



# BHH Bulletin

## Proposed Rulemaking Gone Missing in the Era of Trump Deregulation

By Sarah E. Hansen

The election of Donald Trump as the 45<sup>th</sup> President of the United States ushered in an era of increasing deregulation across all of the federal departments. The Department of Transportation (DOT) and Federal Motor Carrier Safety Administration (FMCSA) are no exceptions. Both have seen long-discussed proposed regulations go by the wayside under the administration, now in its second year of a four-year term. The administration’s regulatory stance has been highlighted by an Executive Order issued on January 30, 2017, which stated that “[u]nless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed,” also known as the “one-in, two-out” policy.

### Sleep Apnea Monitoring

One of the gasping breaths of the Obama administration was late attempts to implement a program for sleep apnea monitoring of commercial vehicle drivers. During the last year of the Obama administration, on March 10, 2016, the FMCSA issued a Notice of Proposed Rulemaking (NPRM) concerning the prevalence of moderate to severe obstructive sleep apnea (“OSA”). The NPRM would have required driver screening for OSA risk factors, to determine if the driver should be referred for sleep apnea testing and/or treatment. These efforts, however, never got off the ground. Under the new administration, the FMCSA stated that it “believes the current safety programs . . . and rulemaking addressing fatigue risk management are the appropriate avenues to address OSA.”

The “current safety programs” referred to by the FMCSA are the physical fitness requirements that must be met by every driver to operate a CMV. Pursuant to the FMCSA regulations, the physical qualifications for drivers relative to sleep apnea-related issues simply require that the driver “[h]as no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely.”

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See 49 CFR §391.41(e)(5). FMCSA regulations require each driver to obtain a “Medical Examiner’s Certificate” from a medical examiner, stating that they are medically fit to operate a CMV. See 49 CFR §391.41(a)(1)(i). The current regulations state that if a medical examiner detects a respiratory dysfunction that in any way is likely to interfere with the driver’s ability to safely control and drive a CMV, then the driver must be referred to a specialist for further evaluation and therapy. See 49 C.F.R. §391.41(b)(5).

The “current safety programs” referred to by the FMCSA are the physical fitness requirements that must be met by every driver to operate a CMV. Pursuant to the FMCSA regulations, the physical qualifications for drivers relative to sleep apnea-related issues simply require that the driver “[h]as no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely.” See 49 CFR §391.41(e)(5). FMCSA regulations require each driver to obtain a “Medical Examiner’s Certificate” from a medical examiner, stating that they are medically fit to operate a CMV. See 49 CFR §391.41(a)(1)(i). The current regulations state that if a medical examiner detects a respiratory dysfunction that in any way is likely to interfere with the driver’s ability to safely control and drive a CMV, then the driver must be referred to a specialist for further evaluation and therapy. See 49 C.F.R. §391.41(b)(5).

Attorneys, risk managers, and adjusters still need to be aware of the regulatory efforts and be cognizant of technology that is developing to address issues with driver fatigue, in general, and sleep apnea, in particular. The FMCSA is already studying driver distraction and fatigue detection warning systems, aimed at detecting behavior indicative of fatigued driving, such as the driver’s pose, hand gestures, yawning, erratic lane changing and speed variations, and heart rate monitoring. This technology, if implemented, would provide a warning system if these behaviors were detected, notifying both the driver and transmitting this information back to the terminal.

Initiatives such as driver fatigue technology and sleep apnea screening are likely to be expensive and time consuming for motor carriers to implement. However, the fact that these options are available, although not yet mandatory pursuant to governmental regulation, opens the door to possible argument and questioning by plaintiffs’ counsel about why these options were not exercised in cases involving driver fatigue, if not adopted by the motor carrier on a voluntary basis. Be prepared for plaintiffs’ counsel to argue that consideration of “community safety” and “best practices” would have been promoted by adoption of OSA screening methods and/or driver fatigue monitoring devices, even if they are not required by regulation. In responding to these arguments, it is important to emphasize that every situation must be looked at individually to determine the best methods for doing business in a responsible manner, taking all considerations into account, and avoid falling into the “reptile theory” trap.

### **Speed Limiter Mandate**

A speed limiter (also known as a governor) is a device utilized to measure and regulate the speed of an engine, including limiting the speed of a motor vehicle. There has been ongoing discussion regarding the requirement of mandatory speed governors on CMVs dating back several decades. In 1991, the NHTSA published a report called “Commercial Motor Vehicle Speed Control Devices” in response to the 1988 Truck and Bus Safety and Regulatory Reform Act. It was not until August 26, 2016, however, that the NPRM regarding speed limiters on large CMVs was released by the DOT. The NPRM would have required vehicles with a gross vehicle weight of more than 26,000 pounds to be equipped with a speed limiting device and would require motor carriers operating those vehicles in interstate commerce to maintain functional speed limiting devices in their vehicles and manufacturers to ensure that all applicable vehicles had speed limiters, as manufactured and sold. The NPRM did not determine what speed would be chosen as the highest permitted speed under this new rulemaking, deferring that decision to a later time. It applied to all multipurpose passenger vehicles, trucks, and buses meeting the 26,000-pound minimum, with the NHTSA and FMCSA acting in unison so that the rule would be applicable to nearly all vehicles on the roadway of that weight.

At this point, the mandatory speed limiter rule is, essentially, on hiatus, although it is not completely out of the question and we will have to see if it is revived at some point. With respect to claims and litigation, like the sleep apnea testing discussed above, attorneys, adjusters, and risk managers should keep in mind plaintiffs’ arguments that even though this kind of technology is not mandatory, it is still available. If you have a claim where your client does not have a speed governor on their vehicle and there are allegations that excessive speed caused or contributed to the accident, you will want to be prepared for arguments that the technology was available, and your client was at fault for not utilizing it. Be careful during discovery, and depositions in particular, about questions regarding the impact of this kind of technology on “safety” initiatives and goals and attempts by the plaintiffs’ bar to use this to open the door to “reptile theory”-style arguments.

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## **Are You Ready for a Wallaby at the Water Cooler? What Employers Need to Know Regarding Service Animals and Emotional Support Animals in the Workplace**

By Sarah Hansen

More and more employees are attempting to bring their service animals and emotional support animals (“ESAs”) to work, and whether or not an employer has a duty to accommodate for service animals and ESAs is still a developing area of law. The ADA requires employers to provide a “reasonable accommodation” to disabled employees or applicants, which can include allowing such an individual to bring his/her service animal to work. *See* 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. app. § 1630.2(o).

### **Service Animals Versus ESAs**

The first roadblock for an employer in evaluating a request for an accommodation is to distinguish between what is a “service animal” versus an ESA. While Title I of the ADA (prohibiting discrimination in employment) does not address or define “service animals,” Title III of the ADA (prohibiting discrimination by public accommodations) does. *See* 42 U.S.C. § 12116; 29 C.F.R. § 1630.1(a); 42 U.S.C. § 12186; 28 C.F.R. § 36.101; Pub. L. No. 101-336, 104 Stat. 327 (1990). According to Title III regulations, a service animal is defined as:

any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. . . . The work or tasks performed by a service animal must be directly related to the individual's disability.

28 C.F.R. § 36.104. The definition limits service animals to dogs and, in certain circumstances, miniature horses. 28 C.F.R. § 36.302(c)(9). On the other hand, ESAs are not defined by any federal law. The ADA and its implementing regulations do not address ESAs, and as such, ESAs are not required entrance to public accommodations. In addition, whereas service animals are limited to dogs or miniature horses, ESAs can be any kind of animal, regardless of species.

### **Reasonable Accommodation**

Under Title I of the ADA, private employers with 15 or more employees and state and local government employers, regardless of size, are required to make “reasonable accommodations” for the known physical or mental limitations of an employee or job applicant with a disability. 42 U.S.C. §§ 12111(5) and 12112(b)(5)(A). A person is considered disabled for the purposes of requesting a reasonable accommodation from an employer, if he/she: (1) has a physical or mental impairment (which includes emotional or mental illness) that “substantially limits” one of more “major life activities;” or (2) has a record of such impairment. 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2(g)(1). Reasonable accommodations are “[m]odifications or adjustments to the work environment” that enable a disabled employee to: (1) perform the “essential functions” of his/her position **or** (2) “enjoy equal benefits and privileges of employment as are enjoyed by [his/her employer’s] other similarly situated employees without disabilities.” 29 C.F.R. § 1630.2(o)(1). It is important that employers check their local and state laws, as they may obligate employers to allow ESAs in the workplace in certain situations.

Overall, employers need to carefully analyze whether the requested accommodation is reasonable and will adequately alleviate the effects of the employee’s disability on his/her ability to work. An accommodation is only reasonable if it is effective and proportional to the costs. *Branson v. West*, No. 97 C 3538, 1999 WL 311717, at \*11 (N.D. Ill. May 11, 1999). At the same time, an employer is required to address any barriers to an employee’s ability to actually **use** an assistive device, such as a service animal, effectively in the workplace. *McDonald v. Dep’t of Envtl. Quality*, 214 P.3d 749, 760 (Mont. 2009). An employer is **not** required to provide a reasonable accommodation when: (1) the employer can demonstrate that the accommodation would impose an “undue hardship” on the operations of the employer or (2) when a requested accommodation would pose a direct threat to the health or safety of the employee, other employees, or the public. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. §§ 1630.9(a) and 1630.15(d); *see* 29 C.F.R. app § 1630.2(r); *see also* 28 C.F.R. § 36.208(a) (applying to Title III – public accommodations).

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### **Interactive Process**

Under the ADA, once an employee requests an accommodation to bring his/her animal to work, that employer has a mandatory obligation to engage in an “interactive process” with the employee to identify the limitations caused by the employee’s disability and potential reasonable accommodations that could overcome those limitations. *Assaturian v. Hertz Corp.*, 2014 WL 4374430, at \*8 (D. Haw. Sept. 2, 2014). Once the request is made and the need for such accommodation is not obvious, then the employer may require that the individual provide reasonable documentation about his/her disability, functional limitations, and that the disability necessitates a reasonable accommodation. *Enforcement Guidance, supra*; 29 C.F.R. app. § 1630.9. Alternatively, an employer may explain to the employee that it needs to verify the existence of an ADA disability and the need for the accommodation and then ask the employee the nature of his/her disability and functional limitations. *Id.* The next step is that the employer and employee should discuss the possibilities and logistics of such an accommodation and the employer should make a timely good faith effort to find a suitable effective solution. *See Branson*, 1999 WL 311717, at \*12; 29 C.F.R. app. § 1630.9. If an employer chooses to deny a request for a reasonable accommodation, it should provide a written explanation for the denial and/or suggest an alternative accommodation. *See Branson*, 1999 WL 311717, at \*14-15.

Overall, requests to bring service animals and ESAs to work will need to be analyzed on a case-by-case basis and employers should remain open to engaging in an interactive process with employees to discuss whether an accommodation is reasonable and feasible (even if the request may seem strange or unusual). If a service animal or ESA is not disruptive and having it in the workplace is not problematic from a logistical standpoint, an employer may want to consider allowing the animal, especially given that what constitutes a “reasonable accommodation” or “undue hardship” in the context of animals at work is still a somewhat amorphous subject. This area of law remains murky and it is likely that employees will choose to push the envelope with respect to what reasonable accommodations they claim are necessary.

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## Wearable Woes: An Emerging Issue in Product Liability Litigation

By Sarah Hansen

Popular wearables such as the Fitbit have experienced setbacks as they sell millions of their fitness trackers to the public. These problems have ranged from skin irritation to a failure to accurately monitor the user's heartrate. Fitbit has fended off multiple lawsuits, including a shareholder lawsuit resulting from alleged failures of their device to work as advertised, resulting in a plunge in its stock value.

In October 2013, Fitbit released its Force model and by the end of that year, users were reporting skin irritations on their wrists where they were wearing the fitness tracker<sup>1</sup>. Apple Watch users also reported skin irritation in the area where they were wearing their watch<sup>2</sup>. Several customers who alleged that they suffered from skin irritation commenced a lawsuit against Fitbit claiming to have been misled by their advertising of the device. As a result of the consumer complaints, Fitbit issued a recall of the Force model offering a full refund<sup>3</sup>. Of more significant concern, were allegations about the failure of the Fitbits and other wearables to accurately measure the user's heartrate during vigorous exercise.

There seems to be a consensus that wrist-worn heart rate monitors such as Fitbit are generally accurate when a person is at rest or sitting still, but their accuracy comes into question when the user starts to engage in more vigorous exercise<sup>4</sup>. The difference is in the way that the wrist-worn monitors track your heart rate. Electrocardiography and chest strap heart rate monitors measure the electrical impulses from the heart muscle<sup>5</sup>. By contrast, wrist-worn heart rate monitors shine an LED light through the user's skin to measure blood flow through the capillaries<sup>6</sup>. The quality of the information regarding the user's heart rate obtained by a wrist-worn monitor can be impacted by movement of the monitor, the user's skin tone and any interference between the monitor and the skin<sup>7</sup>. Testing has shown that following the Fitbit directions on how to wear the device during vigorous exercise improved the accuracy of the heart rate monitor function.

Wearable sales are expected to grow by 20% each year over the next five years<sup>8</sup>. With wearables becoming more complex and containing more functions, including fitness tracking, we expect that product liability lawsuits from customers will increase in the coming years.

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<sup>1</sup>Katherine Rosman, "Fitbit Now Faces Class-Action Suit in Rash Fallout," *Wall Street Journal* (March 19, 2014), available at: <https://blogs.wsj.com/digits/2014/03/19/fitbit-now-faces-a-class-action-suit-in-rash-fallout/>

<sup>2</sup>Aimee Picchi, "Why Apple Watch is rubbing some users the wrong way", *CBS Money Watch* (May 6, 2015), available at: <https://www.cbsnews.com/news/why-apple-watch-is-rubbing-some-users-the-wrong-way/>

<sup>3</sup>Heather Kelly, "Fitbit recalls activity tracker due to skin rashes," *CNN.com* (February 24, 2014), available at: <http://www.cnn.com/2014/02/21/tech/gaming-gadgets/fitbit-force-recall/index.html>

<sup>4</sup>Robert Jimison, "Fitness trackers' heart rate monitoring accurate enough for most, study says" *CNN* (4 13, 2017), available at: <https://www.cnn.com/2017/04/10/health/fitness-tracker-fitbit-mio-accuracy-study/index.html>

<sup>5</sup>*Id.*; see also, Sharon Profis, "Do wristband heart trackers actually work" *A checkup.*" *Cnet* (May 22, 2014), available at: <https://www.cnet.com/news/how-accurate-are-wristband-heart-rate-monitors/>

<sup>6</sup>*Id.*

<sup>7</sup>Robert Jimison, "Fitness trackers' heart rate monitoring accurate enough for most, study says" *CNN* (4 13, 2017), available at: <https://www.cnn.com/2017/04/10/health/fitness-tracker-fitbit-mio-accuracy-study/index.html>

<sup>8</sup>Paul Lamking, "Smartwatch Popularity Booms With Fitness Trackers On the Slide", *Forbes* (February 2, 2018) available at: <https://www.forbes.com/sites/paullamkin/2018/02/22/smartwatch-popularity-booms-with-fitness-trackers-on-the-slide/#16bdcf867d96>

## AUTONOMOUS VEHICLE LEGISLATION, REGULATION AND LITIGATION

By Donna L. Burden

Legislation at the state level has gained traction since 2011, and its momentum will undoubtedly continue as technology advances. States that have enacted autonomous vehicle legislation include: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Louisiana, Michigan, New York, Nevada, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia and Vermont.<sup>1</sup> Additionally, the governors of Arizona, Delaware, Hawaii, Massachusetts, Washington and Wisconsin have issued executive orders related to autonomous vehicles.<sup>2</sup>

The U.S. Congress has also started to consider legislation on autonomous vehicles. The U.S. House of Representatives passed the Self Drive Act (H.R. 3388).<sup>3</sup> The Act defines a “highly automated vehicle” as a motor vehicle, other than a commercial use vehicle, that has an automated driving system that is capable of “performing the entire dynamic driving task on a sustained basis.”<sup>4</sup> The Act requires the Department of Transportation (DOT), to complete research on the most cost effective method and terminology for informing consumers about the capabilities and limitations of “highly automated vehicles.”<sup>5</sup> In addition to congressional action, the National Highway and Transportation Safety Administration (NHTSA), has also released federal guidance for Automated Driving Systems (ADS), referred to as “A Vision for Safety 2.0.”<sup>6</sup>

We can expect that plaintiffs’ attorneys will adapt with the times. Every new attempt by the industry to make things safer and avoid liability creates, in the fertile minds of plaintiffs’ attorneys, new approaches to impose liability. Few plaintiffs’ attorneys miss an opportunity to find additional potentially responsible parties when filing tort litigation. When crashes involving autonomous vehicles occur, we can expect them to bring in the manufacturers of the vehicles and software companies, upon whose technologies the vehicles rely, along with the owners and operators of those vehicles.<sup>7</sup>

Research into cars that drive themselves appears to be heading into the fast lane, carrying with it the promise of fewer deaths and injuries from car accidents, which could also mean fewer cases for attorneys who handle automotive injury litigation.<sup>8</sup> Opinions differ on how much of a threat driverless cars pose to lawyers’ livelihoods.<sup>9</sup>

Automated systems in self-driving cars will reduce vulnerability to human error, which is the cause of most crashes.<sup>10</sup> While suits focusing on driver error, driver fitness, and fatigue will likely decline as more and more self-driving cars take to the roads, the new technology is not foolproof and accidents will not be completely eliminated.<sup>11</sup> When a self-driving car is involved in a crash, passengers will need lawyers who can unravel the reason its complex systems failed, and potentially bring claims related to the vehicles’ sensors, software and data inputs.<sup>12</sup> This could lead to a shift from one group of plaintiffs’ lawyers to another group of plaintiffs’ lawyers, likely with the aggregate number of cases reduced. Of course, if past is prologue, we can anticipate that the number of potential parties to each lawsuit will be increased as defendants will start seeking indemnification and contribution from whomever they believe is the culpable party. There may be fewer cases, but each case could require more attorneys to represent a potentially increasing number of parties.

The magnitude of the decline in injuries from auto crashes as autonomous cars are introduced is hard to predict.<sup>14</sup> Cars are already being sold with more and more semi-autonomous features, such as lane departure warnings and automated parallel parking.<sup>15</sup> Legal scholars predict a trend toward increased manufacturer liability with increased use of automation. Specifically, they contend that autonomous vehicles will shift the responsibility for avoiding accidents from the driver to the vehicle manufacturer.<sup>16</sup> Despite the concerns raised in the article, the development of autonomous vehicles continues unabated.

<sup>14</sup>“Autonomous Vehicles; Self Driving Vehicles Enacted Legislations,” NCSL, available at: <http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx>

<sup>2</sup>*Id.*

<sup>3</sup>Self Drive Act, H.R. 3388 – 115<sup>th</sup> Congress (2017-2018), available at: <https://www.congress.gov/bill/115th-congress/house-bill/3388>

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>“Automated Driving Systems 2.0: A Vision for Safety,” NHTSA (September 12, 2017), available at [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0\\_090617\\_v9a\\_tag.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf)

<sup>7</sup>William B. Pentecost, Jr. & Matthew K. Mitchell, *The Future is Ours to See: Trucking in 2036*, *The Transportation Lawyer*, Volume 17, pp. 14-19 (April, 2016).

<sup>8</sup>Pentecost & Mitchell, *supra*, citing Charles Toutant, “Should Injury Lawyers Be Worried About Driverless Cars?” *New Jersey Law Journal* (January 27, 2016).

<sup>9</sup>Charles Toutant, “Should Injury Lawyers be Worried about Driverless Cars,” *supra*.

<sup>10</sup>Charles Toutant, “Should Injury Lawyers be Worried about Driverless Cars,” *supra*.

<sup>11</sup>Charles Toutant, “Should Injury Lawyers be Worried about Driverless Cars,” *supra*.

<sup>12</sup>Charles Toutant, “Should Injury Lawyers be Worried about Driverless Cars,” *supra*.

<sup>13</sup>Charles Toutant, “Should Injury Lawyers be Worried about Driverless Cars,” *supra*.

<sup>14</sup>Charles Toutant, “Should Injury Lawyers be Worried about Driverless Cars,” *supra*.

<sup>15</sup>Charles Toutant, “Should Injury Lawyers be Worried about Driverless Cars,” *supra*.

<sup>16</sup>John Villasenor, “Products Liability and Driverless Cars: Issues and Guiding Principles for Legislation,” *supra* (citing Gary E. Marchant & Rachel A. Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System*, 52 *Santa Clara L. Rev.* 1321, 1339 (2012)).

## News

- Burden, Hafner & Hansen, LLC welcomes new associates Alan Bedenko, Esq., Jaclyn Wanemaker, Esq., and Liesel Zimmerman, Esq.
- Phyliss A. Hafner, Esq., partner at Burden, Hafner & Hansen, LLC secured the voluntary discontinuance of a wrongful death case stemming from a May 2016 accident where the Decedent, while in the course of his employment, was crushed by a falling dumpster that was being unloaded from a truck owned by his employer. Ms. Hafner, who represented the trucking company, was able to obtain a voluntary discontinuance of the action against her client with prejudice before the completion of paper discovery or conducting of party and/or non-party depositions.
- Sarah E. Hansen, Esq., a partner at Burden, Hafner & Hansen, LLC has been selected as Co-Chair for the DRI Trucking Committee's 2019 Primer. The Primer will be held on June 26, 2019, in Nashville, Tennessee, and will be a mock trial-type day long "bootcamp" program geared towards young lawyers and attorneys new to trucking, with an emphasis on what to expect when handling a commercial vehicle accident at trial.
- Donna L. Burden, Managing Partner at Burden, Hafner & Hansen, LLC has been named Vice Chair of Webinars for the Alternative Dispute Resolution Committee for the International Association of Defense Counsel (IADC). Mr. Burden is also a Director for the Foundation of the IADC; a position she has held since 2017.
- Donna L. Burden, Esq. was re-elected to another term as part of the Board of Directors for the Trucking Industry Defense Association.

## Community Involvement

- Burden, Hafner & Hansen, LLC garnered the most donations from any firm in Western New York for a fundraising event held by the Western New York Paralegal Association, surpassing donations by many large Buffalo-area firms. Money raised from the event will go towards the Association's Scholarship Program.

## Community Involvement continued

- Burden, Hafner & Hansen, LLC was a table sponsor for SABAH's 2018 Starlight Night Auction & Gala held on November 16, 2018 at the Buffalo Niagara Convention Center. Members of the firm attended the event and a good time was had by all. Here are a few photographs taken at this event.



## Supreme Court Trivia

- 1) Who is the only person to have held the title President and Supreme Court Justice?
- 2) Who was the first woman to serve on the Supreme Court?
- 3) Which justice of the current members of the Supreme Court has had the longest tenure?
- 4) Since the Supreme Court was established in 1789, how many justices have served on the Court to date?
- 5) How many Presidents did not make any nominations to the Supreme Court?

Answers  
1 - William Howard Taft  
2 - Sandra Day O'Connor  
3 - Clarence Thomas  
4 - 114  
5 - 4