



U.S. Department of Justice
Office of the Solicitor General

Principal Deputy Solicitor General

Washington, D.C. 20530

May 13, 2010

MEMORANDUM FOR THE SOLICITOR GENERAL

FROM: NEAL KATYAL
SUBJECT: CURRENT CASES THAT YOU HAVE WORKED ON

The below contains a list of cases in which we feel that you have substantially participated. It is organized by Deputy. We have not done an exhaustive search, so this should not be used as the basis for deciding recusals, should you be confirmed. It is simply a document that you may use to guide your decisions about which cases to participate in pending your nomination.

I. Ed

A. CVSGs:

Holy See Elena chaired meetings with counsel for both sides.

Golden Gate Ed discussed with Elena several times (b) (5)

B. Merits briefs:

NASA v. Nelson our merits brief is now due May 20. Elena's name is on the petition, and has been heavily involved in that case.

Montana v. Wyoming the recommendation OSG has received from ENR (b) (5)

That recommendation has not been submitted to Elena. Such a brief would not be due until late June or early July. She has been substantively involved in the case.

Bruesewitz an amicus brief supporting respondents would be due July 30. We filed a

CVSG last fall in a related case taking the position that supports the respondent's position in Bruesewitz, and we told the Court to grant in Bruesewitz. Elena's name was on that brief.

United States v. Tohono O'Odham Nation. Our brief is due in late June. Elena's name is on the petition in that case.

C. Recommendations:

OPEC (CA5 invited the U.S. to file on act of state and political question in this antitrust case against corporations owned or controlled by OPEC members). Civil is seeking a 30-day extension. Ed discussed the case with Elena last summer when the defendants were urging the U.S. to file uninvited.

II. **Michael**

A. CVSGs: None.

B. Merits Briefs:

Michael has no merits matters due until July and only one merits case in July.

Abbott and Gould (due July 15). Elena has not worked on this case, but she did work on the petition in U.S. v. Williams on the same issue.

C. Oppositions:

Lance and Dotson (child pornography case). Separately discussed. Neal will handle.

D. Recommendations:

Broadcom (U.S. v. Nicholas and Samuelli). Michael discussed it in some depth with Elena, but she neither attended meetings or read paper on it. (b) (6) did call her about the case, on behalf of Samuelli.

E. Tobacco:

1. Our cert reply is due approximately June 4. You worked heavily on it.

2. We have to file opps from the industry petitions around May 25. Due to the relationship with our cert petition, it might fall into the category of cases in which you have worked. The issue on which we filed a petition has to do with remedy for a RICO violation by the tobacco industry. The industry cert petitions all deal with liability in the first instance with only a sliver of attention to remedy, and they range over a wide array of complex first amendment, RICO, extraterritoriality, and procedural questions on which she's not had reason or

occasion to focus. (Some of them were discussed at our meeting with the tobacco lawyers and summarized in the cert memos, so they are not entirely new.) To the extent that remedy is at issue in the industry petitions, it has to do with the form of the injunction and the interaction with the new tobacco legislation. The first of those is not addressed in any way in our cert. petition and the second only in a brief footnote.

III. Malcolm

A. CVSGs: None. All are ones in which Elena hasn't had substantial involvement.

B. Merits Briefs: None.

C. Oppositions:

Henderson v. United States, No. 09-1036, which is due on May 28. Elena previously chaired a meeting in which petitioner's counsel (b) (6) urged us to acquiesce.

D. Appeals:

In Re Ciprofloxacin Hydrochloride Antitrust Litigation, Nos. 05-2852, 05-2852 (2d Cir.). Elena will handle this.

Republican National Committee v. FEC, No. 09-1287. Our response to the RNC's jurisdictional statement is due May 24. Malcolm briefly explained to Elena what the case is about, but has had no meaningful substantive discussions of the merits. However, the RNC filed a motion that pertained solely to the timing of the Court's consideration of the case, and Elena decided that we would not oppose the motion (basically we agreed that we would not seek an extension of the time to file our response to the J.S.). So in that case, Elena has actually made a decision, even though the decision went solely to the position we would take on the opposing party's timing-related motion.

IV. Neal

A. CVSGs:

Candeleria v. Chamber of Commerce. Very heavy participation by Elena.

Pfizer v. Abdullah (Alien tort statute, Nigeria). Elena chaired meetings with both sides and has been involved in some issues with the State Department.

Carmichael (injury to servicemember in Iraq, political question doctrine, contractor liability). Elena has been informed about aspects of the case.

Thompson v. North American Stainless (Title 7 retaliation against fiancé). Elena has

been involved and chaired a decisional meeting.

B. No merits briefs, opps, or appeals in which Elena has been substantially involved.