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**Bcc:** Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )

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SUBJECT:: Today's News

TO:jpardue@fed-soc.org ( jpardue@fed-soc.org [ UNKNOWN ] )

READ:UNKNOWN

BCC:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )

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I have attached two items:

-Talking points on Judge Carolyn Kuhl

-A piece asking why liberals are using a double standard on Judge Kuhl.

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I have attached two items:

- Talking points on Judge Carolyn Kuhl
- A piece asking why liberals are using a double standard on Judge Kuhl.

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

- Carolyn Kuhl has been a judge on the state trial court in Los Angeles since 1995. The American Bar Association rated Judge Kuhl “Well Qualified” to sit on the U.S. Court of Appeals for the Ninth Circuit. Senators Leahy and Schumer have referred to the ABA rating as the “gold standard.”

Ninth Circuit

- Judge Kuhl has been nominated to the Ninth Circuit, which covers California, Arizona, Nevada, Montana, Idaho, Washington, Oregon, Alaska, and Hawaii.
- In a Senate speech, Democratic Senator Schumer recently described this circuit as follows: “The Ninth Circuit is by far the most liberal court in the country. Most of the nominees are Democratic from Democratic Presidents. It is the court that gave us the Pledge of Allegiance case which is way out of the mainstream on the left side.”
  - The 28-judge court has 17 judges appointed by Democrat Presidents and 8 judges appointed by Republican Presidents. President Bush has submitted nominees for the 3 current vacancies, including Carolyn Kuhl.
- The seat to which Judge Kuhl has been nominated has been designated as a “judicial emergency” by the Judicial Conference of the United States. Despite that, she has been waiting nearly two years for a vote by the Senate.

Background on Judge Kuhl

- Since 1995, Judge Carolyn Kuhl has served as a judge on the Los Angeles County Superior Court. She has served in both the civil and criminal divisions of the court, and is now the Supervising Judge of the Civil Division, the first woman to hold that position.
- From 1986 to 1995, Judge Kuhl was a partner in the prestigious Los Angeles law firm of Munger Tolles & Olson. Her practice focused on civil business litigation in both federal and state courts with a specialty in appellate litigation.
- From 1981 to 1986, Judge Kuhl served in the United States Department of Justice. She served as Deputy Solicitor General, Deputy Assistant Attorney General in the Civil Division, and as Special Assistant to Attorney General William French Smith.
  - As Deputy Solicitor General of the United States, she argued cases before the United States Supreme Court and supervised the work of the other attorneys in the office. As Deputy Assistant Attorney General in the Civil Division, Judge Kuhl supervised all civil appellate litigation handled by the Justice Department

nationwide. She also supervised civil trial litigation involving federal agency programs -- in particular, important cases raising critical constitutional or statutory issues.

- In 1977-78, Carolyn Kuhl clerked for Judge Anthony Kennedy, then a Judge on the Ninth Circuit.
- Judge Kuhl is a 1977 graduate of Duke Law School where she was an editor of the Duke Law Journal and graduated with honors. In 1974, she received a B.A. in Chemistry from Princeton University with honors. Judge Kuhl was in the second class of women ever to graduate from Princeton.
- Judge Kuhl has extraordinary bipartisan support.
  - A bipartisan group of 23 women judges on the Superior Court who serve with Judge Kuhl have written to the Judiciary Committee: “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 nearly 100 judges who serve with her wrote: “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.”
  - For a full sample of her extraordinary bipartisan support, see the supporter quotes listed later in this document.
- In 1998, Judge Kuhl took the extraordinary step of writing to Chairman Hatch to express her support for Senate consideration of Judge Paez’s nomination to the 9<sup>th</sup> Circuit. Vilma Martinez, who is past President of MALDEF, recently noted the irony, stating: “Now that President Bush has nominated Kuhl to the 9<sup>th</sup> Circuit, many of the groups that supported Paez, ironically, have turned their fire on Kuhl, apparently to exact payback against Senate Republicans. This turnabout is not fair play. It is the continuation of a vicious cycle that punishes worthy judicial candidates.”
- Throughout her career, Judge Kuhl has dedicated herself to improving the law and the administration of justice.
  - She was elected to the prestigious American Law Institute.
  - Since joining the state bench, Judge Kuhl has served as Chair of the Superior Court’s Research Attorney Committee and on the Superior Court’s Committee on Alternative Dispute Resolution and Judicial Council Task Force on Jury Instructions.

- In addition, she has served as the supervising judge of the Complex Litigation Program and the Civil Division. Judge Kuhl has participated in court programs to introduce youth to the state court system.
- She has been on her court's Alternative Dispute Resolution Committee, and has assisted in the supervision of the program by which the Superior Court provides free mediation services to the public in civil and family law cases.
- Judge Kuhl has been a role model for many women in the law.

A group of 23 women colleagues wrote: "Judge Kuhl has been a mentor to new women judges who join our Court . . . . She has helped promote the judicial careers of women, both Republican and Democrat. She supported the Hon. Margaret Morrow when Judge Morrow was awaiting a hearing . . . . She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend."

Anne Egerton, who is currently a judge on the Los Angeles Superior Court, wrote: "Carolyn served as a mentor to me in those years. Having her guidance and support made a real difference to a young woman learning to navigate the world of male-dominated major corporate firms. At Munger Tolles, Carolyn also helped to organize and actively participated in lunches and other activities of the women attorneys at the firm. We joined together from time to time to discuss issues of common concern to us as lawyers, mothers, and colleagues."

- Judge Kuhl was born in Missouri. She is married and is the mother of two daughters.

## STATEMENTS BY SELECT SUPPORTERS OF JUDGE KUHL

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

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

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

“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.” *Los Angeles Daily Journal*, April 30, 2003.

### **23 Women Judges on the Superior Court of Los Angeles**

“Judge Kuhl is seen by us and by members of the Bar who appear before her as a fair, careful and thoughtful judge who applies the law without bias. She is respected by prosecutors, public defenders, and members of the plaintiffs’ and defense bar. She is conscientious, scholarly, courteous, and willing to listen with an open mind to the arguments of counsel. Judge Kuhl approaches her job with respect for the law and not a political agenda. Judge Kuhl has been a mentor to new women judges who join our Court . . . . She has helped promote the judicial careers of women, both Republican and Democrat. She supported the Hon. Margaret Morrow when Judge Morrow was awaiting a hearing . . . . She also wrote in support of President Clinton’s nomination of the Hon. Richard Paez . . . . She is also a very decent, caring, honest and patient human being who is a delight to have as a professional colleague and friend. As sitting judges, we more than anyone appreciate the importance of an independent, fair-minded and principled judiciary. We believe that Carolyn Kuhl represents the best values of such a judiciary.” *Letter to Senate*, February 22, 2002.

### **A bipartisan group of nearly 100 judges who serve with Judge Kuhl on the Superior Court**

“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.”

**Anne Egerton, former law partner of Judge Kuhl and current fellow judge**

“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**

“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.”

**Officers of the Litigation Section of the Los Angeles County Bar Association (which has over 3000 members)**

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.”

**California Supreme Court Justice Carlos Moreno**

“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**

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

“I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit. . . . I am an attorney for the NAACP. . . . I am a lifelong Democrat. . . . I found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional.” *Excerpt from May 23, 2001, letter to Senator Boxer.*

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

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

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

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

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

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

### **Bruce Broillet, a noted plaintiff’s attorney in Los Angeles**

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

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

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

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

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

**CAROLYN KUHL**  
**Responses to Issues Raised by Opponents**

**ISSUE:**

Some interest groups have raised questions about Judge Kuhl's views on *Roe v. Wade* based on her role as a government lawyer in a 1986 case in which the government filed a brief stating President Reagan's position that *Roe v. Wade* was wrongly decided.

**RESPONSES:**

- A lawyer should not be penalized for representing her client's position in court. The ABA's legal-ethics rules counsel that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Rule 1.2(b), Model Rules of Professional Conduct.
- Judge Kuhl has correctly explained that the Solicitor General's brief in the *Thornburgh* case represented the public position of President Reagan. The appropriate role of the Department of Justice in that case was to present the President's views to the Supreme Court. (In addition, it bears mention that this brief was filed before the Supreme Court addressed and reaffirmed *Roe* in its 1992 *Casey* decision.)
- As a judge on the Ninth Circuit, Judge Kuhl will follow Supreme Court precedent, including *Roe v. Wade*. She has written: "As a judge I am fully committed to following the precedent established by [*Roe v. Wade*] and would do so fairly and properly. . . . I am fully committed to following the state laws that protect a woman's right to have an abortion and Supreme Court precedent stating that a woman's right to choose to have an abortion is protected under the Constitution." (Letter to Senator Boxer, May 29, 2001)
- Judge Kuhl is supported by a wide range of pro-choice supporters who know her and know her record.
  - 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.”
- Democrats are applying a double standard to Carolyn Kuhl. They have not objected to past nominees who were attorneys on this same government brief; indeed, they have voted to confirm nominees who actively opposed *Roe v. Wade*.
  - John Rogers was a career lawyer in the Justice Department’s Civil Division and his name is on the *Thornburgh* brief along with Carolyn Kuhl’s name. Democrats never asked John Rogers about the brief before confirming him to the Sixth Circuit in 2002. The Judiciary Committee approved him by voice vote, and the full Senate confirmed him by voice vote.
  - Charles Fried was Acting Solicitor General and was the lead government attorney on the brief. When the Senate subsequently considered his nomination to be Solicitor General, he was unanimously approved by the Judiciary Committee and confirmed by the full Senate by voice vote and without debate. Senate Democrats who voted in favor of Mr. Fried include Senators Biden, Kennedy, and Leahy.
  - Michael McConnell was confirmed to the Tenth Circuit in 2002 -- and he was not opposed by Democrats despite his publicly stated positions that *Roe v. Wade* is wrongly decided and that he is pro-life.

**ISSUE:**

As an attorney in private practice, Kuhl filed an amicus brief on behalf of a client in *Rust v. Sullivan* (1991). The client supported the federal rule prohibiting family clinics that received federal aid from promoting abortion.

**RESPONSES:**

- Kuhl agreed to file an amicus brief on behalf of a client in *Rust* because she wanted to develop a specialty in appellate law and a practice before the U.S. Supreme Court.
- The ABA’s legal-ethics rules counsel that “[a] lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” Rule 1.2(b), Model Rules of Professional Conduct.
- The regulation challenged in *Rust* did not prevent grant recipients from engaging in abortion-related speech. It only prevented them from using taxpayer funds to do so.
- The issue in *Rust* was not whether there is a constitutional right to abortion, but rather whether the taxpayers had to fund speech promoting abortion.

## ISSUE:

Some interest groups have criticized Judge Kuhl's role in a brief filed by the United States in a 1981 case involving Bob Jones University and the IRS's ability to deny tax-exempt status to educational institutions that engaged in discrimination.

## RESPONSES:

- The legal issue in the case was whether an IRS ruling to deny tax-exempt status based on its determination of "public policy" was consistent with the governing statute. The Department of Justice brief concluded that the statute as then written did not give the IRS authority to determine "public policy" and deny tax exemptions on that basis. The Department proposed that Congress enact a new statute that would grant the authority to deny tax-exempt status to schools that discriminated.
- Judge Kuhl has stated that she came to believe the decision made by the Justice Department in the *Bob Jones* case in 1982 was wrong, for two reasons: First, the "decision was wrong because it appeared insensitive to minorities, regardless of the nondiscriminatory motives of those involved in the decision." Second, from a legal standpoint, the IRS, which was the Justice Department's client, had a defensible legal position, and the Justice Department's traditional role was to advance reasonable legal arguments that were available to defend agency decisions and rules. *May 29, 2001 Letter from Judge Kuhl to Senator Boxer.*
  - In an op-ed in the *Los Angeles Times*, former Solicitor General Charles Fried wrote: "By the time Kuhl came to the office of the solicitor general as my deputy in 1985, I knew she had come to believe (as did I) that she had been wrong, if for no other reason than seeming to side with Bob Jones confused the Reagan administration's message that we were strongly committed to civil rights and racial equality while opposed to quotas." *L.A. Times, Jan. 17, 2003, at 17.*
- Judge Kuhl has explained her role in the case as follows: "[A]t the time I was 29 years old . . . I was on the staff of the Attorney General [and] had no decisionmaking authority with respect to the government's position. The decision was made by the Attorney General and other high-level officials at the Department of Treasury and the White House. I conducted legal research on the issues involved in the case, primarily on the issue of the effect of legislative inaction subsequent to the IRS's adoption of the policy of denying tax exempt statutes to educational institutions that discriminated on the basis of race."
  - Judge Kuhl's original concerns about the IRS position focused on the problems that could arise from the IRS's potential unfettered discretion to define what was "public policy" in any number of situations for purposes of determining tax-exempt status.
  - As a Roman Catholic, she had no sympathy for the university's religious and

racial discriminatory practices. Rather, her analysis in the case was based on basic administrative law principles so as to determine whether the statute gave the IRS authority to deny tax-exempt status based on its determination of “public policy.”

- Charles Cooper, who worked with Kuhl at the Justice Department on this issue, has characterized opponents’ descriptions of Kuhl’s role in the decision making process as “unfair” and “grossly incomplete.” Cooper observed that Kuhl “wasn’t making policy, she was taking notes -- when she and I were even in the room.” Jonathan Groner, *Going After the Bush Bench*, Legal Times, February 1, 2002.
- At the time, many people shared the public policy concerns regarding the IRS’s authority to determine whether an organization is entitled to tax-exempt status.
- In his concurrence in the *Bob Jones* case, Justice Lewis Powell observed that Congress, not the IRS, should develop national policy regarding tax exemptions: “the balancing of these substantial interests is for Congress to perform. I am unwilling to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently ‘fundamental’ to require denial of tax exemptions. Its business is to administer laws designed to produce revenue for the Government, not to promote ‘public policy.’ . . . The contours of public policy should be determined by Congress, not by judges or the IRS.” *Bob Jones*, 461 U.S. at 611 (Powell, J., concurring).
- Harvard Law Professor Laurence Tribe wrote in a 1984 letter to then Attorney General William French Smith: “I have the highest regard for the quality of the brief submitted to the Supreme Court by the Department of Justice in the *Bob Jones* case. I thought it was a powerful and, in most respects, entirely compelling legal document.” *February 10, 1984 Letter from Laurence H. Tribe to Attorney General William French Smith*.

## ISSUE:

**Some interest groups have charged that Judge Kuhl's ruling in the *Sanchez-Scott* case was erroneous and demonstrates insensitivity to women's rights.**

## RESPONSES:

### Factual Background

- 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. The plaintiff knew that this third person was in the room (in other words, there was no surreptitious viewing or 2-way mirror) and, according to her complaint, that the company representative was identified as a "person who was looking at Dr. Polonsky's work." The plaintiff was not told his role or affiliation, however.
- The fundamental wrong 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 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.
- Recognizing that the problem was the doctor's failure to obtain consent, Judge Kuhl dismissed one of the causes of action, the common-law intrusion upon seclusion claim. (At oral argument in the trial court, plaintiff's counsel admitted that plaintiff's theory of this tort would allow patients to sue and recover whenever *any* third party was present in an examination, including a medical student for example.)
- Judge Kuhl thus allowed the other cause of action against the doctor and medical partnership for failure to obtain consent to proceed to trial.

## Responsive Points

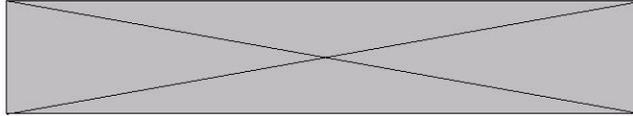
- There are two critical points about this case. First, plaintiff’s negligence claim against the doctor, which was based on the doctor’s failure to seek and obtain consent, would allow the plaintiff to obtain *full recovery*. Second, Judge Kuhl’s ruling allowed this negligence claim to move forward to trial, and thus her ruling did not prevent the plaintiff from obtaining full recovery.
- Justice Paul Turner authored the appellate court opinion in this case, and he wrote to the Judiciary Committee 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. Although the appellate court expanded the intrusion tort beyond previous precedents, he 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.”
- 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 real criticism, and it was a case in which the plaintiff’s case was allowed to go to trial (contrary to the suggestion in much of the misleading commentary about it).
- As a woman and the mother of two daughters, Judge Kuhl has explained that she was very sensitive to the facts described in the complaint.
- In an extraordinary letter, 97 of Judge Kuhl’s fellow Judges wrote: “We have worked side by side with Judge Kuhl, have attended her judicial education presentations, talked with her about the law, and received reports from litigants who have appeared before her. We know she is a professional who administers justice without favor, without bias, and with an even hand.” Letter to Senators Hatch, Leahy, Feinstein, and Boxer (Feb. 28, 2003).

## ISSUE:

Some interest groups have contended that Judge Kuhl is insensitive to civil rights based on her participation as Deputy Solicitor General in filing the government's brief in Meritor Savings Bank v. Vinson, the landmark sexual harassment case.

## RESPONSES:

- Carlyn Kuhl was representing a client in this case, and a lawyer should not be penalized for representing her client's position in court.
- Carolyn Kuhl was the fourth person listed on the amicus brief after Solicitor General Charles Fried and Assistant Attorneys General Reynolds and Willard.
- The brief advanced the position that sexual harassment violated Title VII, an issue that the Supreme Court had not previously addressed. Moreover, the government argued that unwelcome sexual advances violate Title VII when they create a hostile work environment, a position contrary to the argument set forth by the employer in that case.
  - The Government's position was in accord with briefs filed by several amici, including the Women's Bar Association of the State of New York, and a group of state Attorneys General including Mr. Lieberman of Connecticut and Mr. Humphrey of Minnesota.
- The government argued for a standard of liability based on whether sexual advances made in the workplace were "unwelcome," the same standard that the plaintiff had urged the Court to apply. Indeed, the first heading in the "Discussion" section of the brief stated: "Unwelcome Sexual Advances That Create A Hostile Working Environment Violate Title VII."
  - On the facts of the case, the government argued that the trial court's findings taken as a whole supported the conclusion that the supervisor's advances were not "unwelcome" in that case.
- At the time of the decision, the *National Organization for Women* (NOW) called the decision "on balance a victory for working or employed women." On behalf of the Justice Department, Carolyn Kuhl also commented that the government was pleased with the ruling. She commented that the ruling held that sexual harassment of an employee by a supervisor violates the federal law against sex discrimination in the workplace, and that courts should look to agency principles to determine employer liability. *The New York Times*, June 20, 1986.



Contact: Sean Rushton  
(202) 481-6850  
May 22, 2003

## Why are Liberals Using a Double Standard to Keep a Woman off the Federal Court?

**Washington, DC** – The Committee for Justice (CFJ) today decried liberals’ use of a double standard to justify their opposition to the nomination of Judge Carolyn Kuhl to the 9<sup>th</sup> Circuit Court of Appeals.

The key issue cited by Kuhl’s opponents, one of the president’s most qualified and excellent nominees, is her involvement on a brief of an abortion-rights case, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), while working for the U.S. Department of Justice in the 1980s. Despite her relatively low-level position at the time, and that numerous attorneys, including then-Acting Solicitor General Charles Fried, directed the brief’s substance, liberals now mention the brief as reason to block Kuhl – currently a California Superior Court Judge – from the federal bench, possibly even by filibuster.

Yet in 2002, Democrats gave a free pass to Sixth Circuit nominee John Rogers, who was also at the U.S. Department of Justice in the 1980s and who contributed substantially to the *Thornburgh* brief. Not only was Rogers not asked about the brief during his confirmation hearing, he was confirmed by *unanimous consent* on the Senate floor.

“Why was John Rogers, a career academic who – just like Carolyn Kuhl – worked on the *Thornburgh* brief early in his career, considered uncontroversial enough to earn easy passage, yet Carolyn Kuhl, a currently sitting judge, is being threatened with the most radical opposition tactic possible, the judicial filibuster?” asked CFJ Chairman C. Boyden Gray. “What, besides gender, differentiates these nominees?”

“As with the current filibusters of nominees Miguel Estrada and Priscilla Owen, Senate liberals continue to hold ethnic minorities and women to a different standard than white males,” Gray continued. “The same crowd that decries the ‘glass ceiling’ is sending the unambiguous message that women or minorities who happen to be conservative need not apply for positions of power.”

“A sterling nominee like Carolyn Kuhl is sorely needed on the Ninth Circuit Court of Appeals,” Gray concluded. “This is the nation’s most liberal court – the same one that ruled reference to ‘God’ in the Pledge of Allegiance unconstitutional – and would be well served by some balance to its activist ideology.”

The Committee for Justice supports constitutionalist judicial nominees.

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