

S. HRG. 109-318

**NOMINATIONS OF J. THOMAS ROSCH AND
WILLIAM E. KOVACIC TO BE COMMISSIONERS
OF THE FEDERAL TRADE COMMISSION**

HEARING

BEFORE THE

**COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE**

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

NOVEMBER 14, 2005

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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**NOMINATIONS OF J. THOMAS ROSCH
AND WILLIAM E. KOVACIC TO BE
COMMISSIONERS OF THE FEDERAL TRADE
COMMISSION**

MONDAY, NOVEMBER 14, 2005

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m. in room SD-562, Dirksen Senate Office Building, Hon. Ted Stevens, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. TED STEVENS,
U.S. SENATOR FROM ALASKA**

Well thank you very much. I'm sorry to be slightly late. We have two nominees for the Federal Trade Commission here today.

J. Thomas Rosch is a noted antitrust lawyer who currently practices law in San Francisco. He has chaired the antitrust sections of both the American Bar Association and the California Bar Association.

And earlier in your career you were the Director of the FTC's Bureau of Consumer Protection?

Mr. ROSCH. That is correct Mr. Chairman.

The CHAIRMAN. It's a long way around to get a promotion isn't it? Go to San Francisco and come back.

Our other nominee is William, correct me if I'm wrong, Kovacic. Mr. KOVACIC. That's right sir.

The CHAIRMAN. Professor of law at George Washington University. He also served in the FTC I'm told, he was General Counsel from 2001 through 2004.

Mr. KOVACIC. Yes.

The CHAIRMAN. And along with a distinguished academic career, I'm told you served as attorney-advisor to FTC Commissioner Douglas, and as an attorney in the FTC's Bureau of Competition.

Mr. KOVACIC. Yes sir.

The CHAIRMAN. Well that's very much of a compliment to both of you that you would come back to be part of the agency that you've worked for in the past. And we will be pleased to continue this hearing as soon as my friend has made a statement, Senator Inouye.

**STATEMENT OF THE HON. DANIEL K. INOUE,
U.S. SENATOR FROM HAWAII**

Senator INOUE. Well I'd just like to thank both of them for giving their service to this country. Oftentimes I wonder why men and women do that. That's a lot of sacrifice. And I commend you for that. Both you have great experiences in antitrust work, but as you know your responsibilities will be much broader than that. And so I'll wait until question time.

The CHAIRMAN. Yes sir. Let me call on you first Mr. Rosch, if you have a statement. Would you introduce for the record, so the record will show who is with you today. Hold that mike a little bit closer to you perhaps.

**STATEMENT OF J. THOMAS ROSCH, NOMINEE TO BE
COMMISSIONER OF THE FEDERAL TRADE COMMISSION**

Mr. ROSCH. Thank you Mr. Chairman, I'd be very pleased to do exactly that. They've come from both California and Illinois to be with me today and I would like to introduce them. First, my wife Kitty, my wife of 44 years, actually 44 plus now, she will remind me. Our son, Tom, and his wife, Debbie; our daughter, Laura Gillette, and her husband, Ed; and my four granddaughters who are about to get the civics lesson of their lives, and I'm going to do it in order of age if you don't mind because I'll get in trouble if I don't. Starting with Amy who is 6 minutes older than Catherine, then Catherine, Carolyn and finally Julia. Thank you Mr. Chairman.

The CHAIRMAN. Thank you very much. Please proceed with your statement.

Mr. ROSCH. Mr. Chairman, at the outset, let me express my gratitude to you and to the Committee for permitting us to appear before you today. We know you have a lot of things on your plate, and it is very good of you to fit us in.

I've had the privilege over the last month to meet with a number of members, I met with Senator Inouye, among others, and I've also met their staffs and I met with the staff of this Committee. And I'd like to share with you briefly a couple of frequently asked questions, as well as my answers to those questions.

First, I've often been asked what I consider to be the central priorities of the Commission over the next several years and why. Those priorities it seems to me are three fold: They are energy, health care and high tech including biotech.

That is so for two reasons. First, those sectors collectively account for a huge share of this Nation's economy. And second, there are unique challenges to effective law enforcement in those sectors. That said, I think there's a unifying principle, and that principle is Visible Presence. I am a great admirer of the way the highway patrol goes about its business. When they're on my tail, I tend to be very cautious in the way that I drive. I think it's equally critical to effective law enforcement for the Commission to have a visible presence in these as well as other sectors.

With respect to consumer protection specifically, I've had occasion to review the chart in the office that adjoins this hearing room listing the Top Ten unfair acts or practices today. And I'm struck by the extent to which they are the same or similar acts or prac-

tices with which the Commission's Bureau of Consumer Protection was concerned when I had the privilege of serving as its Director 30 years ago. But I'm also struck by the differences. Thirty years ago, those acts or practices occurred primarily in the bricks and mortar context. Today, they occur primarily in the Internet context.

Additionally, the Internet has spawned some new problems: spam; spyware; identity theft; privacy invasion among others, which I know the Commission has been working on closely with this Committee. So I believe that both the Commission and this Committee simply have to focus on the Internet. And to do that, we need the U.S. Safe Web Act to facilitate cross border cooperation because Internet wrongdoing impacting the United States can occur just as easily overseas as it can here at home. So I thank this Committee for its support for this legislation and express the hope that it is soon enacted.

Finally, Mr. Chairman, I've been frequently asked why I am interested in this position, Co-Chairman Inouye asked me specifically about that. And I'll be brief because it's a pretty easy question for me to answer. Kitty and I were a couple of Nebraska kids. Over the past 65 plus years, this country has been absolutely wonderful to us. It's time for us to give back. We've concluded that the best way to do that is to share with the Commission the background and experience in antitrust and consumer protection that I've had over the past 40 years. That's what I plan to do.

And I'd be remiss if I didn't mention the attraction of working at an agency with a staff like the Commission's. They were superb 30 years ago, they are superb today. We'll have our differences because our roles are different. But those differences will be discussed civilly, respectfully and professionally. So, if confirmed, I look forward to returning to the FTC again. Thank you.

[The prepared statement and biographical information of Mr. Rosch follow:]

PREPARED STATEMENT OF J. THOMAS ROSCH, NOMINEE TO BE COMMISSIONER OF THE
FEDERAL TRADE COMMISSION

Mr. Chairman, Co-Chairman Inouye, distinguished Members of this distinguished Committee. At the outset, let me express my gratitude to you for permitting us to appear before you today. I know you have a lot of things on your plate, and it is very good of you to fit us in.

I would also like to take a minute to introduce the members of my family who have come from California and Illinois to be with me this afternoon: my wife of 44 years, Kitty; our son, Tom, and his wife, Debbie; our daughter, Laura Gillette, and her husband, Ed; and my four granddaughters who are about to get the civics lesson of their life, in order of age—Amy (who is six minutes older than Catherine), Catherine, Carolyn and Julia.

Mr. Chairman, I've had the privilege of meeting with a number of you—or your staffs—including the staff of this Committee—during the past month. I'd like to share with you briefly a couple of frequently asked questions, as well as my answers to those questions.

First, I've frequently been asked what I consider to be the Commission's likely priorities over the next few years. They are three fold: energy, health care and high tech (including biotech). That is so for two reasons. To begin with, those three sectors collectively account for a huge share of this Nation's economy. Second, there are unique challenges to effective law enforcement in those sectors. That said, there is a unifying principle, and that principle is *visible presence*. I am a great admirer of the way the highway patrol does its job. When they're on my tail, I tend to drive very cautiously. I think it's equally critical to effective law enforcement for the Commission to have a visible presence in these (as well as other) sectors.

With respect to consumer protection specifically, I've had occasion to review the chart in the office that adjoins this hearing room: the Top Ten list of unfair or deceptive acts or practices. I'm struck by the extent to which they are the same or similar acts or practices with which the Commission's Bureau of Consumer Protection was concerned when I had the privilege of serving as its Director 30 years ago. But I'm also struck by the differences. Thirty years ago, those acts or practices occurred primarily in a bricks or mortar context. Today, they occur primarily in the Internet milieu.

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Finally, Mr. Chairman, I've been frequently asked why I am interested in this position. That's the easiest question. Kitty and I were a couple of Nebraska kids. Over the past 65 plus years of our lives, this country has been extraordinarily good to us. It's time for us to give back. And we've concluded that the best way to do that is to share with the Commission the background and experience in antitrust and consumer protection that I've had over the past 40 years. That's what I plan to do.

And I'd be remiss if I didn't mention the attraction of working at an agency with a staff like the Commission's. They were superb 30 years ago, they are superb today. We'll have our differences because our roles are different. But those differences will be discussed civilly, respectfully and professionally. So, if confirmed, I look forward to returning to the FTC again. Thank you.

A. BIOGRAPHICAL INFORMATION

1. Name (Include any former names or nicknames used): John Thomas Rosch (J. Thomas Rosch; Tom Rosch).
2. Position to which nominated: Commissioner, Federal Trade Commission.
3. Date of Nomination: September 29, 2005.
4. Address (List current place of residence and office addresses):

Residence: information not released to the public.
Office: 505 Montgomery Street San Francisco, CA 94111.

5. Date and Place of Birth: Council Bluffs, Iowa 10/4/39.
6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).

Carolyn Lee Rosch, Housewife.
Thomas Lee Rosch—43.
Laura Lee Rosch—39.

7. List all college and graduate degrees. Provide year and school attended.

Harvard College, Cambridge, Massachusetts 1957–1961 B.A. Magna Cum Laude 1961.

Jesus College, Cambridge University Cambridge, England 1961–1962 Knox Fellow (no degree).

Harvard Law School, Cambridge, Massachusetts 1962–1965 L.L.B. Cum Laude 1965.

8. List all management-level jobs held and any non-managerial jobs that relate to the position for which you are nominated.

McCutchen, Doyle, Brown & Enersen, Attorney, San Francisco, CA Associate attorney 1965–1972; Partner 1972–1973; 1975–1993.

Federal Trade Commission Washington, D.C. Director of Bureau of Consumer Protection 1973–1975.

Latham & Watkins LLP, Attorney, San Francisco, CA Partner 1994–present.

9. List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above, within the last five years: Instructor, Haas School of Business. University of California, Berkeley, CA 2005.

10. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational or other institution within the last five years.

Partner, Latham & Watkins LLP (see #8 above).

Instructor, Haas School of Business. University of California (see #9 above).

11. Please list each membership you have had during the past ten years or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religious organization, private club, or other membership organization. Include dates of membership and any positions you have held with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age or handicap:

a. Chair, American Bar Association, Antitrust Section (1991: member 1975–present).

b. Chair, California State Bar Antitrust & Trade Regulation Section (1993: member 1990–present).

c. Board of Directors, The Eisenhower Institute Washington, D.C., 1992–present.

d. Board of Directors and Advisory Board, California Supreme Court Historical Society, 1995–present San Francisco, CA.

e. Board of Directors and Advisory Board, Northern District of California, U.S. District Court Historical Society 1998–present, San Francisco, CA.

f. Advisory Board, Bureau of National Affairs Antitrust & Trade Regulation Reporter, 1974–present.

g. Advisory Board, Practising Law Institute, 1995–present.

h. The Bohemian Club, San Francisco, CA, 1989–October 2005. *

i. The Pacific Union Club, San Francisco, CA, 1985–October, 2005. *

*These clubs restrict membership on the basis of sex. I have submitted my resignation to both of them.

12. Have you ever been a candidate for public office? If so, indicate whether any campaign has any outstanding debt, the amount, and whether you are personally liable for that debt. No.

13. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$500 or more for the past 10 years.

\$3,000—Elizabeth Dole 2000.

\$2,000—Bush/Simon Fund Raiser 2001.

14. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognition for outstanding service or achievements.

a. Ames Award, Harvard College 1961 (award to outstanding senior for scholarship, leadership and character).

b. Knox Fellow, Cambridge University 1961–1962 (Harvard College scholarship awarded to senior based on scholarship).

c. Fellow, American College of Trial Lawyers (1986–present).

d. California Antitrust Lawyer of the Year 2003 (California Bar Association Award).

e. California Lawyer Magazine “Best In The West” Antitrust Lawyer (2004).

f. Ranked as Leading Antitrust Attorney by *Chambers USA: America’s Business Lawyers*; *The Best Lawyers In America*; *Legal Media Group’s Expert Guide to Competition and Antitrust Lawyers*; and *Global Competition Review’s GCR 100*.

15. Please list each book, article, column, or publication you have authored, individually or with others, and any speeches that you have given on topics relevant to the position for which you have been nominated. Do not attach copies of these publications unless otherwise instructed.

Publications

a. “The George Court and Economic Welfare: A Business Perspective,” *Competition Magazine* (California State Bar 2003).

- b. "Developments In The Law of Vertical Restraints" (Practising Law Institute annually 1990–present).
- c. "Manual of FTC Practice and Procedure" (Bureau of National Affairs, 1990) (with periodic updates).
- d. Messages From the Chairman, Competition Magazine (American Bar Association Antitrust Section, 1990).
- e. Chairman's Keynote Speech, Antitrust Law Journal (American Bar Association Antitrust Section, 1990).
- f. "Traps In Judicial Deference to Business Judgment" (The Conference Board, 1987).

Speeches (Except Speeches as FTC Bureau Director)

- a. Chair, and Speeches on Development In Vertical Restraint and Consumer Protection Law at Practicing Law Institute Annual Antitrust Institutes 1980–present.
- b. Chair, and Speeches on Joint Venture, Monopolization Vertical Restraint and Class Action Law at Conference Board Symposia 1978, 1980, 1984–2003.
- c. Speeches on Consumer Protection, Monopolization and Vertical Restraint Law at ABA Antitrust Section Spring and Annual Meeting Programs 1977–80, 1983–1990, 1992, 1997, 2000.
- d. Speeches on Developments In Ethics In Government Investigations, Price Discrimination at Golden State Institutes 1990–1992, 2003.
- e. Speeches on Magnuson-Moss Act and Vertical Restraints at Northwestern Law School Antitrust Institutes 1975, 1998.

16. Please identify each instance in which you have testified orally or in writing before Congress in a nongovernmental capacity and specify the subject matter of each testimony: None.

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers.

I will continue to receive retirement benefits from Latham & Watkins as described in my Ethics Commitment letter to Christian S. White, dated September 8, 2005 (copy attached). Under the Latham & Watkins partnership agreement, on the day I retire from the firm I will receive a prorated final partnership payment for my work performed in 2005, which will not be based on any firm services performed after my departure. I also will be reimbursed the value of my Latham & Watkins LLP capital account upon the day of my retirement. Also, under the Latham & Watkins partnership agreement, as amended, I will be entitled to receive a retirement payment for ten years after leaving the firm. During the time that I am in government service, these payments will be a fixed amount. I understand that so long as I am a government employee and am receiving fixed retirement payments from the firm, I will not participate personally and substantially as a Commissioner in any particular matter that would have a direct and predictable effect on Latham & Watkins' ability or willingness to meet this financial obligation unless I first obtain a written waiver under 18 U.S.C. 208(b)(1). After I leave government service, pursuant to the amended partnership agreement, the share of partnership income for each of the remaining years will be based on my five highest earning years in the 10 years prior to retirement. Lastly, I will continue to hold interests in four Limited Liability Companies held by certain partners of Latham & Watkins LLP (VP Fund Investments 2004, LLC; Mutual Partners, LLC; P.E. Partners II, LLC and P.E. Partners III, LLC) which cannot be divested at this time.

Upon confirmation, I will resign from my unpaid positions as instructor at the Haas School of Business of the University of California and as a board member of the Eisenhower Institute. Pursuant to 5 CFR §2635.502, I will not participate in any particular matter involving specific parties which one of the parties is, or is represented by, either of these entities for one year from the last date I provided services to these entities unless I am authorized to participate.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation or practice with any business, association or other organization during your appointment? No.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

All such investments, obligations and liabilities are described in detail in the above-referenced Ethics Commitment letter to Christian S. White and my Executive Branch Public Financial Disclosure Report, both of which are attached hereto. My financial disclosure report identifies several stock holdings as well as several stock mutual funds. I understand that under 5 CFR § 2640.201(a), consistent with 18 U.S.C. § 208(b)(2), I may participate in any particular matter affecting one or more holdings of a diversified mutual fund where the otherwise disqualifying financial interest in the matter arises because of my ownership of an interest in the fund. Consistent with the prohibitions of 18 U.S.C. § 208(a), unless I obtain a waiver under section 208(b)(1) or I qualify for a regulatory exemption under section 208(b)(2), I will not participate personally and substantially in any particular matter in which I have, or any person or organization whose interests are imputed to me has, a financial interest, if the particular matter will have a direct and predictable effect on that financial interest. Also, I will seek a conflict of interest waiver concerning my holdings held in four Limited Liability Companies held through by certain partners of Latham & Watkins, LLP (VP Fund Investments 2004, LLC; Mutual Partners, LLC; P.E. Partners/II, LLC and P.E., Partners III, LLC), which cannot be divested at this time. Until I receive such a waiver, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on the financial interests of these LLCs. No other assets have been identified as presenting a conflict at this time, however, should any asset become a conflict, I will divest conflicting financial interests. I may seek certificates of divestiture from the U.S. Office of Government Ethics for any assets divested, where permissible. I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on any of these interests until divestiture has been accomplished or until a waiver has been obtained.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last 15 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

The attached letter to Christian S. White and the attached Financial Disclosures describe the financial investments that I have made. A list of the firm clients with matters for which I have been the principal responsible attorney is attached as Schedule A. I have marked with an asterisk those clients with matters involving the Federal Government. Of these clients I believe the only one with a matter currently before the Commission is McKesson Corporation.

5. Describe any activity during the past 5 years in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy: None.

6. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items.

As discussed in my Ethics Commitment letter (copy attached), consistent with the prohibitions of 18 U.S.C. § 208(a), unless I obtain a waiver under section 208(b)(1) or I qualify for a regulatory exemption under section 208(b)(2), I will not participate personally and substantially in any particular matter in which I have, or any person or organization whose interests are imputed to me has, a financial interest, if the particular matter will have a direct and predictable effect on that financial interest. Further, I will not participate in any particular matter involving specific parties in which one of the parties is, or is represented by, any client for whom I personally performed legal services, for one year from the last date I provided services to the client unless I am authorized to participate. I understand that I will have a continuing obligation to comply with ethics laws and regulations that will require vigilance regarding any changes in my financial interests, the financial interests of persons and organizations imputed to me under the ethics laws and regulations, and other outside interests. I will keep the Agency's ethics officials informed about any new or changing interests and will take all appropriate steps to avoid or remedy potential conflicts.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity, other than for a minor traffic offense? No.

3. Have you or any business of which you are or were an officer ever been involved as a party in an administrative agency proceeding or civil litigation? No.
4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? No.
5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination: None.
6. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion or any other basis? No.

D. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees? Yes.
2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistle blowers from reprisal for their testimony and disclosures? Yes.
3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee? Yes.
4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so? Yes.

The CHAIRMAN. Mr. Kovacic.

STATEMENT OF WILLIAM E. KOVACIC, NOMINEE TO BE COMMISSIONER OF THE FEDERAL TRADE COMMISSION

Mr. KOVACIC. Mr. Chairman, Mr. Co-Chairman, I'd like to introduce my wife Kathryn Fenton, and to thank her for her encouragement and indispensable support to me in this endeavor.

The CHAIRMAN. We welcome your wife.

Mr. KOVACIC. I am deeply honored that President Bush has nominated me to be a member of the Federal Trade Commission, and I am most grateful to this Committee for considering my appointment. I also thank the staff of the Committee which was enormously generous with its attention and assistance in the process. And let me also recognize my considerable debt to FTC Chairman Majoras, Commissioners Leary, Harbour, and Leibowitz, and to the FTC's Office of Congressional Relations for being my shepherds in the process leading to the hearing. And I should add that no person has been more helpful to me than Orson Swindle, whose seat I would occupy if I am fortunate to be confirmed.

I began my acquaintance with the FTC about the time that Tom Rosch did—thirty years ago exactly, when I served as a legislative assistant on the majority staff of Senator Philip Hart's Judiciary Subcommittee on Antitrust and Monopoly. In my year with Senator Hart's subcommittee staff, I studied the agency while working on the measure that Congress enacted in 1976 as the Hart-Scott-Rodino Antitrust Improvements Act. The FTC became, and has remained to this day, the principal focus of my professional life. Twice before, as Chairman Stevens mentioned, I worked at the Commission from 1979 to 1983, as a staff attorney and an attorney advisor and then as the agency's General Counsel from 2001 through 2004. More the any other subject, the FTC has occupied my attention as an academic and a researcher.

My aim in seeking your approval is not simply to return, once again, to a wonderful institution that is dear to me. There is a vast difference between simply having a job and doing something useful with the job. If I am fortunate to be confirmed, I will apply my

knowledge and experience to the challenges that now command the careful attention of the Commission's members and its exceptional staff. Three priorities stand out to me, and they very much resemble Tom Rosch's list.

The first is to participate in devising effective litigation and non-litigation strategies to address the competition and consumer protection issues of greatest concern to consumers. The most pressing matters include energy—a subject whose importance was underscored in this Committee's hearings last week—health care, and information security and privacy.

My second aim is to contribute to the Commission's existing efforts to enhance the infrastructure of cooperation and coordination with government institutions at home and abroad to strengthen the implementation of competition and consumer protection policy.

The third is to help ensure that the Commission sustains and enhances the deep base of knowledge that is indispensable to success in formulating competition and consumer protection programs. Key means to this end include investments in research and analysis and the maintenance and continuing enhancement of the FTC's already superb staff of attorneys, economists, and administrative professionals.

My larger ambition mirrors the goal that Chairman Majoras set for the agency's leadership when she celebrated the FTC's 90th anniversary in September last year. Academic and popular commentators often exhort government officials to "pick the low hanging fruit." Wouldn't you like a dollar for every time you've heard that aphorism? These observers rarely urge policymakers on the other hand to plant trees that will bear fruit long after they have left office. I would measure my own contributions not simply by the current output of matters, but also by investments that make the FTC successful for the longer term.

If I am fortunate enough serve on the agency again, I will do my best to work with the Members of the Commission, with the agency's staff, and indeed with the Members of this Committee to fulfill the destiny that Senator Albert Cummins foresaw for the FTC in the year of its creation: to make the Federal Trade Commission "the most efficient protection to the people of the United States that Congress has ever given by way of a regulation of commerce."

Thank you.

[The prepared statement and biographical information of Mr. Kovacic follow:]

PREPARED STATEMENT OF WILLIAM E. KOVACIC, NOMINEE TO BE COMMISSIONER OF
THE FEDERAL TRADE COMMISSION

Chairman Stevens, Co-Chairman Inouye, and Members of the Commerce Committee. I am deeply honored that President Bush has nominated me to be a member of the Federal Trade Commission, and I am most grateful to this Committee for considering my appointment. I also thank the staff of this Committee and the staffs of the Committee's members for their generous, thoughtful assistance. Let me also recognize my considerable debt to FTC Chairman Majoras, Commissioners Leary, Harbour, and Leibowitz, and to the FTC's Office of Congressional Relations for guiding me in this process. And no person has been more helpful to me than Orson Swindle, whose seat I would occupy if I am fortunate to be confirmed.

I began my acquaintance with the Federal Trade Commission thirty years ago in serving as a legislative assistant on the majority staff of Senator Philip Hart's Judiciary Subcommittee on Antitrust and Monopoly. In my year with Senator Hart's

subcommittee staff, I studied the agency while working on the measure that Congress enacted in 1976 as the Hart-Scott-Rodino Antitrust Improvements Act. The FTC became, and has remained, the principal focus of my professional life. Twice before I have worked at the Commission, first as a staff attorney and an attorney advisor from 1979 to 1983, and then as the agency's General Counsel from 2001 through 2004. More than any other subject, the FTC has occupied my attention as an academic and a researcher.

My aim in seeking your approval is not simply to return, once again, to a wonderful institution that is dear to me. There is a vast difference between simply having a job and doing something useful with the job. If I am fortunate to be confirmed, I will apply my knowledge and experience to the challenges that now command the careful attention of the Commission's members and its exceptional staff. Three priorities stand out.

The first is to participate in devising effective litigation and non-litigation strategies to address the competition and consumer protection issues of greatest concern to consumers. The most pressing matters include energy—a subject whose importance was underscored in this Committee's hearings last week—health care, and information security and privacy.

The second is to contribute to the Commission's existing efforts to enhance the infrastructure of cooperation and coordination with government institutions at home and abroad to strengthen the implementation of competition and consumer protection policy.

The third is to help ensure that the Commission sustains and enhances the deep base of knowledge that is indispensable to success in formulating competition and consumer protection programs. Key means to this end include investments in research and analysis and the maintenance and continuing enhancement of the FTC's already superb staff of attorneys, economists, and administrative professionals.

My larger ambition mirrors the goal that Chairman Majoras set for the agency's leadership when she celebrated the FTC's 90th anniversary in September last year. Academic and popular commentators often exhort government officials to "pick the low hanging fruit." These observers rarely urge policy makers to plant trees that will bear fruit long after they have left office. I would measure my own contributions not simply by the output of current policy initiatives, but also by investments that make the FTC successful for the longer term.

If I am fortunate to be confirmed, I will do my best to work with the members of the Commission, the agency's staff, and the Members of this Committee to fulfill the destiny that Senator Albert Cummins foresaw for the FTC in the year of its creation—to make the Federal Trade Commission "the most efficient protection to the people of the United States that Congress has ever given . . . by way of a regulation of commerce."

I look forward to your questions.

A. BIOGRAPHICAL INFORMATION

1. Name (Include any former names or nicknames used): William Evan Kovacic.
2. Position to which nominated: Commissioner, Federal Trade Commission.
3. Date of Nomination: July 28, 2005.
4. Address (List current place of residence and office addresses):
 Residence: information not released to the public.
 Office: George Washington University Law School, 2000 H Street, NW., Washington, DC 20052.
5. Date and Place of Birth: Poughkeepsie, New York, October 1, 1952.
6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).
 Spouse: Kathryn Marie Fenton,
 Partner,
 Jones Day,
 51 Louisiana Avenue, N.W.,
 Washington, DC 20001.
 No children.
7. List all college and graduate degrees. Provide year and school attended.
 A.B., Public and International Affairs, Princeton University, 1974.
 J.D., Columbia University, 1978.

8. List all management-level jobs held and any nonmanagerial jobs that relate to the position for which you are nominated.

General Counsel,
Federal Trade Commission,
June 2001 through December 2004.

Professor,
George Washington University Law School,
June 1999 to present (on leave: June 2001 through July 2004).

Visiting Professor,
George Washington University Law School,
August 1998 through June 1999.

Visiting Professor,
Washington College of Law,
American University,
August 1994 through June 1995.

Professor,
George Mason University School of Law,
June 1986 to June 1999.

Associate,
Bryan Cave,
September 1983 to June 1986.

Attorney Advisor,
Commissioner George W. Douglas,
Federal Trade Commission,
January 1983 to September 1983.

Attorney,
Planning Office,
Bureau of Competition,
Federal Trade Commission,
September 1979 to January 1983.

Law Clerk to the Honorable Roszel C. Thomsen, Senior United States District Judge,
U.S. District Court for the District of Maryland,
September 1978 to September 1979.

Legislative Assistant, Majority Staff,
Subcommittee on Antitrust and Monopoly,
U.S. Senate Committee on the Judiciary,
June 1975 to July 1976.

9. List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above, within the last five years.

Advisor,
Antitrust Modernization Commission,
May 2005 to the present.

10. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational or other institution within the last five years.

Consultant,
Bates & White,
April 2005 to present.

Consultant,
BearingPoint,
May 2005 to present.

Consultant,
International Law Institute,
August 2005 to present.

Member,
International Board of Advisors,
Concurrences [published by Thomson Transactive],
January 2005 to present.

Contributing Editor,

Antitrust Law Journal [published by the ABA Section of Antitrust Law],
August 1997 to present.

Member,
Board of Advisors,
Center for Research in Regulated Industries,
Rutgers University,
September 1998 to June 2001, January 2005 to present.

Member,
Editorial Board,
Journal of Regulatory Economics [published by Kluwer Academic Publishers],
January 2005 to present.

Member,
Advisory Board,
The Government Contractor [published by Thomson West],
June 1999 to present.

Member,
Board of the Glencairn Governance [homeowners' association, Clifton, Virginia],
May 1998 to present.

Member,
Advisory Board,
University of Detroit Jesuit High School & Academy,
July 2003 to present.

11. Please list each membership you have had during the past ten years or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religious organization, private club, or other membership organization. Include dates of membership and any positions you have held with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age or handicap.

American Bar Association

Member,
September 1980 to present.

Vice-Chair,
Antitrust, Competition, and Trade Regulation Committee,
Section of Administrative Law and Regulatory Practice,
July 1990 to August 1992.

Co-Chair,
Amicus Committee,
Section of Antitrust Law,
August 1998 to June 2001.

Contributing Editor,
Antitrust Law Journal,
Section of Antitrust Law,
August 1997 to present.

Chair,
Sherman Act Section 1 Committee,
Section of Antitrust Law,
August 1994–August 1997.

Vice-Chair,
Public Contract Law Educators Committee,
Section of Public Contract Law,
August 1996 to August 1998.

Chair,
Public Contract Law Educators Committee,
Section of Public Contract Law,
August 1989 to August 1996.

Federal Bar Association

Member,
September 1986 to present.

Chair,
Antitrust and Trade Regulation Section,
October 1990 to September 1993.

Republican National Committee

- Charter Member,
June 2000 to present.
- Computer Law Association
Member,
Board of Directors,
April 2001 to June 2001.
- St. Claire of Assisi Roman Catholic Church
Parish member,
January 1995 to present.
- Western Economic Association International
Member,
January 1990 to present.
- American Political Science Association
Member,
January 2000 to present.
- International Bar Association
Member,
January 2004 to present.
- American Society of International Law
Member,
January 2001 to present.
- Association of American Law Schools
Council Member,
Antitrust and Economic Regulation Section,
January 1994 to January 1996.
Chair,
Antitrust and Economic Regulation Section,
January 1997 to January 1998.
- RAND Corporation Alumni Association
Member,
January 2004 to present.
- University of Detroit Jesuit High School and Academy
Member,
Board of Advisors,
July 2003 to present.
- United States Naval Institute
Sustaining Member,
October 1995 to present.
- Note: None of these organizations restricts membership on the basis of sex, race, color, religion, national origin, age, or handicap.
12. Have you ever been a candidate for public office? No.
13. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$500 or more for the past 10 years.
Bush-Cheney 2004 (March 2004): \$2000.
Republican National Committee (April 2005): \$500.
14. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognition for outstanding service or achievements.
George Washington University Law School
Chair Appointment to the E.K. Gubin Professorship of Government Contracts Law: 2004.
Recipient, Distinguished Faculty Service Award: 2001.
George Mason University School of Law

Chair Appointment to the George Mason University Foundation Professorship: 1998.

Recipient, Richard S. Murphy Teaching Award: 1998.

Recipient; George Mason University Alumni Association Teaching Award: 1998
Recipient, Phi Delta Phi Teaching Award: 1992–93.

Recipient. George Mason University Distinguished Faculty Award: 1990.

Elected, Faculty Speaker at the Commencement Exercises for the School of Law (chosen by a vote of graduating students): 1989, 1990, 1991, 1992, 1993, 1995, 1996, and 1998.

Washington College of Law, American University

Recipient: First-Year Class Teaching Award: 1994–1995.

Federal Trade Commission

Recipient, Award for Distinguished Service: 2005.

American Bar Association, Section of Antitrust Law

Recipient, Chair's Award for Distinguished Service for 2003–2004.

Recipient, Chair's Award for Special Service for 2000–2001.

University of Detroit Jesuit High School and Academy

Recipient, Alumnus of the Year Award: 2000.

Federal Bar Association

Recipient, Award for Distinguished Service: 1993.

15. Please list each book, article, column, or publication you have authored, individually or with others, and any speeches that you have given on topics relevant to the position for which you have been nominated. Do not attach copies of these publications unless otherwise instructed.

Books

Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy (Thomson West 2002) (with Andrew I. Gavil and Jonathan B. Baker).

Teacher's Manual to Accompany Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy (Thomson West 2002) (with Andrew I. Gavil and Jonathan B. Baker).

Antitrust Law and Economics in a Nutshell (5th edition, Thomson West 2004) (with Stephen Calkins and Ernest Gellhorn).

Chapters in Books and Other Published Collections of Papers

Achieving Better Practices in the Design of Competition Policy Institutions, in *On the Merits—Current Issues in Competition Law and Policy* 195 (Paul Lugard & Leigh Hancker eds., Intersentia, 2005).

Competition Policy Cooperation and the Pursuit of Better Practices, in *The Future of Transatlantic Economic Relations: Continuity Amid Discord* 65 (David M. Andrews, Mark A. Pollock, Gregory C. Shaffer & Helen Wallace eds., Robert Schuman Centre, European University Institute, 2005).

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- Predatory Pricing Standards and Competition in Postal Areas*, in Diffusion of New Regulatory Approaches in Postal Services 67 (Ulrich Stumpf & Monika Plum, eds.: Wissenschaftliches Institut für Kommunikationsdienste GmbH Bad Honnef, Germany, April 1997).
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- Antitrust and the Evolution of a Market Economy in Mongolia*, in De-monopolization and Competition Policy in the Post-Communist Countries 89 (Ben Slay, ed.: Westview, 1996) (with Robert S. Thorpe).
- Public Choice and the Origins of Antitrust Policy*, in The Causes and Consequences of Antitrust: A Public Choice Perspective 243 (Fred S. McChesney & William F. Shughart III eds.: University of Chicago, 1995).
- The Law and Economics of Privacy: Applications to Regulated Industries*, in Incentive Regulation for Public Utilities 113 (Michael A. Crew, ed.: Kluwer, 1994).
- The Application of Legal Safeguards Against Predation to the Postal Services Industry*, in Commercialization of Postal and Delivery Services: National and International Perspectives 45 (Michael A. Crew & Paul R. Kleindorfer, eds.: Kluwer, 1994).
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Journal Articles

The Impact of Leniency and Whistleblowing Programs on Cartels, *International Journal of Industrial Organization* (Forthcoming 2005) (with Cecile Aubert and Patrick Rey).

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Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy, *9 George Mason Law Review* 843 (2001).

Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy, *68 Antitrust Law Journal* 805 (2001).

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- Creating Competition Policy: Betty Bock and the Development of Antitrust Institutions*, 66 *Antitrust Law Journal* 231 (1997).
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- Antitrust Policy and Horizontal Collusion in the 21st Century*, 9 *Loyola Consumer Law Reporter* 97 (1997).
- Administrative Adjudication and the Use of New Economic Approaches in Antitrust Analysis*, 5 *George Mason Law Review* 313 (1997).
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- Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 *Administrative Law Journal of the American University* 461 (1995).
- Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 *DePaul Law Review* 1197 (1995).
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- Competition Policy, Rivalries, and Defense Industry Consolidation*, 8 *Journal of Economic Perspectives* 91 (1994) (with Dennis Smallwood).
- Competitive Access Issues and Telecommunications Regulatory Policy*, 20 *Journal of Contemporary Law* 419 (1994) (with Alex Larson and Douglas Mudd).
- The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 *Antitrust Bulletin* 5 (1993).
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- The Influence of Economics on Antitrust Law*, 30 *Economic Inquiry* 294 (1992).
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- Merger Policy in a Declining Defense Industry*, 36 *Antitrust Bulletin* 543 (1991).
- The Reagan Judiciary and Environmental Policy: The Impact of Appointments to the Federal Courts of Appeals*, 18 *Boston College Environmental Law Review* 669 (1991).
- Predatory Pricing Safeguards in Telecommunications Regulation: Removing Impediments to Competition*, 35 *St. Louis University Law Journal* 1 (1990) (with Alex Larson).
- The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 *Wayne Law Review* 1413 (1990).
- Comments and Observations on the Sherman Act: The First Century*, 59 *Antitrust Law Journal* 119 (1990).
- Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, 58 *Antitrust Law Journal* 1059 (1990).
- Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 *Iowa Law Review* 1105 (1989).
- Congress and the Federal Trade Commission*, 57 *Antitrust Law Journal* 869 (1989).

Federal Antitrust Enforcement in the Reagan Administration: Two Cheers for the Disappearance of the Large Firm Defendant in Nonmerger Cases, 12 *Research in Law & Economics* 173 (1989).

Reform of United States Weapons Acquisition Policy: Competition, Teaming Arrangements, and Dual-Sourcing, 6 *Yale Journal on Regulation* 249 (1989) (with William B. Burnett).

Illegal Agreements With Competitors, 57 *Antitrust Law Journal* 517 (1988).

Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement During the Reagan Administration, 33 *Antitrust Bulletin* 467 (1988).

Built to Last? The Antitrust Legacy of the Reagan Administration, 35 *Federal Bar News & Journal* 244 (June 1988).

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The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement, 17 *Tulsa Law Journal* 587 (1982).

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Monographs, Reports, and Working Papers

Competition Policies for Growth: Legal and Regulatory Framework for Sub-Saharan Countries (U.S. Agency for International Development, May 2001) (with Cynthia L. Clement, Andrew I. Gavil, and Georges Korsun).

The State of Federal Antitrust Enforcement—2001: Report of the Task Force on the Federal Antitrust Agencies (American Bar Association, Section of Antitrust Law, January 2001) (with Joe Sims, Mary Cranston, Michael Denger, Richard Steuer, and Patricia Vaughn).

Advisory Report on the Development of Consumer Protection Law in Vietnam (Aug. 1997) (Prepared for the Ministry of Justice of the Government of Vietnam under United Nations Development Program VIE/94/003).

Advisory Report on Approaches to Competition Policy in Vietnam (July 1997) (Prepared for the World Bank and the Central Institute of Economic Management of the Government of Vietnam) (with William A.W. Nielson).

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Analysis of Competition in Mongolia & Three Case Studies (University of Maryland, Center on Institutional Reform and the Informal Sector, Country Report No. 14: 1994) (with Karen Turner Dunn and Robert S. Thorpe).

Antitrust Analysis and Defense Industry Consolidation (American Bar Association, Section of Public Contract Law: 1994) (with Richard Feinstein and Patrick Sheller).

Study of Monopolies and Competition Policy in Zimbabwe: Final Report of the Zimbabwe Monopolies Commission Study (U.S. Agency for International Development, Project on Implementing Policy Change, September 1992) (with Anthony Davis, Clive Gray, David Gordon, and Eugenia West).

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The Reagan Judiciary Examined: A Comparison of Antitrust Voting Records of Carter and Reagan Appointees to the Federal Courts of Appeals (Washington Legal Foundation, Working Paper Series No. 34: April 1989).

The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy (Washington Legal Foundation, Working Paper No. 32: February 1989).

Permanence and Regulatory Change: The Longevity of Reagan Antitrust and Consumer Protection Policy at the Federal Trade Commission (Washington Legal Foundation, Working Paper No. 29: December 1988).

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Coping with a Mature Product in a Changing Industry: White Paper of the National Task Force on the Yellow Pages Industry (Aug. 6, 1987) (with Steven Heckmyer, et al.).

Horizontal Mergers: Law and Policy (American Bar Association, Section of Antitrust Law, Monograph No. 12: 1986) (with William Blumenthal et al.).

Magazine, Newsletter, and Newspaper Articles

Developing Competition Policy in Transition Economies: Milestones in 2000, 4 International Antitrust Bulletin 40 (American Bar Association, Section of Antitrust Law, Spring 2001).

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Panel Discussion: Mergers and Acquisitions, 2001 Fordham Corporate Law Institute 219 (Barry E. Hawk, ed. 2002).

Holding Legislators Accountable for Their Regulatory Promises, 2000 Law Review of Michigan State University—Detroit College of Law 9 (2000).

Panel Discussion: Antitrust in Transition Economies, in 1999 Fordham Corporate Law Institute 563 (Barry E. Hawk, ed. 2000).

16. Please identify each instance in which you have testified orally or in writing before Congress in a non-governmental capacity and specify the subject matter of each testimony.

William E. Kovacic & Steven Schooner, Proposed Changes to Part 9 of the Federal Acquisition Regulation Relating to Contractor Responsibility -Testimony Before the Committee on Small Business, House of Representatives, U.S. Congress (Oct. 21, 1999).

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers: None.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation or practice with any business, association or other organization during your appointment? If so, please explain.

If I am fortunate to be confirmed to be a member of the Federal Trade Commission, I will request that my current employer (George Washington University) grant me an unpaid leave of absence from my position on the faculty of the George Washington University Law School. If George Washington University grants me the leave of absence, I will be abide by the restrictions described in my letter of July 22, 2005 to Christian S. White, the Designated Agency Ethics Official of the Federal Trade Commission. A copy of my letter to Mr. White is attached to my answers to the Committee's Questionnaire. If George Washington University does not grant me a leave of absence, I will resign from the George Washington Law School faculty upon my confirmation as a member of the Federal Trade Commission.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

My letter of July 22, 2005 to Christian S. White, mentioned in my answer to Question B.2. above, describes all investments, obligations, liabilities or other relationships which could involve potential conflicts of interest in the position to which I have been nominated. For the Committee's reference, I have attached a copy of the July 22, 2005 letter to my answers to the Committee's Questionnaire.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last 5 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

My letter of July 22, 2005 to Christian S. White, mentioned in my answer to Question B.2. above, describes all business relationships, dealings, or financial transactions I have had since September 15, 2000—for myself, on behalf of any client, or acting as an agent—that could in any way constitute a possible conflict of interest in the position to which I have been nominated. For the Committee's reference, I have attached a copy of the July 22, 2005 letter to my answers to the Committee's Questionnaire.

5. Describe any activity during the past 5 years in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy: None.

6. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items.

My letter of July 22, 2005 to Christian S. White, mentioned above, states the steps I will take to resolve any potential conflict of interest, including all matters raised in my responses above. I will abide by the commitments presented in my letter to Mr. White.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity, other than for a minor traffic offense? No.

3. Have you or any business of which you are or were an officer ever been involved as a party in an administrative agency proceeding or civil litigation? No.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? No.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination.

If I am fortunate to be confirmed, my service as a member of the Federal Trade Commission would draw heavily upon my past experience at the Commission—as an attorney in the Bureau of Competition, as an attorney advisor to a commissioner, and as General Counsel—and upon my experience from June 1975 to July 1976 as a legislative assistant on the majority staff of the Senate Judiciary Subcommittee on Antitrust and Monopoly. During my year with the Senate Antitrust Subcommittee, I worked extensively on assignments concerning the statute Congress eventually passed as the Hart-Scott-Rodino Antitrust Improvements Act of 1976. These experiences have given me a special affection for the Federal Trade Commission and an intense personal and professional interest in the responsibilities that Congress has entrusted to the agency.

6. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion or any other basis? No.

D. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees? Yes.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistle blowers from reprisal for their testimony and disclosures? Yes.

3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee? Yes.

4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so? Yes.

The CHAIRMAN. Thank you very much. I'm struck by the fact that the two of you have a background in this agency and as you both said, have a dedication to it. At no time has that been required more than it is now. I do hope that you can work together in terms of dealing with the issues that face us. And I'm one who shares your opinion about the importance of the FTC in terms of overall structure in protecting the whole concept of interstate commerce. Now, we've had a lot of issues that are before us recently. We've had some involving mergers and other you know, the issues that you read about in the editorials all the time.

But let me ask you this, I'm hearing more, and more about a staff driven agency. Now you both were members of the staff, do you think this Commission ought to be a staff driven entity, or should the priorities be set by the Commission itself, rather than by the staff. Mr. Rosch?

Mr. ROSCH. I think Mr. Chairman that the priorities ought to be set by the Commission. I think we're well advised to get input from the staff. That was the way it was when I was there before, I would expect that it would be that way in the future. Let me add one thing to what Mr. Kovacic has said, and it's in answer to your question as well. I think that the staff is particularly important when it comes to trying cases. At that juncture they're up against some of the finest lawyers in the United States. And it's critically important that the Commission have not only the lead counsel, but the bench strength in order to go face to face with them. And I would hope that over the period of time that Bill and I are there, if we are so lucky as to be confirmed, that we're going to be able to develop that kind of bench and lead counsel experience.

The CHAIRMAN. Mr. Kovacic.

Mr. KOVACIC. There's no more important responsibility for the Commissioners than to set priorities and to provide guidance to the staff about what the agency's use of resources should be. I think that requires a continuing collaboration with the staff to understand what those who are closest to the development of specific cases know. But in the first instance and continually, the functions of setting priorities, determining directions, specifying how the agency will act, deciding what specific initiatives will be chosen are perhaps the most important functions that the Commissioners themselves can perform. It is their responsibility.

The CHAIRMAN. Well I ask that question, because I heard the other day, I can't believe I heard that the staff, that the Commission actually appealed a decision of the Commission. I can't believe that, but isn't that what we heard? That they really sought a further review after the Commission made a decision. Now I firmly believe in having a very strong staff, but I also believe this Commission absolutely needs to have a bipartisan—your our bipartisan router in the whole area of interstate commerce as we continue down this long river of global enterprise and I think that unless you really have the cooperation and the understanding of who's in charge, there's going to be a difficult time.

We had a hearing as you both mentioned, that one of you mentioned, last week about the oil industry coming in to explain the

pricing system and what led to these very high prices. We've been asked to deal with the legislation to give the FTC authority to have direct involvement in the concept of price gouging when it involves interstate commerce. Have either of you expressed an opinion about that, whether Congress should enact that law?

Mr. ROSCH. I've not expressed an opinion, but I do have some opinions, Your Honor. Not Your Honor, sorry that's a slip of the tongue. Mr. Chairman.

The CHAIRMAN. I wouldn't have made a very good judge. But let me ask your opinion then. As you know the Chairman said that she believed that the FTC should not have that authority, and we had a split in the attorney generals from the states on that issue. Do you believe Congress should extend that authority to FTC?

Mr. ROSCH. Well let me say first Mr. Chairman, and Mr. Co-Chairman, that I believe that the FTC has an arsenal of tools with which to deal with virtually any sector of the American economy and I don't think energy is any exception. It has the authority to challenge mergers. It has the authority to conduct investigations into collusion and when there's reason to believe that there is collusion I do believe that the American public is entitled to know whether there is.

It has the authority to challenge unfair acts or practices that are deceptive. And it also has authority, though more limited to challenge unfair methods of competition. Now all of that said, the next question is, does it need any more authority, and my own view is that that's debatable. It's debatable because despite the fact that the Supreme Court has held that Section 5 of the FTC Act is broader than the Sherman Act, lower courts have expressed a view that it is in fact co-extensive with the Sherman Act. If and to the extent that this Committee and the Senate and the Congress, believe that the FTC should go beyond the Sherman Act in Section 5, then I believe that that power must come from the Congress.

The CHAIRMAN. Mr. Kovacic.

Mr. KOVACIC. One thing that I think the Committee appreciates and I would like to make clear is that certainly should the Congress decide to enact legislation, let there be no question in your minds that I would faithfully enforce it. I look at the collective experience that we've had at the state level with price gouging legislation. One of my fields at George Washington has been teaching contracts. And I've had some occasion to look at that experience, and the theme that I think some of the witnesses raised in the hearing last week is some of the difficulty associated with defining and applying a prohibition on price gouging.

I think that there is a real possibility in the studies that the Congress has requested the Commission to make and it is now undertaking, and perhaps in a more extensive and collaborative relationship with the state attorneys general (an area where perhaps more effort could be devoted) to get a more careful sense of precisely how the state laws have worked in practice.

The impression I get from looking at the literature, is that the experience on the whole has been relatively limited, and somewhat ambiguous. But I think there is the possibility there for the Congress to learn a great deal more, for the Commission to learn a great deal more before suggesting specific adjustments in legisla-

tion that go beyond the considerable authority that the agency already has.

The CHAIRMAN. Thank you. Senator Inouye.

Senator INOUE. Well if I may followup, I'm certain that you are well aware that GAO issued the report in May of 2004 suggesting that the FTC mergers of these oil companies resulted in high prices. Knowing that, would you favor the Congress as suggested, or alluded to by the Chair consider amending the laws so that you would have authority to enforce—take enforcement action. Not just investigate in the case of price gouging, because you did have price gouging, \$6 a gallon for no reason whatsoever.

Mr. KOVACIC. It would be a significant change in our general approach to competition policy and consumer protection to give the agency the authority to cap prices in specific instances. This would be, I think, a significant expansion of the authority the Commission previously has exercised, though I agree with Ton Rosch that it would be possible to interpret elements of our existing authority to give us the capacity at the intersection of competition and consumer protection doctrine to do that.

I think the great challenge for us would be to define—and I think this has remained the problem that is not well resolved in the commentary or discussions—specifically what the excessive price would be. I do think that the GAO study was useful in that it contributed to our knowledge of the effects of the mergers. As I pointed out, in my time as General Counsel while I had the opportunity to appear before several Congressional bodies, I have great concern about the soundness of some of the methodologies they used to reach their results, and I think the GAO is entirely well-founded in pressing the Commission to justify and explain the effects of what it's done. To the extent that further efforts to evaluate the consequences of our past acts are to be a greater element of what we do, I think that is a very sensible way to go ahead. The matter that troubles me the most in deciding what the operational standard would be, would be to decide precisely what the formula for setting the ceiling would be, even in times of emergency.

Mr. ROSCH. Mr. Co-Chairman, can I take a swing at that myself. My own view is that there is a difference between challenging or at least investigating and possibly challenging acts or practices that lead to higher prices on the one hand. And directly trying to cap prices on the other hand. As I've indicated, I think that if and to the extent high prices are the result of collusion the American public has every right to have the FTC investigate and challenge those acts or practices. Very clearly the Commission has that authority.

The Commission also has the authority to challenge acts or practices that lead to higher prices, insofar as those involve deception and that's true of deceptive manipulation as well.

Where I think the Commission can make a tremendous contribution is in connection with the sort of thing that 33.83 contemplates. And that is conducting an investigation and throwing sunlight on the results of that investigation. If it is correct that the oil companies are making what appear to some to be excessive profits, then it seems to me that the proper thing to do is to throw sunlight on the reasons for that, and for the profits in the first instance at

least, before one goes to the extreme step of trying to impose price caps. I guess the reason that I have this reaction on price caps is that I was here in 1973, and 1975, when President Nixon imposed price caps and I recall gas station lines stretching for two miles or so if you could get gas at all.

And I also recall that when they took the caps off, that we suffered a period of inflation that sent interest rates into the teens. And so I must say, that I am very reluctant to endorse the Commission's imposing any such caps. Should as a policy matter that is thought be the right thing to do, I believe frankly that that is something that the Congress, rather than an agency should do.

Senator INOUE. Is there any other agency with the authority to enforce price gouging, anti-price gouging laws, short of collusion?

Mr. KOVACIC. Senator, I don't think at the federal level that there is. The main efforts to date are those that the Committee heard testimony on last week, and those have been state-by-state efforts that have principally been focused on the activities, the operations of retailers and wholesalers. Most of our experience has come indirectly from looking at what public utility commissions and federal regulators such as the Federal Communications Commission have done in the past in setting ceilings for prices. For gasoline and other refined products in this country the answer to this date has only been in the states.

The CHAIRMAN. What about Justice, what about the Department of Justice?

Mr. KOVACIC. Mr. Chairman, in using its antitrust authority under the Sherman Act, the Department would face the same limits imposed by doctrine that the FTC does. It's been fairly clear, standard competition law from the 1940s onward that a decision by a firm to raise its prices, so long as the price raising isn't the result of improper behavior, is unbounded, that the high price is not forbidden.

The CHAIRMAN. The Senator's question as I understood it covered the industry itself, collusion between entities in the industry certainly would fall under the Justice Department wouldn't it?

Mr. KOVACIC. It would, and the Federal Trade Commission as well could unmistakably challenge collusion involving participants in the industry. I was referring before to what might be considered to be purely unilateral behavior.

Senator INOUE. I have one more question. We're now in the process of considering amendments to the 1996 Telecommunications Act, and we find for example that words are now in our vocabulary that never appeared in those days such as spyware. Does the FTC need additional authority or power to cope with spyware problems?

Mr. KOVACIC. Senator, I think for myself that the suggestions that have been made in several legislative proposals to make the existing penalties more powerful both on the civil side and on the criminal side would be useful enhancements of the authority that the Commission has—certainly on the civil side—and for public authorities with criminal enforcement power to use greater criminal sanctions.

I also think that a useful supplement to the existing legislative scheme is a measure that this Committee in different forms has en-

dorsed and that Tom mentioned a moment before, and that's the US SAFE WEB Act, I think the US SAFE WEB Act would give the Commission far better capacity to work with other competition and consumer protection authorities worldwide to deal in particular with problems caused by spyware. Because the wrongdoers today are geographically highly mobile and they are technologically adroit, I fear that in some ways we are running a half step behind them to the extent that our framework for cooperating with other public authorities that have the capacity to work with us to deal with these problems is weak.

So I would say that's an area in which I would simply add my own endorsement for views that this body has accepted already, and that is that improving the foundation for sharing information will give us a decided advantage in dealing with spyware as well.

Senator INOUE. Well thank you very much. And Mr. Chairman, if I may I would like to submit a few questions.

The CHAIRMAN. Yes. I have a couple of other questions. Gentlemen, we hear too much I think about the global economy on the news media and other places. But as a matter of fact the Commission's practices have been to look at our own economy in determining what is fair competition, what is necessary in terms of acquisitions, mergers. To what extent should the policies of the FTC change because of the advent of the participants in the global economy? We have global giants now, the German post office, really indirectly owns one of the air carriers in the United States now. We have so many different entities coming in from China that are really—they're purchasing part of our infrastructure, but they're competing literally through one of our own corporate shells with our existing economy. Have you looked at this in terms of whether the Chairman should broaden our scope as far as determining what is competition and who we're competing with as far as the FTC is concerned? Is it strictly interstate commerce that we should be dealing with, or are we going to be in your terms looking at global commerce?

Mr. ROSCH. Well Mr. Chairman, I think in the antitrust area, the seeds have been planted that Bill was talking about earlier. There is close cooperation among many nations in terms of antitrust enforcement and to some extent I think that has been spearheaded by the Justice Department initially. But the FTC has participated in that effort and I think it is bearing fruit. In the consumer protection area I sense that it's not as well developed and it should be for the very reasons Bill mentioned.

These practices can occur in the Far East, in Europe, and yet they can impact the United States and they can impact the world for that matter. And I think it's important as I said in my opening statement that there be a degree of international cooperation which cannot exist at the present time without legislation from this Committee and this Congress.

Mr. KOVACIC. Mr. Chairman, I think one of the most encouraging trends in antitrust analysis within the U.S. agencies and within the larger community of competition authorities worldwide is a greater recognition over time that markets—the so-called relevant markets in which mergers or other behavior are analyzed—increasingly has to take place in a global context. In evaluating the signifi-

cance of individual U.S. firms, or the significance of transitions involving U.S. firms, the competitive arena in which to assess their behavior more and more is not simply the United States or North America, or the Western Hemisphere, it's truly global.

An encouraging tendency—and I observed this frequently in my time as FTC General Counsel—is that in the deliberations in which markets are defined and the significance of behavior or individual transactions are evaluated, the FTC and its staff increasingly are pressed in the direction of asking “Do we have the right frame of reference?” More and more, the answer to the question of who competes and who’s competitively important involves an examination of global players and not simply U.S. firms operating in the U.S. Because this is becoming a norm that competing agencies feel they should follow internationally, I have a significant degree of confidence that the trend toward acknowledging the significance of international players will continue.

The CHAIRMAN. Well Senator Inouye, in terms of this Committee, we had that function with regard to communications all too often as to whether an entity is too large. But when you look at the entity in terms of its competition with other entities from foreign countries the size of the competitors here at home become irrelevant in terms of the competition in the world market from one of our entities. I wonder if we’ve got the proper frame of reference to really succeed in the global market if our standard is, is the size of the relative competitors within our own economy as compared to the global market. I’m not sure that this has crept enough into the FTC standard to really look at what our American companies are competing with. And whether the size of those companies is relevant now to other companies here at home, or the total competition out in the global scene. And I can’t ask a question about matters that I think might come before you, but I’ve been told about several that do exist now where because of the competition from foreign companies coming in to do business in the United States, the size of the existing largest competitor in our own economy is such, that it’s very hard to compete with the coalitions and the mergers that have already been put together abroad. This is going to be particularly true I think in the communications field before this decade is out. It’s going to be one of the No. 1 questions, the question won’t be size, are these entities too large, and if we look at just the United States, they will seem large. But if you look at the global market, which is really the market for this industry in the telecommunications industry in the future, they will be small. I’m just urging that you make sure that in terms of your service at the FTC that you look at the field of competition and not the size of the competitors here at home. I think that is going to be a very difficult problem for you in your term.

I want to thank you. Any further questions Senator?

Senator INOUE. I just want to emphasize the point that you brought up that it is a problem for us, not just on the Commerce Committee, but also on the Defense Committee and right now we’re coping with a major decision, should we open up purchases to the world when we know that the manufacturers in certain countries are being subsidized by their governments and not paying taxes that our manufacturers would have to pay, but they happen to be

our allies. If this continues we could put ourselves out of business. It is a serious problem. Thank you very much.

The CHAIRMAN. Thank you. And we look forward to reporting your nominations. I think you're exceptionally qualified, each one of you and we congratulate you and as a matter of fact envy you, as lawyers with an opportunity to serve at the FTC during this critical period of our history. Thank you very much Gentlemen.

Mr. KOVACIC. Thank you.

Mr. ROSCH. Thank you.

[Whereupon, at 3:15 p.m., the hearing was adjourned.]

