



PRELIMINARY REPORT ON THE NOMINATION OF GENE E. K. PRATTER TO THE THIRD CIRCUIT COURT OF APPEALS

On November 15, 2007, President Bush nominated Gene E. K. Pratter, a former partner at Duane Morris, L.L.P., and a United States District Court Judge for the Eastern District of Pennsylvania since June 18, 2004, to the United States Court of Appeals for the Third Circuit. If confirmed, Judge Pratter would replace Judge Franklin S. Van Antwerpen, who took senior status in 2006. The American Bar Association's Standing Committee on the Federal Judiciary rated Judge Pratter well-qualified.

BRIEF BACKGROUND ON THE THIRD CIRCUIT AND THE NOMINATION PROCESS

The Third Circuit is based in Philadelphia, Pennsylvania, and hears appeals from the federal district courts of New Jersey, Pennsylvania, Delaware, and the Virgin Islands. Of the 12 judges currently serving on the court, six were appointed by Democratic presidents and six were nominated by Republican Presidents. Five of the six Republican appointees were nominated by President George W. Bush.

The Bush administration is very aware of the political implications of judicial nominations, and it has pursued a widely acknowledged and largely successful campaign of packing the courts with conservative judges over the past seven years. In addition, in choosing nominees the President has established a pattern of ignoring the advice of home-state senators. This strategy has led many commentators, including President Bush's supporters, to question whether President Bush's top priority is filling vacancies on the courts or mollifying his conservative base by picking fights with the Senate over ultra-conservative nominees. For example, in nominating Shalom Stone, a Third Circuit nominee from New Jersey, President Bush blindsided Mr. Stone's home-state senators, Mr. Lautenberg (D-NJ) and Mr. Menendez (D-NJ), who were unaware that Mr. Stone was being considered for the position. The two senators had previously discussed the vacancy with the White House and had already agreed to support a different nominee. That consensus candidate, however, was suddenly withdrawn from consideration without explanation, and the President unilaterally opted to instead nominate Mr. Stone.¹ Senators Lautenberg and Menendez expressed disappointment with having had their recommendations ignored, and the senators have not returned their blue slips, which traditionally prevents a nomination from moving forward.

¹ Lisa Brennan, *N.J. Republican Lawyer Nominated to Fill Alito Seat on Third Circuit*, N.J. L.J., July 19, 2007; see also Dana E. Sullivan, *Where Oh Where is the Shalom Stone Nomination?*, N.J. L.J., Oct. 12, 2007.

Far from being an isolated incident, the President has also refused to consult with senators in Rhode Island, Maryland, and Virginia about circuit court vacancies in those states. Indeed, with respect to a Fourth Circuit seat traditionally filled by a Virginian, President Bush ignored the bi-partisan recommendations of Senators Warner (R-VA) and Webb (D-VA), choosing instead to nominate E. Duncan Getchell, who had already been considered and rejected by these senators. According to Senator Webb, in deciding on their recommended candidates, the Virginia senators sought “an unprecedented level of involvement of professional legal organizations, as well as five Virginia Bar Associations,” and interviewed more than a dozen attorneys from the Commonwealth, including two sitting members of the Virginia Supreme Court, the Dean of the University of Richmond Law School, a U.S. District Court Judge from Norfolk, and Mr. Getchell. After completing their research, the senators presented President Bush with a list of “five outstanding candidates,” all of whom possessed remarkably conservative credentials. Mr. Getchell was not on this list. With such widespread Senate support of Warner and Webb’s bipartisan cooperation, any of the individuals on the senators’ list would have likely enjoyed a speedy confirmation. In contrast, Mr. Getchell, in recognition that his nomination was unlikely to move forward given that neither Senator Webb nor Senator Warner had yet returned his blue slip, recently requested that his nomination be withdrawn.

BRIEF BIOGRAPHY OF GENE E. K. PRATTER

1. Education and Career

Gene E. K. Pratter was born in 1949 in Chicago, IL. She earned an A.B. from Stanford University in 1971 and received her J.D. from the University of Pennsylvania in 1975. After graduating from law school, Judge Pratter joined the law firm of Duane Morris LLP as an associate, where she concentrated her practice in commercial litigation, professional responsibility, and insurance law. She was made partner in 1983 and served as General Counsel to Duane Morris from 1999 until 2004. Between 2000 and 2004, Judge Pratter also served as a multinational partner with Duane Morris, MNP, her firm’s London affiliate. On November 3, 2003, Judge Pratter was nominated by President Bush for a seat on the District Court of Eastern Pennsylvania. She was confirmed by the Senate and sworn in as a district judge on June 18, 2004.

2. Political Activities and Associations

Judge Pratter has been a member of the Philadelphia Chapter of the conservative Federalist Society since 1994.² Additionally, before being appointed to the federal bench, Judge Pratter was a frequent and consistent contributor to the Republican Party. Between the years 2000 and 2004, Judge Pratter donated over \$15,000 to various Republican candidates and conservative PACs, including \$3,250 to Senator Arlen Specter (R-PA), her

² Gene E. K. Pratter, *United States Senate Judiciary Committee Questionnaire for Judicial Nominees* (2007).

home-state Senator and Ranking Member of the Senate Judiciary Committee, and \$2000 to President Bush.³

Some of these donations occurred after Judge Pratter was under consideration for a federal judgeship. According to the Center for Investigative Reporting, Judge Pratter was one of 18 district judges who donated to politicians who were influential in their appointments.⁴ Though at the time Judge Pratter made these contributions no laws or ethics rules existed that forbade contributions by a nominee for a federal judgeship, many, including Senator Specter, had stated that such contributions are inappropriate once the candidate is under consideration by a judicial selection committee—as Judge Pratter was when she donated to both Senator Specter and President Bush.⁵ Indeed, in February 2007, the ABA adopted a new Model Code of Judicial Conduct that prohibits campaign contributions by candidates seeking appointment to judicial office. The code of conduct serves as a recommendation to states and the federal judiciary. Judge Pratter donated \$1,500 to Senator Specter between February and March 2003 and, according to her district court nominee judicial questionnaire, interviewed with his committee that spring.⁶ She subsequently interviewed with then-White House counsel Alberto Gonzalez in July and September 2003—just weeks before contributing \$2000 to President Bush.⁷

3. Published Interviews and Published Writings

In a 2007 interview with *The Philadelphia Lawyer*, Judge Pratter, a longtime member of the Pennsylvania Bar Association’s Women in the Profession Committee, made comments that were dismissive of the idea that law firms contribute to continuing inequalities in the legal profession.⁸ When asked to what she attributed “present-day difficulties in firm retention of attorneys in general, and of women and minority attorneys in particular,” Judge Pratter responded by saying that she “frankly think[s] that the fact that women lawyers and minority... lawyers move is that they realize they are highly sought after and have lots of opportunities. ... People don’t feel like they have to be trapped in firms that are not suiting them- and firms haven’t figured out what’s missing from the package.”⁹ When pressed in later questions to acknowledge that women and minority lawyers might face unique challenges in their legal careers, Judge Pratter again demurred. Though she acknowledged that some view her as a “trailblazer” in the legal

³ Newsmeat, Gene Pratter’s Federal Campaign Contribution Search Results, http://www.newsmeat.com/fec/bystate_detail.php?st=PA&last=pratter&first=gene (last visited Jan. 25, 2008).

⁴ Will Evans, *Money Trail Leads to Bush Judges*, Salon.com, Oct. 31, 2007, <http://centerforinvestigativereporting.org/articles/moneytrailsleadtobushjudges>. See also Center for Investigative Reporting, *Money Trail Leads to Federal Bench: State-by-State Report on Campaign Contributions From federal Judges Appointed During the Bush Administration*, released Oct. 31, 2006, available at, http://www.centerforinvestigativereporting.org/files/MoneyTrails_FullReport.pdf.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Interview by Arlene Rivera Finkelstein with Gene E.K. Pratter, *Questions for Judge Gene E. K. Pratter: U.S. District Court Judge for the Eastern District of Pennsylvania*, THE PHILA. LAWYER, Winter 2007, at 37.

⁹ *Id.* at 37.

profession and that women are a minority on the federal bench, she stated that the challenges she faced early in her career “did not emanate from being a *woman* lawyer,” but rather were the same challenges faced by all young or inexperienced lawyers.¹⁰

Additionally, though throughout her career Judge Pratter has published numerous articles and given many speeches on professional responsibility and legal ethics, she has not written or spoken extensively on constitutional or federal statutory law issues during her career, nor has she published works that shed light on her own views of the law.

For instance, in 2001, as co-chair of the American Bar Association’s Task Force on the Independent Lawyer, she and her committee issued a report entitled “Lawyers Doing Business with Their Clients: Identifying and Avoiding Legal and Ethical Dangers,” in which the committee concluded that although “lawyer investments in their clients and client transactions can raise significant issues of ethics and professionalism,” there should not be a complete ban on the practice.¹¹ Instead, the Task Force concluded that “the procedural and substantive protections under the common law of fiduciary duty and some (but not all) ethics rules are sufficient to guide attorneys in distinguishing between permissible and impermissible transactions, and—if followed—are adequate to protect clients.”¹²

4. Significant Litigation

Prior to her appointment as a district court judge, Judge Pratter spent her entire legal career as an attorney with the Philadelphia-based firm Duane Morris, LLP. Judge Pratter practiced commercial litigation, professional liability, and insurance law and served as the attorney of record in at least 25 cases in both state and federal court.

RECORD ON THE BENCH

On the district court, Judge Pratter has issued nearly 300 decisions on a wide range of issues. In a floor statement delivered the day of Judge Pratter’s confirmation to the district court, Senator Leahy stated that “sometimes we have to take a risk to allow a nominee to be confirmed.”¹³ Though many aspects of Judge Pratter’s record admittedly gave him pause, including “her record of defending businesses [which] raises concerns about her ability to balance business and individual interests,” Senator Leahy expressed hope that Judge Pratter would abide by her promise to “be fair to all parties that come before her.”¹⁴ Unfortunately, Judge Pratter’s time on the bench indicates Senator Leahy’s hope was misplaced. This is particularly apparent in Judge Pratter’s employment law decisions, which, as Senator Leahy predicted, illustrate an unjustified hostility toward

¹⁰ *Id.* at 38.

¹¹ A Report of the Task Force on the Independent Lawyer, *Lawyers Doing Business with their Clients: Identifying and Avoiding Legal and Ethical Dangers*, A.B.A. LITIG. SEC. (2001), available at <http://www.abanet.org/litigation/ethics/abareport.pdf>.

¹² *Id.*

¹³ *On The Confirmation of Gene E. K. Pratter*, June 15, 2004 (statement of Sen. Patrick Leahy, Chairman, Senate Comm. on the Judiciary), available at <http://leahy.senate.gov/issues/nominations/pratter.html>.

¹⁴ *Id.*

plaintiffs' lawyers and a bias against employees seeking redress for workplace discrimination.

1. Cases Where Judge Pratter Sat on the Third Circuit by Designation

On 28 occasions, Judge Pratter has sat by designation on the United States Court of Appeals for the Third Circuit. In this capacity, Judge Pratter wrote 16 opinions for a unanimous court. In cases where she joined an opinion authored by another judge, that opinion always represented the majority of the court. She wrote no dissenting opinions.

2. Cases Where Judge Pratter Was Reversed by the Third Circuit

On 16 occasions, Judge Pratter's district court rulings were appealed to the Third Circuit. Her orders were reversed or partially overruled in three significant cases.

EEOC v. Hora Inc., 2007:¹⁵ An attorney appealed an order issued by Judge Pratter finding her in violation of the Pennsylvania Rules of Professional Conduct (Rules) and disqualifying her from representing Manessta Beverly in a lawsuit against Beverly's former employer HORA, the management company for Days Inn. The Equal Employment Opportunity Commission (EEOC) filed suit against Beverly's employer, alleging that Beverly's supervisor, Nelson Garcia, created a sexually-hostile working environment by harassing Beverly and other female employees, and that HORA retaliated against her when they fired her after she complained about Garcia's conduct. Judge Pratter disqualified Barnett from representing Beverly in the EEOC action—a very severe sanction—because she concluded that Barnett acted in violation of Rules 3.7 and 4.2 when she spoke to another HORA employee, Debbie Richardson. The Third Circuit determined that Judge Pratter had abused her discretion and reversed the order.

Under Rule 4.2, a lawyer “shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter” without the other lawyer's consent or a court order. This rule would have forbidden Barnett's communications with Richardson only if Richardson were an employee who regularly consulted with HORA's lawyer about the case, or if she had the authority to obligate HORA on the matter, or if her connection to the harassment claim could be imputed to HORA for liability purposes. Richardson, an administrative assistant, was clearly outside the scope of this rule. Additionally, the Third Circuit held that Rule 3.7, which forbids “a lawyer from acting as advocate at a trial in which the lawyer is likely to be a necessary witness,” was also not applicable. Judge Pratter reasoned that HORA might argue that the EEOC claim was nothing more than a personal vendetta by Richardson, which might require Barnett to testify about their conversations. The Third Circuit disagreed; they reasoned that not only was such a defense unlikely, since several other women testified about Garcia's conduct, but that the exception to Rule 3.7, which disallows disqualifying a lawyer if it would cause substantial hardship to the client, would apply in this case.

¹⁵ *EEOC v. HORA, Inc.*, No. 05-5393, 2007 U.S. App. LEXIS 15705 (3d Cir. June 29, 2007).

Taliaferro v. Darby Township Zoning Board, 2006:¹⁶ Residents challenged the zoning board's decision to grant a variance to defendants, which allowed them to build a storage facility in a residential zone. The residents argued that defendants purposely discouraged residential development in order to perpetuate a white majority in the township, in direct violation of a redevelopment agreement. Additionally, two of the residents argued that the building of a storage facility adjacent to their homes would lower their property values. Judge Pratter dismissed all of the plaintiffs' claims. The Third Circuit affirmed her decision as to the claims seeking enforcement of the redevelopment agreement, but reversed Judge Pratter's dismissal of the claims brought by the adjacent property owners. The Third Circuit reasoned that Judge Pratter was correct in ruling that residents had no standing to enforce the redevelopment agreement because they could not show that they as individuals suffered actual injury as a result of the defendant's action, even if his building of the storage unit was specifically done to prevent the land from being used for low income housing. However, because the adjacent property owners did allege actual injury, in that the variance for nonresidential use would lead to a lowering of their property values, they had standing to challenge the variance and the dismissal of those claims should be reversed.

Phillips v. Sheraton Society Hill, 2005:¹⁷ Phillips appealed Judge Pratter's *sua sponte* dismissal of his employment discrimination complaint. Phillips, a *pro se* litigant, alleged that he was unfairly dismissed from his job after he informed his boss of an off-duty injury that would require physical therapy. Under the Americans with Disabilities Act, a Plaintiff may only bring a claim of discrimination after exhausting his administrative remedies by first filing a charge with the EEOC and then being issued a right-to-sue letter. Judge Pratter reasoned that dismissal with prejudice was appropriate in this case because Phillips, who had no attorney, failed to allege in his complaint that he had received a right-to-sue letter, and thus failed to assert that he had exhausted his administrative remedies, as required before bringing suit. The appeals court reversed, vacated the dismissal order, and remanded the case to the district court. In its *per curiam* opinion, the Third Circuit stated, "[W]e are troubled by the fact that Phillips was given no opportunity to amend the complaint before the district court *sua sponte* dismissed it. Phillips' failure as a *pro se* litigant to allege exhaustion does not warrant dismissal of this action with prejudice." The Third Circuit further concluded that as there was no evidence of bad faith, undue delay, or prejudice on the record to warrant dismissal without leave to amend, it could not be assumed that Phillips failed to exhaust his administrative remedies simply because he failed to specifically make such an allegation.

3. Other Significant Rulings

Fassl v. Our Lady of Perpetual Help Roman Catholic Church, 2005:¹⁸ Aletha Fassl was a director of music at Our Lady of Perpetual Help Roman Catholic Church who felt she had been forced out of her job because of a neurological disorder. As a result, she sought

¹⁶ *Taliaferro v. Darby Township Zoning Board*, 458 F.3d 181 (3d Cir. 2006).

¹⁷ *Phillips v. Sheraton Soc'y Hill*, 163 Fed. Appx. 93 (3d Cir. 2005).

¹⁸ *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-404, 2005 U.S. Dist. LEXIS 22546 (E.D. Pa. Oct. 5, 2005).

damages from the church under several employment laws, including the Americans with Disability Act (ADA), the Family Medical Leave Act (FMLA), and the Pennsylvania Human Relations Act (PHRA). The ADA claim and the PHRA claim were dismissed for lack of jurisdiction because these laws have definitively been interpreted to include a “ministerial exception” that exempts employment relations between religious institutions and their “ministers” from various federal employment laws. The church sought dismissal of the FMLA claim, arguing that this exception also applied to the FMLA. Judge Pratter agreed and dismissed all of Fassel’s employment claims. Moreover, Judge Pratter reprimanded Fassel for bringing a frivolous suit, even though the issue was one of first impression because no court had ever applied the “ministerial exception” to the FMLA. Judge Pratter held that since the “ministerial exception” is based on the Free Exercise Clause of the Constitution, there is no basis upon which to distinguish its application to different employment discrimination laws.

Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority (SEPTA), 2006:¹⁹ Disabled in Action of Pennsylvania (DIA), a non-profit corporation that advocates for the civil rights of disabled persons, brought claims under the ADA and the Rehabilitation Act of 1973 (RHA), seeking to require SEPTA to modify two large downtown subway stations so that the stations would be wheelchair accessible. SEPTA filed for summary judgment, arguing that some of DIA’s claims were barred by the statute of limitations and that other requested changes were not required because the stations in question, while central, were not defined as “key” stations under the law—a designation that had been codified from a prior settlement agreement with SEPTA. Judge Pratter granted summary judgment to SEPTA on all counts and dismissed the claims of DIA. Judge Pratter reasoned that DIA was on notice of SEPTA’s construction plans once barricades were placed around the escalator with accompanying signs explaining that the work was being done as part of the “Escalator Replacement Project.” Since these barricades were put up in 2001, and DIA filed its complaint three-and-a-half years later, this claim was time-barred because it exceeded the two year statute of limitations applied to claims brought under the ADA. Additionally, Judge Pratter concluded that no private right of action existed under which the DIA could challenge SEPTA’s determination of which stations were “key” stations.

Griffen v. Alpha Phi Alpha, 2007:²⁰ Martyn Griffen, a 20-year-old pledge, filed a complaint against a fraternity and two individual members seeking damages for injuries he allegedly suffered during unauthorized hazing rituals. The fraternity sought to dismiss Griffen’s claims or, in the alternative, stay litigation pending arbitration. Judge Pratter stayed the litigation pending arbitration. She reasoned that the arbitration clause included in the pledge application, which Griffen signed, was valid and enforceable under Section 2 of the Federal Arbitration Act, and its applicability extended to include the sorts of injuries Griffen allegedly suffered during fraternity hazing activities. Judge Pratter rejected Griffen’s argument that the contract was one of adhesion, and thus unconscionable. Under her analysis, though the fraternity is a sizable international organization that unilaterally prepared the agreement, there was no evidence that they

¹⁹ *Disabled in Action v. SEPTA*, No. 03-CV-1577, 2006 U.S. Dist. LEXIS 84730 (E.D. Pa. Nov. 17, 2006).

²⁰ *Griffen v. Alpha Phi Alpha, Inc.*, No. 06-1735, 2007 U.S. Dist. LEXIS 14901 (E.D. Pa. Mar. 2, 2007).

refused to negotiate its terms, nor was there evidence that Griffen did not understand the contract when he signed it. Additionally, she rejected Griffen's argument that the arbitration clause was substantively unfair, finding that the clause did not create an arbitration procedure that favored one party over the other.

United States v. Reid, 2007: Kia Reid pleaded guilty to committing a federal hate crime. The Department of Justice charged Ms. Reid after discovering that she was the author of an anonymous note to her Muslim supervisor which stated, in part, "You and your kids will pay... Remember 9/11. Patriotism and anger along with desire for revenge."²¹ The Justice Department sought the maximum penalty: a yearlong prison sentence for the misdemeanor charge. Assistant United States Attorney Eric Gibson argued that Reid deserved the maximum sentence because "there are some things you do not do."²² Reid's attorney, however, requested probation or house arrest because Reid was apologetic and was already working in a mosque. Judge Pratter agreed with the U.S. attorney that this "was a very serious crime" and specifically commented that the reference to the victim's children "almost takes one's breath away."²³ However, she opted to forgo the maximum sentence requested by the Justice Department. Instead, Judge Pratter sentenced Reid to two years probation, with the first 8 months to be served in a half-way house, and 200 hours of community service at a mosque.²⁴

Delaware County Safe Drinking Water Coalition v. McGinty, 2007:²⁵ Delaware County Safe Drinking Water Coalition, a Pennsylvania not-for-profit whose members depend on a particular water supply, sued the Environmental Protection Agency (EPA) and landowners, seeking an injunction to prevent the agency from giving the landowners a permit to conduct construction on their land which would likely adversely affect the water supply. The coalition also sought to compel the EPA to comply with duties arising under the Clean Water Act (CWA). The EPA filed a motion to dismiss for lack of subject matter jurisdiction. Judge Pratter granted the motion to dismiss and denied the coalition's application for a preliminary injunction. Judge Pratter reasoned that though the CWA includes a provision which allows citizens to bring suit in order to compel certain agency action, the provision was inapplicable in this case because the agency actions in question were discretionary rather than mandatory agency action. Judge Pratter held that the provision only allows citizens to bring suit to enforce mandatory agency action; discretionary action by the agency is non-reviewable through the CWA's citizen suit provision; thus, the court had no jurisdiction to hear the case.

Brisker v. Potter, 2007:²⁶ Michelle Brisker, an African-American woman, filed suit against John Potter, the Postmaster General of the United States Postal Service (USPS)

²¹ John Shiffman, *Woman Sentenced for Sending Hate-Crime Note to Boss*, PHILA. INQUIRER, Oct. 24, 2007.

²² *Id.*

²³ John Shiffman, *Woman Sentenced for Threat Citing 9/11 to Arab American*, PHILA. INQUIRER, Oct. 24, 2007.

²⁴ *Id.*

²⁵ *Del. County Safe Drinking Water Coal., Inc. v. McGinty*, No. 07-1782, 2007 U.S. Dist. LEXIS 55327 (E.D. Pa. July 27, 2007).

²⁶ *Brisker v. Potter*, No. 06-4473, 2007 U.S. Dist. LEXIS 88002 (E.D. Pa. Nov. 29, 2007).

and her former employer, seeking damages arising out of her allegedly discriminatory discharge. Brisker, who had 10 years of experience with USPS, claimed that she was fired during a 90-day probationary period at a new position with USPS due to race and sex discrimination. Potter petitioned for summary judgment, arguing that Brisker failed to outline a *prima facie* case for discrimination under Title VII, and he presented evidence that her dismissal was based on legitimate reasons. Judge Pratter granted Potter's summary judgment motion, dismissing Brisker's claims. Judge Pratter held that although Brisker put forth sufficient evidence to state a *prima facie* claim of race and sex discrimination, Brisker failed to meet her burden of demonstrating that Potter's proffered reasons for her dismissal were pretextual.

In coming to this conclusion, Judge Pratter was dismissive of Brisker's claims that Potter told her upon her dismissal that it would be in her best interest to deliver mail in "[her] own neighborhood with [her] own kind." She also found insufficient Brisker's statements that she was provided inadequate equipment and training, and that her lateness in finishing her route was due to her supervisor purposely delaying her departure. Pratter ruled that the discriminatory comment was "counterbalanced" by the fact that another African-American female was hired at the end of the probationary period, and that the evidence of inadequate training was insufficient to defeat a summary judgment motion without affirmative evidence that other employees did receive adequate training or supplies.

CONCLUSION

No nominee comes to the Senate Judiciary Committee with a presumption of confirmation. As Committee Chair Patrick Leahy (D-VT) has stated, the Senate's constitutional "advice and consent" role is a serious responsibility, by which "those 100 of us privileged to serve in the Senate are entrusted with protecting the rights of 280 million of our fellow citizens." Therefore, the Committee must thoroughly review each nomination in order to uphold the integrity of this constitutional duty.

The Bush administration has pursued a widely acknowledged campaign of court packing over the past six years. Five of the twelve judges currently on the Third Circuit were appointed by President George W. Bush. Confirmation of another nominee whose chief qualification is loyalty to the political agenda of the White House would cast doubt on the independence on this court of last resort for many Americans. The ethically questionable campaign contributions she made to President Bush and her home-state senators while she was under consideration for a district court appointment, together with her lack of a demonstrated commitment to equal justice for all, render her unqualified for a lifetime appointment to the court of appeals.