. Under questioning from Senator Feinstein, Kuhl admitted that in her entire career in private practice, spanning a total of some 12 years, including 9 as a partner in a prestigious law firm, she had handled only two pro bono cases. Kuhl Hearing, at 60-61.[43] Although Kuhl sought to excuse this on the ground that she was raising children while at the same time trying to be a partner in a law firm (Kuhl Hearing, at 61), it is worth noting that during this same period Kuhl managed, among other things, to find the time to draft the amicus brief in the Supreme Court supporting VMI's efforts to continue to exclude women as well as the amicus brief in support of an anti-choice group in Rust v. Sullivan. Across this country, many law firm associates and partners are also parents, and yet they make the time to fulfill their ethical obligations to perform pro bono work.

[44] See Senator Leahy's post-hearing questions to Kuhl (ques. 3), answered by Kuhl on April 29, 2003.

[45] On the date she submitted her written answers to Senator Leahy, Kuhl admitted in a cover letter to Senator Hatch that she her name was in fact on this brief "and I now recall that I did participate in drafting that brief." Kuhl Letter to Sen. Hatch (Apr. 29, 2003) at 1.

[46] See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Donovan, 746 F.2d 839 (D.C. Cir. 1984).

[47] Id.

[48] Brief for the Respondent In Opposition to Petition for Writ Of Certiorari, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, at 6 (Aug. 14, 1985) (LEXIS pagination).

[49] Brief of the Chamber of Commerce, et al. as *Amici Curiae* in Support of Petitioners, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, at 5 (March 1986).

[50] See, e.g., Kuhl's answers to Senator Leahy's post-hearing questions (ans. 3) (Apr. 29, 2003).

[51] Kuhl's answers to Senator Leahy's post-hearing questions (ans. 3d) (Apr. 29, 2003).

[52] According to a letter from Ms. Moore's attorney to Senator Feinstein's office, it was Judge Kuhl, and not the plaintiff who had filed the frivolous suit, who had raised the jurisdictional question in the first place; the plaintiff had "never argued that the Court lacked jurisdiction to rule on [Ms. Moore's] motion" for legal costs. Letter from Mark Allen Kleiman to David Hartman and Tom Oscherwitz (Apr. 2, 2003), at 2.

[53] See post-hearing questions of Senator Grassley and of Senator Schumer (second set).

[54] Post-hearing questions of Senator Schumer (second set, ques. b).

[55] Kuhl's answers to post-hearing questions of Senator Schumer (second set, ans. b) (Apr. 29, 2003).
[56] Post-hearing questions of Senator Schumer (second set, at 1).
[57] Id. at 1-2.