

THE WHITE HOUSE

WASHINGTON

May 20, 2003

Dear Senator Frist and Senator Hatch:

I write to provide you a summary of relevant information about Judge Carolyn Kuhl as the Senate prepares for debate on her nomination to the Ninth Circuit. Judge Kuhl is a woman of exceptional experience, integrity, and intellect who represents the mainstream of American law and values. Her record has been unfairly distorted and her character unfairly attacked by interest groups. They have done a disservice to this highly qualified woman and would do a disservice to the Judiciary and the American people if they were to succeed in blocking her from confirmation.

This letter first will summarize Judge Kuhl's record and support and then will respond to issues that have been raised by interest groups opposing her nomination.

I. Judge Kuhl's Record and Support

Judge Kuhl possesses superb qualifications, has strong bipartisan support, and received a "well qualified" rating from the American Bar Association, which Democrat Senators have referred to as the gold standard. Born in Missouri, she graduated with honors from Princeton University and Duke University Law School. She served as a law clerk on the Ninth Circuit to then-Judge Anthony Kennedy. She came to Washington at the beginning of President Reagan's Administration and served for five years in the Department of Justice. She began as a special assistant to the Attorney General, moved on to be Deputy Assistant Attorney General in the Civil Division, and then was named Deputy Solicitor General. She then returned to California in 1986 and became a partner at the prestigious Los Angeles firm of Munger Tolles & Olson. In 1995, Governor Wilson appointed her to the Los Angeles County Superior Court.

Judge Kuhl thus has extensive experience in federal and state government, in the Executive and Judicial Branches, and in public service and private legal practice. Since 1995, she has served on the Los Angeles Superior Court. Judge Kuhl now serves as the Supervising Judge of the Civil Department of that Court and is the first woman to hold that position. She supported Judge Richard Paez in his nomination to the Ninth Circuit, demonstrating her commitment to law and fair process without regard to politics or political gain. In short, Judge Kuhl has devoted extraordinary time and effort in her life to public service and the legal process, and she possesses a combination of intellect, experience, and character that makes her ideally suited to be an excellent circuit judge.

Given her record, it is no surprise that Judge Kuhl has garnered bipartisan support from California and national bar leaders, Republicans and Democrats, and defense lawyers and plaintiffs' lawyers. This support speaks volumes about the kind of judge she would be on the Ninth Circuit.

- **Vilma Martinez**, who is a Democrat, an accomplished and nationally respected California attorney, and a past President of the Mexican American Legal Defense and Educational Fund, wrote: “Kuhl is what I think of as an old fashioned judge. She cares about due process for everyone. In her seven years on the Superior Court bench, she has shown that she is careful to hear both sides. She does not try to influence the outcome of a case to favor one side or the other. She is serious about her oath to follow the law, whatever the result. . . . Both the plaintiff and defense bars in Los Angeles actively support Kuhl.”
- **The officers of the Litigation Section of the Los Angeles County Bar Association** (which has over 3000 members) have written in support of Judge Kuhl, both in May 2001 and April 2003. They stated that they are “life-long Democrats” who have “first-hand knowledge of Judge Kuhl’s integrity, intellect, judicial competence, fairness, and commitment to improving the administration of justice. . . . Those of us who appear before and work with Judge Kuhl know that she is a fair and caring person and an exceptional jurist.” They also stated that she has a “well-deserved reputation as being a fair minded judge who follows legal precedent. . . . On a personal level, we have come to know her as a warm, witty, and deeply caring person.”
- **A bipartisan group of nearly 100 judges who serve with Judge Kuhl on the Superior Court** have signed an extraordinary joint letter to the Senate supporting Judge Kuhl: “We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand. We believe her elevation to the Ninth Circuit Court of Appeals will bring credit to all of us and to the Senate that confirms her. As an appellate judge, she will serve the people of our country with distinction, as she has done as a trial judge.”
- **A bipartisan group of 23 women judges who have served with Judge Kuhl** wrote: “Judge Kuhl is seen by us and by the members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs’ and defense bar. . . . Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges She has helped promote the careers of women, both Republican and Democrat. . . . She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend. As sitting Judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.”
- **A bipartisan group of more than a dozen Justices of the California Court of Appeal** -- appointees of Democrat and Republican Governors who as appellate judges have worked directly with Judge Kuhl or have reviewed her work as a trial judge -- have written individual letters of support for Judge Kuhl. To take one example, Justice Paul Boland wrote: “[Judge Kuhl] has distinguished herself as a judge who is highly

intelligent, renders balanced, reasoned decisions, is intellectually honest, and is even-handed and fair.”

- **California Supreme Court Justice Carlos Moreno**, who previously was appointed to the federal district court in Los Angeles by President Clinton, wrote to express his “strong and unequivocal support” for Judge Kuhl. He wrote: “I had the pleasure of serving on the Los Angeles Superior Court with Judge Kuhl. She was widely respected among her fellow colleagues and lawyers for her dedication, scholarship, fairness, and adherence to the law. I have never discerned in her any ideological predisposition to decide a legal or factual issue in a predetermined manner. To the contrary, her reputation and practice is to decide matters with an open mind as to all issues. Judge Kuhl is a warm, intelligent, and decent person who should be fairly considered for this distinguished appointment. I can think of no one more qualified or deserving for this office.”
- **The President of the Consumer Attorneys Association of Los Angeles** wrote that “[t]hose who respect her judicial abilities, fairness, and temperament include attorneys on either side of an issue.” The Board of Governors of that Association voted to encourage individual members to support Judge Kuhl’s nomination.
- **Leo Terrell, a California civil rights lawyer**, wrote: “I am an attorney for the NAACP. . . . I am a lifelong Democrat. . . . I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.”

II. Responses to Issues Raised Against Judge Kuhl

Certain special-interest groups have raised questions about Judge Kuhl, but the allegations do not withstand scrutiny.

1. Sanchez-Scott Case. Some groups have raised questions about Judge Kuhl’s ruling as a state-court judge in the *Sanchez-Scott* case. We believe the case has been badly mischaracterized, and are disappointed that this case has unfairly become part of the brief against Judge Kuhl.

The plaintiff in the case sued four parties -- a doctor, the doctor’s employer medical partnership, a pharmaceutical company, and the pharmaceutical company’s representative -- after an incident in which the plaintiff was examined by the doctor in the presence of a pharmaceutical company representative. The company representative was present as part of an oncology mentorship program established to allow pharmaceutical company salespersons to better learn how an oncologist attends to patients and manages medications. It was common for physicians to explain the program and seek consent from the patient at the beginning of the visit, but the plaintiff alleged that this had not occurred in her case. The plaintiff knew that a third person was in the room (in other words, there was no *surreptitious* viewing or 2-way mirror) and, according to her complaint, was told that the company representative was a “person who was looking at Dr. Polonsky’s work.” But the plaintiff was not told of the third-party’s role or affiliation.

The fundamental wrong that occurred here -- as reflected in plaintiff's complaint -- was that the attending *doctor* failed to ask for the patient's consent to the presence of the third-party company representative before conducting the examination. If the doctor had asked and received consent, there could be no complaint about the third party's presence; if he had asked and not received consent, then the company representative would not have been present for the examination. *In short, the doctor was the clear wrongdoer for his failure to seek and obtain the patient's consent to the presence of the third party.*

The plaintiff did not just sue the doctor for failure to obtain consent, however, but also sued the pharmaceutical company and company representative. The plaintiff alleged two primary torts: (i) common-law "intrusion upon seclusion" against all defendants; and (ii) negligence by the doctor and medical partnership in failing to obtain the patient's consent to the presence of the company representative before conducting the examination. (The plaintiff also alleged a cause of action under the California Constitution, but ultimately did not pursue that claim.)

As often occurs in civil litigation, the plaintiff here asserted multiple causes of action arising out of a single incident. Judge Kuhl then was called upon to assess which causes of action did and did not apply to the facts as alleged by plaintiff, and thus which claims could proceed toward trial.

In this case, Judge Kuhl dismissed the common-law intrusion upon seclusion claim. *She thus allowed the other cause of action against the doctor and medical partnership for failure to obtain consent to proceed to trial.* In dismissing one cause of action and thus allowing the other to proceed to trial, she reasoned based on California precedent that (i) the plaintiff was aware that the third person was in the room so the incident was not a surreptitious taping or viewing or a trespass, which under California law were the types of cases in which intrusion upon seclusion had been recognized, (ii) the purpose for having the third party present was otherwise legitimate if consent had been requested by the doctor and provided by the patient, (iii) the fundamental problem here was the doctor's failure to seek and obtain consent from the patient, which was covered by the plaintiff's separate negligence claim against the doctor and medical partnership.

At the core, there are two critical points to keep in mind about this case. First, the negligence tort, which was based on the doctor's failure to seek and obtain consent, applied to these facts and would allow the plaintiff to obtain *full recovery*. Second, Judge Kuhl's ruling allowed this claim to move toward trial, and thus her ruling did not prevent the plaintiff from obtaining full recovery.

Justice Paul Turner was one of the three judges who heard this case on appeal. Although the three-judge panel allowed the intrusion upon seclusion claim to proceed, he wrote to the Judiciary Committee to explain that a claim for intrusion upon seclusion when there was no surreptitious viewing or taping or the like was a case of "first impression" under California law. (At oral argument in the trial court, plaintiff's counsel admitted that their theory would allow patients to sue and recover whenever *any* third party was present in an examination, including a medical student for example.) Justice Turner added that a "strong argument can be made that

[Judge Kuhl] 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.” Justice Turner concluded: “With all respect to those who have criticized Judge Kuhl as insensitive or biased because of my opinion in *Sanchez-Scott*, they are simply incorrect.”

In sum, while one can debate the proper scope of the intrusion upon seclusion tort and whether it ordinarily should cover non-surreptitious activities (which also can be covered by other torts), we do not think this one ruling should be permitted to negate the strong record and support Judge Kuhl has amassed. Moreover, it is important to place this case in context. Judge Kuhl has handled more than 2000 civil cases during her 7-year tenure on the bench. This is the only case she ruled upon or decided as a judge that has engendered any criticism, and it was a case in which her decision allowed the plaintiff’s case to trial (contrary to the suggestion in much of the misleading commentary about it).

2. Thornburgh Case. Some groups have raised questions about the fact that Judge Kuhl, as a government lawyer in 1986 (before the Supreme Court’s 1992 decision in *Casey*), worked on a Supreme Court brief that re-stated President Reagan’s position that *Roe v. Wade* should be overruled. It bears mention that John Rogers, who was confirmed to the Sixth Circuit without controversy, also was listed as an attorney for the government on this brief. We do not know Judge Kuhl’s policy views on abortion or on *Roe v. Wade*, and we do not ask candidates their personal views on abortion or *Roe v. Wade*. But regardless of what her views may be, she was in that 1986 brief representing her client President Reagan, and we are confident based on her record that she would faithfully apply Supreme Court precedent as a judge on the Court of Appeals. She wrote to Senators Feinstein and Boxer, for example, that “[t]he constitutional right of a woman to make her own choices regarding personal medical issues, including choices regarding issues of reproductive freedom, has been established by both *Roe v. Wade* and *Planned Parenthood v. Casey* [citations omitted]. As a judge I am fully committed to following the precedent established by these cases and would do so fairly and properly.”

Many attorneys who indicated they are pro-choice have written to the Senate that they are confident, based on their personal knowledge of Judge Kuhl, that she will faithfully follow precedent as a lower-court judge. For example, Anne Egerton, former law partner of Judge Kuhl and current fellow judge, wrote:

I understand that some have raised concerns about Judge Kuhl’s commitment to gender equality and reproductive rights. I do not share those concerns. I have been active in feminist and pro-choice organizations since I first joined the nascent Arizona Women’s Political Caucus in 1971. . . . I provided legal services on a pro bono publico basis for Planned Parenthood Los Angeles, serving as their outside general counsel for about two years in the late 1980s. . . . I have been a registered Democrat for thirty years, and I have supported – financially and otherwise – [Senator Feinstein], Senator Boxer, and other Democratic legislators and candidates. I have no reservations in recommending Judge Carolyn Kuhl . . . for appointment to the Ninth Circuit Court of Appeals. I know Judge

Kuhl to be committed to the rule of law and to the application of governing precedent. In the area of reproductive freedom, that precedent of course includes *Roe v. Wade* and the many cases such as *Akron* that have applied its landmark holding.”

Gretchen Nelson, officer of the Litigation Section of the Los Angeles County Bar Association and prominent plaintiff’s attorney in Los Angeles, wrote:

I am a life-long Democrat. I am also a plaintiff’s attorney. My political views are and have always been liberal. . . . I firmly agree with the U.S. Supreme Court’s opinion in *Roe v. Wade*, 410 U.S. 113 (1973), and I trust that the decision will remain viable. I am opposed to the appointment of any judicial nominee who is incapable of ruling based upon a considered and impartial analysis of all of the facts and legal issues presented in any matter. Judge Kuhl is not such a nominee and she is well-deserving of appointment to the Ninth Circuit.

3. Role as Special Assistant to the Attorney General in 1981. Some groups have raised questions about Judge Kuhl’s record as a 29-year-old special assistant to the Attorney General on the *Bob Jones* case. Judge Kuhl’s position at the time was that the Internal Revenue Service ruling at issue in the case was inconsistent with the governing statute, which of course is the kind of basic administrative law question that arises frequently in government litigation. In addition, as a policy matter, she was concerned about the effect a free-standing IRS power to decide “public policy” on its own and without congressional direction would have with respect to the tax-exempt status of all-girls and all-women’s schools.

As she testified at her hearing, however, she came to realize that the position taken by the Department of Justice in that case was a mistake for two reasons. First, the traditional role of the Department of Justice is to defend federal agencies if a reasonable argument can be made in support of the agency position (regardless whether the Justice Department lawyers might agree or disagree with that legal position), and a reasonable argument could have been made to defend the IRS position. Second, given the nature of the university’s policies, the position taken in the case badly undermined the Administration’s commitment to civil rights and became in her words a “disaster” for the Reagan Administration. There should be no suggestion, however, that Carolyn Kuhl was somehow sympathetic to the university’s practices at the time. Indeed, she testified that, as a Catholic, she brooked no sympathy for the university’s religious and racial discriminatory practices. Judge Kuhl made a basic analysis of administrative law principles (one which law professor Laurence Tribe subsequently stated was well-reasoned), but she ultimately came to believe that was not the right approach in that case under all of the circumstances.

Please do not hesitate to contact me with any questions about this superb nominee, and thank you for your support of her nomination.

Sincerely,



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cc: The Honorable Thomas Daschle
The Honorable Patrick Leahy
The Honorable Dianne Feinstein
The Honorable Barbara Boxer