

April 6, 2005

The Honorable Arlen Specter
Chair, Committee on the Judiciary
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
269 Russell Senate Office Building

RE: Opposition of the Society of American Law Teachers (SALT) to the
Nomination of Thomas B. Griffith to the United States Court of Appeals for the
District of Columbia Circuit

Dear Senators Specter and Leahy:

The Society of American Law Teachers (SALT) writes to urge the Senate
Committee on the Judiciary to reject the nomination of Thomas Griffith to the
United States Court of Appeals for the District of Columbia Circuit.

SALT is the largest organization of law professors in the United States.
Representing more than 900 law professors from over 160 law schools, SALT has
a powerful interest in the qualifications of federal judges, to assure both the
appropriate development of the law and an environment of integrity in which our
students may practice law. Our concerns are that those persons honored with
appointment to the bench possess great intellectual ability, unimpeachable
rectitude, and sensitivity to the delicate task of interpreting constitutional,
statutory, and other legal standards. Judges must simultaneously respect
constitutive, legislative, and executive bodies, honor precedent, and maintain the
law's consistency with what Justice Cardozo called "the justice to which law in its
making should conform. . . ."

Mr. Griffith's suspension from the District of Columbia Bar for
non-payment of dues for the period 1997-2001 represents a serious failure to meet
the basic obligations of any practicing lawyer--to pay one's bar dues and register
as an active member of the bar--let alone the obligation of one who seeks
appointment to what has been called the second most powerful court in the United
States. While he has blamed his former law firm for the failure to pay his dues, it

is clear that the obligation to maintain bar membership is that of the attorney in question, and not of another entity. The effect of Mr. Griffith's failure to pay his bar dues and register was to render unauthorized any legal practice in which he engaged during the period of his suspension for non-payment of dues.

Mr. Griffith's suggestion that the reason for his non-payment of dues was in the nature of a clerical error, with its implied connotation of inadvertence, belies the lengths to which the District of Columbia Bar goes to remind its members of their obligations to pay their dues and register. As a formal matter, the D.C. Bar sends three first-class notices (two by letter, and one by postcard) reminding members who have not paid their dues that failure to do so will lead to suspension. In addition, the D.C. Bar informally sends its members reminders by e-mail. Thus, a member of the bar has to be particularly insensitive to his or her professional obligations not to realize that he or she is in danger of suspension for non-payment of dues.

While Mr. Griffith apparently has now paid his bar dues and is no longer suspended from the D.C. Bar, his reinstatement, pursuant to D.C. bar policy, would be prospective only. Thus, his period of suspension necessarily constitutes a period in which, if he was practicing law, he was doing so without a license.

As is well-known by now, Mr. Griffith became general counsel to Brigham Young University in 2000. It is rather remarkable for him to claim that he did not think he needed to be a member of the Utah bar to function as general counsel in that jurisdiction. But that claim is made even more problematic by the belated acknowledgment that, because of his suspension from the D.C. Bar, he in fact was not a member of any bar during the period prior to his reinstatement.

Mr. Griffith's failure to maintain membership in at least one state bar is more than a technical violation of the law. Judges are sworn to uphold the law as written. Citizens (and certainly lawyers) are deemed to be knowledgeable about the requirements the law imposes upon them. Given Mr. Griffith's cavalier attitude regarding his own bar membership, we have serious questions regarding his fitness to interpret the kinds of legal obligations he will be asked to adjudicate as a federal appellate judge. For one who claims to care passionately about the rule of law,¹ Mr. Griffith's handling of his bar membership is deeply disturbing.

It is Mr. Griffith's unwillingness to follow the rule of law that makes so troubling his opposition to use of the substantial proportionality test as an alternative for determining compliance with Title IX of the Education Amendments of 1972. As a member of the Secretary of Education's Commission on Opportunity in Athletics, Mr. Griffith opposed use of this test as one of the three recognized ways in which a college or university can demonstrate compliance with the statute. The substantial opportunity test permits a school to show compliance by demonstrating that it offers athletic opportunities to male and female students in substantial proportion to each gender's representation in the school's student body. Although every court of appeals that has considered the

¹ See Thomas B. Griffith, *Lawyers and the Rule of Law*, 16 UTAH B. J. 12 (October 2003).

legitimacy of this test has upheld it, Mr. Griffith characterized it as unconstitutional, “illegal,” “unfair,” and “morally wrong.”² Significantly, colleges and universities are not required to use the substantial proportionality test, but its availability provides them with a sensible and fully appropriate means to assess their progress in achieving the ultimate goal of gender equity in athletics. Mr. Griffith’s concern that the test sets out a quota system misses the point that sometimes to prove discrimination (or demonstrate its likely absence) numbers (not quotas) can be helpful guideposts. His belief that he knows better than the courts what the law should be suggests an arrogance that ill-suits him for a position as a federal appellate judge who would apply, rather than make, the law.

SALT urges the Committee to reject the nomination of Thomas B. Griffith to the Court of Appeals.

Sincerely,

Professor José Roberto (Beto) Juárez, Jr.

Professor Holly Maguigan
Co-Presidents
Society of American Law Teachers

² Transcript of Commission on Opportunity in Athletics hearing, Jan. 30, 2003, at 27.