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Kavanaugh,[Brett]

**Responses of Brett Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit
to the Written Questions of Senator Durbin**

1. A draft January 25, 2002 memorandum to the President from then-White House Counsel Alberto Gonzales recommends that the President reject then-Secretary of State Colin Powell's recommendation that the President reconsider his determination that the Geneva Conventions do not apply to the conflict with the Taliban and Al Qaeda. The memorandum also states that the Geneva Conventions' "strict limitations on questioning of enemy prisoners" are "obsolete."

A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in writing the draft memorandum and any previous and/or subsequent drafts, and your involvement in shaping the conclusions and recommendations of such memoranda.

Response: I had no involvement in writing the draft memorandum or in writing any previous or subsequent drafts. I had no involvement in shaping the conclusions or recommendations of such memorandums.

B. When did you first learn about such memoranda's conclusions and recommendations? When did you first review any such memoranda?

Response: I was not aware of this draft memorandum until news stories about it appeared in 2004, and I did not review it until some time later in 2004.

C. Do you agree with the draft January 25, 2002 memorandum's conclusions and recommendations? Please explain.

Response: As an executive branch official and as a judicial nominee, it would not be appropriate for me to discuss my agreement or disagreement with conclusions or recommendations in this draft memorandum to the President.

2. On February 2, 2002, the President issued a memorandum stating, among other things, that the Geneva Conventions do not apply to the conflict with Al Qaeda and do not apply to Al Qaeda and Taliban detainees.

A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in drafting the memorandum and shaping the policy reflected therein.

Response: I had no involvement in drafting the memorandum. I had no involvement in shaping the policy reflected in it.

B. When did you first learn about the policy reflected in the memorandum?

When did you first review the memorandum?

Response: I was not aware of this memorandum until after news stories about it appeared in 2004, and I did not review it until some time later in 2004.

- C. The memorandum states, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with Geneva." How do you define "humane treatment"?**

Response: I had no role in drafting the memorandum and was not aware of it until after news stories about it appeared in 2004. As an executive branch official not involved in this issue and as a judicial nominee, it would not be appropriate for me to attempt to define terms in this memorandum.

- D. Has the White House provided any guidance to the U.S. Armed Forces regarding the meaning of humane treatment? Please explain.**

Response: I have not been involved in this issue in the course of performing my responsibilities at the White House; as a result, I do not have personal knowledge of what memorandums or guidance, if any, have been issued on this topic.

- E. The directive to treat all detainees humanely applies only to the U.S. Armed Forces. Are U.S. personnel other than members of the U.S. Armed Forces required to treat all detainees humanely? Please explain.**

Response: See response to 2C.

- F. The President's memorandum states, "our values" call for us to treat detainees humanely, including those who are not legally entitled to such treatment. It also states that the U.S. Armed Forces shall treat detainees humanely "as a matter of policy." Which detainees is the United States not legally required to treat humanely? Can the President determine, as a matter of policy, that U.S. personnel are not required to treat detainees humanely? Please explain.**

Response: See response to 2C.

- 3. On August 1, 2002, the Justice Department's Office of Legal Counsel (OLC) issued an opinion entitled, "Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A ("OLC torture memo").**

- A. At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about the OLC torture memo.**

Response: I was not aware of and had no meetings, briefings, and/or other discussions about the August 1, 2002, memorandum before I read news stories about the memorandum in the summer of 2004.

B. When did you first learn about the OLC torture memo? When did you first review it?

Response: I first learned about the August 1, 2002, memorandum in 2004 after news stories about it.

C. Do you believe that the OLC torture memo's analysis of the torture statute is correct? Please explain.

Response: The Administration has repealed the August 1, 2002, memorandum, and I agree with that decision. As I stated at my hearing, I do not agree with the legal analysis in the memorandum, including with respect to the definition of torture.

4. The OLC torture memo concludes that the torture statute does not apply to interrogations conducted under the President's Commander-in-Chief authority.

A. Do you agree with this conclusion? Please explain.

Response: I do not agree with the legal analysis or conclusions in the August 1, 2002, memorandum. I am not aware of any claim that there are constitutional deficiencies in 18 U.S.C. 2340-2340A or that there are applications of that statute that would be unconstitutional. The President has a responsibility under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress.

B. In your opinion would the torture statute be unconstitutional if it conflicted with an order issued by the President as Commander-in-Chief? Please explain.

Response: The President has a constitutional duty under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress. I am not aware of a claim that 18 U.S.C. 2340-2340A is unconstitutional or that there are applications of the statute that would be unconstitutional. If such a claim were made, it would be analyzed under the three-part framework set forth by Justice Jackson in his concurring opinion in *Youngstown Steel* and followed by the Supreme Court since then. In referring to what is called category 3, Justice Jackson explained that "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be

scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”

5. **The OLC torture memo argues that in order for abuse to constitute torture under the torture statute, “The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.” Do you agree with this conclusion? Please explain.**

Response: The Administration has repealed the August 1, 2002, memorandum, and I agree with that decision because I believe the legal analysis in the memo is flawed, including with respect to the definition of torture.

6. **The Justice Department has acknowledged that OLC has also issued at least one opinion on the legality of specific interrogation techniques. According to media reports, OLC issued one such opinion in August 2002, during the same time frame as the OLC torture memo. It reportedly authorizes the use of specific abusive interrogation methods, including mock execution and “waterboarding” or simulated drowning.**

- A. **At the time, you were Associate Counsel to the President. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about this and/or other OLC opinions dealing with interrogation policies and practices.**

Response: I have no knowledge of such an opinion. To the extent any such memorandum or analysis exists, I have not been involved in preparing it, nor have I reviewed or discussed it.

- B. **When did you first learn about OLC’s analysis of specific abusive interrogation techniques?**

Response: I have no knowledge of such an opinion. To the extent any such memorandum or analysis exists, I have not been involved in preparing it, nor have I reviewed or discussed it.

- C. **Do you believe that OLC’s analysis of the legality of specific interrogation techniques is correct? Please explain.**

Response: I have no knowledge of such an opinion. To the extent any such memorandum or analysis exists, I have not been involved in preparing it, nor have I reviewed or discussed it.

- D. **In your opinion, is it legally permissible for U.S. personnel to torture a detainee?**

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148.

E. In your opinion, is it legally permissible for U.S. personnel to subject a detainee to waterboarding? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

F. In your opinion, is it legally permissible for U.S. personnel to subject a detainee to mock execution? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

G. In your opinion, is it legally permissible for U.S. personnel to physically beat a detainee? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

H. In your opinion, is it legally permissible for U.S. personnel to force a detainee into a painful stress position for a prolonged time period? Is it inhumane?

Response: Federal statutes prohibit torture, 18 U.S.C. 2340-2340A, and cruel, inhuman, and degrading treatment, Public Law 109-148. If confirmed as a judge, I would fully and faithfully apply laws against torture and cruel, inhuman, and degrading treatment. Questions whether particular factual circumstances violate laws against torture and cruel, inhuman, and degrading treatment may come before the courts, and as a judicial nominee, it would not be appropriate to provide advance rulings about particular factual circumstances.

7.

Beginning in 2001, the President has authorized the National Security Agency

(NSA) to eavesdrop on Americans in the United States without court approval. The President has stated that this warrantless surveillance program is reviewed every 45 days, and that this review includes the Counsel to the President.

- A. During this time period, you have served as Associate Counsel to the President, Senior Counsel to the President, and Assistant to the President and Staff Secretary. Please describe your involvement, if any, in any meetings, briefings and/or other discussions, about the NSA surveillance program, and your involvement, if any, in shaping the program and the legal justification for the program.
- B. When did you first learn about the President's authorization of the program?

Response: I did not learn of the existence of this program until after a *New York Times* story about it appeared on the Internet late on the night of Thursday, December 15, 2005. I had no involvement in meetings, briefings, or other discussions in shaping the program or the legal justification for the program. Since December 16, 2005, the President has spoken publicly about the program on numerous occasions, and I have performed my ordinary role as Staff Secretary with respect to staffing the President's public speeches.

8. One premise of the NSA surveillance program appears to be that FISA is unconstitutional to the extent it conflicts with the President's authorization of the program. For example, a Justice Department memo issued on January 19, 2006 entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President" states: "Because the President also has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation - to defend the United States against foreign attack."

- A. Do you believe FISA is unconstitutional to the extent it conflicts with the President's authorization of the NSA program? Please explain.

Response: The question of FISA's interaction with the Authorization for the Use of Military Force and the President's Article II authority is being analyzed by the Committee and is the subject of litigation in the federal courts. As a judicial nominee, it would not be appropriate for me to provide an opinion on that question.

- B. Can Congress place any limits on the President's exercise of his Commander-in-Chief power? For example, can the President, pursuant to his Commander-in-Chief power, authorize actions that would otherwise violate the War Crimes Act of 1996, 18 U.S.C. 2441, if he determines such actions are necessary to combat a terrorist threat?

Response: The President has a constitutional duty under Article II to take care that the laws are faithfully executed, including the Constitution and statutes passed by Congress. I am not aware of any claim that the War Crimes Act of 1996 either is unconstitutional on its face or could be unconstitutional as applied. Any such claim would be analyzed under category 3 of the three-part framework set forth by Justice Jackson in his concurring opinion in *Youngstown Steel* and subsequently followed by the Supreme Court. In this category, the President's authority is at its "lowest ebb."

9. **According to recent press reports, a concerted effort has been made by the Bush White House to utilize presidential signing statements to bypass and manipulate laws passed by Congress, without resorting to vetoes. President Bush has issued over 750 such statements "a record high" and is the first president since Thomas Jefferson to serve so long in office without issuing a single veto. Phillip Cooper, a scholar on executive power, has said: "There is no question that this administration has been involved in a very carefully thought-out, systemic process of expanding presidential power at the expense of the other branches of government. This is really big, very expansive, and very significant."**

A. Please describe in detail the role you have played in this effort.

Response: Signing statements are generally drafted and reviewed by Department of Justice attorneys, Office of Management and Budget (OMB) attorneys, White House attorneys, and other Administration attorneys whose agencies are affected by a bill's provisions. This process is usually coordinated by OMB. After the signing statement has been drafted and cleared through the OMB process, it comes to the Staff Secretary's office for White House senior staffing and Presidential review and signature. I have been Staff Secretary since July 2003; the Staff Secretary's office staffs signing statements before they are reviewed and signed by the President.

Like Presidents before him, President Bush has issued signing statements to identify legislative provisions that implicate certain constitutional requirements -- for example, the Recommendations Clause, Presentment Clause, Opinions Clause, and Appointments Clause.

B. Please provide a list of all signing statements you have drafted or reviewed.

Response: I have been Staff Secretary since July 2003. The Staff Secretary's office reviews all Presidential signing statements and ensures that drafts of them are staffed to the White House senior staff and cleared by the White House Counsel's office and the Department of Justice, among other offices.

10. **Do you know Jack Abramoff? Please describe any meetings, discussions, or other interactions between you and Mr. Abramoff from 2001 to the present.**

Response: No. None.

11. **Concerns have been raised about your lack of legal experience regarding the issues that are litigated before the D.C. Circuit. According to a report by the Federal Judicial Center, half of the D.C. Circuit docket involves administrative appeals, and of those appeals, over 70% come from the Environmental Protection Agency, Federal Energy Regulatory Commission, and Federal Communications Commission. In addition, the D.C. Circuit ranks first among all circuit courts in the country in the percent of National Labor Relations Board cases heard by the court.**

Please identify all cases or matters on which you have worked involving the Environmental Protection Agency, Federal Energy Regulatory Commission, Federal Communications Commission, and National Labor Relations Board, and briefly describe the nature of your work in each case or matter. Please give specific information; Senator Kennedy asked you a similar written question in 2004 which you declined to answer with specificity. You do not need to identify cases in which you worked as a law clerk.

Response: In private practice, I represented Verizon and worked on the "open access" issue. This issue involved the question whether cable companies must allow consumers to obtain the Internet Service Provider of their choice when the cable company provides high-speed Internet access – in other words, whether cable companies should be regulated under the same regulatory regime as traditional telephone companies with respect to broadband access. I worked on this issue in connection with FCC regulation of the subject and also on an antitrust suit that was filed in the Western District of Pennsylvania. *See also* Fight for Internet Access Creates Unusual Alliance, *New York Times* (August 12, 1999).

For Verizon, I also worked on statutory and regulatory issues arising out of the Telecommunications Act of 1996.

As Staff Secretary to the President since July 2003, I have helped coordinate the speechwriting process with the speechwriters and relevant policy offices. The President has given numerous speeches on energy policy, labor policy, communications policy, and environmental policy since I became Staff Secretary. The President also has made a variety of public decisions and policy proposals related to those subjects that also have come through the Staff Secretary's office for review and clearance. The Staff Secretary's office also helps review and clear final drafts of the President's Budget, which has sections dealing with energy, labor, communications, and environmental policy.

12. **You have spent your entire legal career working for either President Bush or Ken Starr. You co-authored the Starr Report. You worked for President Bush's 2000 campaign and went to Florida to participate in President Bush's recount activities. The federal judge recusal policy set forth at 28 U.S.C. 455 requires federal judges to disqualify themselves "in any proceeding in which his impartiality might reasonably be questioned." Many people believe your impartiality will reasonably be**

questioned in any case involving policies of President Bush or matters litigated by the Republican Party.

If confirmed, would you be willing to disqualify yourself in all cases involving a challenge to a policy of the George W. Bush Administration?

If confirmed, would you be willing to disqualify yourself in all cases in which the Republican Party was a party (including *amicus*) before the court?

Response: If confirmed, I would carefully examine recusal obligations under 28 U.S.C. 455 and all other applicable laws and rules, and I would consult precedents and my colleagues as appropriate. I have a full appreciation for the importance of statutory recusal obligations and understand that I may have to recuse from certain cases. At this point, without knowing the facts, circumstances, and parties involved in a particular case and before I have done the work and research necessary, I cannot identify the particular cases that might require or justify recusal.

13. At their nomination hearings, Chief Justice John Roberts, Jr. and Justice Samuel Alito, Jr. testified in opposition to the use of foreign legal opinions and international norms. Chief Justice Roberts testified that he opposed the use of foreign law because it “allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they’re finding precedent in foreign law, and use that to determine the meaning of the Constitution.” Justice Alito testified that “I don’t think foreign law is helpful in interpreting the Constitution.” Do you agree with these statements? Why or why not?

Response: As a general matter, I do not think foreign law is a useful guide for interpreting the United States Constitution. If confirmed as a judge on the U.S. Court of Appeals for the D.C. Circuit, I would follow the precedents of the Supreme Court. To the extent that the Supreme Court has used or uses foreign law to help resolve particular questions or issues, I would be bound to follow that Supreme Court precedent, and I would do so fully and faithfully.

14. Justice Kennedy, for whom you once served as a law clerk, has cited foreign legal opinions and international norms in some of his opinions. Do you believe it was inappropriate for him to cite foreign legal opinions and international norms in his opinions in *Lawrence v. Texas* (which struck down state sodomy laws) and *Roper v. Simmons* (which struck down state death penalty laws for children)? Why or why not?

Response: The cases cited in this question are precedents of the Supreme Court. If confirmed as a judge on the U.S. Court of Appeals for the D.C. Circuit, I would follow these precedents fully and faithfully. As a nominee to a court of appeals, it would not be appropriate for me to express my agreement or disagreement with the results or reasoning of these decisions.

15. The American Bar Association recently downgraded their rating of your

nomination from “Well Qualified” to “Qualified,” but it did not provide an explanation for its decision.

- A. Based on information the ABA may have provided to you, and based on your extensive experience working with the ABA when you helped evaluate judicial nominees in the White House Counsels’ office, what do you believe is the basis for the ABA’s lowering of their rating of your nomination?**
- B. According to a May 3, 2006 article in the *Washington Post*, a White House spokesperson said that the ABA’s revised rating of your nomination “resulted from changes in the ABA panel’s personnel, not from new findings.” Do you agree with this assertion? If so, please explain the basis for that belief and set forth the exact changes in the ABA panel’s personnel that led to the lower rating of your nomination.**

Response: The American Bar Association provided an explanation of its most recent “qualified/well-qualified” rating on Monday, May 8, 2006, in written and oral testimony to the Committee. I am aware that all 42 individual reviews conducted by ABA Committee Members over three years have found that I am well-qualified or qualified to serve on the D.C. Circuit.

- 16. Many of the written answers you submitted in November 2004 were evasive or nonresponsive. Other judicial nominees have provided direct and candid answers to some of these same questions. Please submit more responsive and complete answers to the following written questions I sent to you in 2004: Questions 3, 10A, 10B, 10D, 10E, 13A, and 13B.**

Response:

3. Membership in the Federalist Society is not a necessary qualification to be a judicial nominee, and preference is not given to members of the Federalist Society. As far as I am aware, the majority of President Bush’s judicial nominees have not been members of the Federalist Society.

10A: President Bush has sought to appoint judges who will interpret the law and not legislate from the bench. He has successfully appointed two Supreme Court Justices and numerous court of appeals and district court judges who have stated their agreement with this general judicial approach.

10B: In a book, speeches, and cases, Justice Scalia has explained his judicial philosophy is one primarily of original meaning and textualism. Justice Thomas also has explained his judicial philosophy in a variety of constitutional and statutory cases since he assumed his seat on the Supreme Court.

10D: If confirmed, I would seek to adhere to the following judicial philosophy: I would interpret

the law as written and not impose my own policy preferences; I would exercise the judicial power prudently and with restraint; I would follow Supreme Court precedent fully and faithfully; and I would maintain the absolute independence of the Judiciary. Strict constructionism does not have a single defined meaning as I understand the term; strict constructionism is sometimes defined to mean interpreting the law as written.

10E: If confirmed, I would follow all binding Supreme Court precedent, including *Brown v. Board*, *Miranda v. Arizona*, and *Roe v. Wade*.

There has been public debate in the last three decades about the reasoning and results of *Miranda* and *Roe*, including in the dissents in those two cases. Both cases have been reaffirmed by the Supreme Court – for example, *Miranda* was reaffirmed in *Dickerson v. United States* and *Roe v. Wade* was reaffirmed in *Planned Parenthood v. Casey*. Issues relating to or arising out of those two cases continue to come before the courts, and as a judicial nominee, it would not be appropriate for me to describe my agreement or disagreement with the two cases.

13B: The Supreme Court has decided a number of cases with respect to affirmative action. If confirmed, I would follow those precedents fully and faithfully. I do not have an agenda with respect to affirmative action, or any other policy issues, that I would seek to advance as a judge if I am confirmed.

17. In early May 2004, following your first hearing before the Senate Judiciary Committee, you were sent written followup questions from several members of the Committee. You did not submit answers to these questions until late November 2004, after the presidential election. Why did you wait seven months to answer these questions?

Response: After my hearing in April 2004, my understanding was that no further action would occur on my nomination that year and that I should submit written answers to the follow-up written questions before the end of the Congressional session so that the record of my 2004 hearing would be complete were I to be re-nominated in 2005. I met that timeline and submitted the answers in November 2004 before the end of the Congressional session. There may have been a miscommunication or misunderstanding, for which I take responsibility, and I was pleased to have the opportunity to appear at the hearing on May 9, 2006, to answer additional questions from the Members of the Committee.

18. Would you be willing to come before the Senate Judiciary Committee and testify at a second hearing?

Response: Yes, during the week of May 1, I told Chairman Specter and Senator Schumer that I would be pleased to appear at a second hearing, and I was happy to have the opportunity to do so on May 9.