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Counsel's Office, White House

Rao, Neomi

Stack:	Row:	Sect.:	Shelf:	Pos.:	FRC ID:	Location or Hollinger ID:	NARA Number:	OA Number:
W	20	24	3	3	10166	23029	6124	6323

Folder Title:

[Brett Kavanaugh]: Kavanaugh - 2006

Withdrawn/Redacted Material

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	Brett M. Kavanaugh	19	N.D.	P5;
002	Draft	Brett M. Kavanaugh	20	05/17/2006	P5;
003	Email	FW: Myth/Fact Issue... - To: Neomi Rao - From: Grant Dixon	1	05/11/2006	P5;
004	Handwritten Note	Other Qs	4	N.D.	P5;
005	Handwritten Note	Brett Strategy Call	2	04/27/2006	P5;
006	Handwritten Note	Kavanaugh - Moot [with attachment]	3	05/07/2006	P5;
007	List	General Executive Power	2	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:
10166

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
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Freedom of Information Act - [5 U.S.C. 552(b)]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
008	List	Kavanaugh Moots - WHCO	3	N.D.	P5;
009	List	Kavanaugh Moots - WHCO	3	N.D.	P5;
010	List	BK Moots: 180 EEOB	5	N.D.	P5;
011	List	Brett Kavanaugh: Potential Moot Topics	3	N.D.	P5;
012	Handwritten Note	Meeting re: Brett	1	04/28/2006	P5;
013	Draft	Brett M. Kavanaugh	16	N.D.	P5;

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[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

10166

OA Num.:

6323

NARA Num.:

6124

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES

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May 5, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

As former Attorneys General of the United States, we write in strong support of Brett Kavanaugh's nomination to the United States Court of Appeals for the D.C. Circuit. Our past experiences as Attorneys General include extensive involvement in the selection of judges combined with a comprehensive knowledge of and familiarity with our federal court system. From that vantage point, we can each state with certainty that Mr. Kavanaugh is an outstanding nominee to the federal bench.

Mr. Kavanaugh is particularly known for his intelligence, commitment to public service, and integrity. Throughout his career, Mr. Kavanaugh has shown a dedication to the legal profession and the rule of law, and his professional accomplishments speak volumes to his ability to serve as a federal judge. His academic credentials are superlative, having graduated from Yale University and from Yale Law School. He followed these achievements by clerking for Supreme Court Justice Anthony Kennedy. Mr. Kavanaugh brings a wealth of broad experiences to this nomination, ranging from private practice as an associate and partner at a prestigious law firm to years as a close advisor to the President of the United States. During that time, he has practiced in each level of our judicial system, from trial, to appellate, to the Supreme Court, working on both criminal and civil matters. Mr. Kavanaugh also brings other qualities to the table—namely a warm personality, a strong work ethic, and a good character.

We believe that Mr. Kavanaugh possesses each characteristic of an outstanding nominee to the U.S. Court of Appeals for the D.C. Circuit, including academic and professional credentials and integrity. We therefore urge this Committee and the Senate to move quickly to confirm Mr. Kavanaugh to the federal bench. America would be well served by Mr. Kavanaugh's prompt confirmation.

Sincerely,



William P. Barr, Attorney General under
President George H.W. Bush, 1991-1993

On behalf of:

Griffin B. Bell, Attorney General under
President Carter, 1977-1979

Edwin Meese, III, Attorney General under
President Reagan, 1985-1988

Dick Thornburgh, Attorney General under
Presidents Ronald Reagan and George H. W. Bush,
1988-1991

John Ashcroft, Attorney General under
President George W. Bush, 2001-2005

cc: The Honorable Patrick J. Leahy

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III

106TH CONGRESS
1ST SESSION**S. RES. 44**

Relating to the censure of William Jefferson Clinton.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 12, 1999

Mrs. FEINSTEIN (for herself, Mr. BENNETT, Mr. MOYNIHAN, Mr. CHAFEE, Mr. KOIL, Mr. JEFFORDS, Mr. LIEBERMAN, Mr. SMITH of Oregon, Mr. DASCHE, Ms. SNOWE, Mr. REID, Mr. GORTON, Mr. BRYAN, Mr. MCCONNELL, Mr. CLELAND, Mr. DOMENICI, Mr. TORRICELLI, Mr. CAMPBELL, Mr. WYDEN, Mrs. LINCOLN, Mr. KERRY, Mr. KERREY, Mr. SCHUMER, Mr. DURBIN, Mrs. MURRAY, Mr. WELLSTONE, Mr. BREAUX, Ms. MIKULSKI, Mr. DORGAN, Mr. BAUCUS, Mr. REED, Ms. LANDRIEU, Mr. KENNEDY, Mr. LEVIN, Mr. ROCKEFELLER, Mr. ROBB, Mr. INOUE, and Mr. AKAKA) submitted the following resolution; which was referred to the Committee on Rules and Administration

RESOLUTION

Relating to the censure of William Jefferson Clinton.

Whereas William Jefferson Clinton, President of the United States, engaged in an inappropriate relationship with a subordinate employee in the White House, which was shameful, reckless and indefensible;

Whereas William Jefferson Clinton, President of the United States, deliberately misled and deceived the American people, and people in all branches of the United States Government;

Whereas William Jefferson Clinton, President of the United States, gave false or misleading testimony and his actions have had the effect of impeding discovery of evidence in judicial proceedings;

Whereas William Jefferson Clinton's conduct in this matter is unacceptable for a President of the United States, does demean the Office of the President as well as the President himself, and creates disrespect for the laws of the land;

Whereas William Jefferson Clinton fully deserves censure for engaging in such behavior;

Whereas future generations of Americans must know that such behavior is not only unacceptable but also bears grave consequences, including loss of integrity, trust and respect;

Whereas William Jefferson Clinton remains subject to criminal actions in a court of law like any other citizen;

Whereas William Jefferson Clinton's conduct in this matter has brought shame and dishonor to himself and to the Office of the President; and

Whereas William Jefferson Clinton through his conduct in this matter has violated the trust of the American people:
Now, therefore, be it

1 *Resolved, That—*

2 (1) the United States Senate does hereby cen-
3 sure William Jefferson Clinton, President of the
4 United States, and does condemn his wrongful con-
5 duct in the strongest terms;

3

1 (2) the United States Senate recognizes the his-
2 toric gravity of this bipartisan resolution, and trusts
3 and urges that future congresses will recognize the
4 importance of allowing this bipartisan statement of
5 censure and condemnation to remain intact for all
6 time; and

7 (3) the Senate now move on to other matters
8 of significance to our people, to reconcile differences
9 between and within the branches of government, and
10 to work together—across party lines—for the benefit
11 of the American people.

○

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**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, and I do not have personal knowledge regarding the scope or intended scope of this memorandum. I do not have personal knowledge of other memorandums or guidance, if any, that may apply to these kinds of cases.

- 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 2D.

- 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 2D.

- 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 its analysis of 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 that 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: 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: 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: 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 analysis of 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. As Staff Secretary since July 2003, I would have staffed nearly all signing statements before they were reviewed and signed by the President.

Like Presidents before him, President Bush has issued signing statements to identify legislative provisions that pose traditional Executive Branch concerns with respect to 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: In my capacity as Staff Secretary, I would have reviewed nearly all Presidential signing statements since July 2003 to ensure that drafts of them were staffed to the White House senior staff and cleared by the Counsel's office, 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 have 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 books, articles, and cases, Justice Scalia has explained his judicial philosophy as 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 the latter two cases, including in the dissents in those two cases. Both cases have been reaffirmed by the Supreme Court – *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 any agenda with respect to affirmative action, or any other 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 was an

apparent 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.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Other Qs	4	N.D.	P5;

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COLLECTION:

Counsel's Office, White House

SERIES:

Rao, Neomi

FOLDER TITLE:

[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

10166

OA Num.:

6323

NARA Num.:

6124

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Freedom of Information Act - [5 U.S.C. 552(b)]

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Records Not Subject to FOIA

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Brett Strategy Call	2	04/27/2006	P5;

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COLLECTION:

Counsel's Office, White House

SERIES:

Rao, Neomi

FOLDER TITLE:

[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

10166

OA Num.:

6323

NARA Num.:

6124

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES**Presidential Records Act - [44 U.S.C. 2204(a)]**

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Kavanaugh - Moot [with attachment]	3	05/07/2006	P5;

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COLLECTION:

Counsel's Office, White House

SERIES:

Rao, Neomi

FOLDER TITLE:

[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

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6124

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	General Executive Power	2	N.D.	P5;

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COLLECTION:

Counsel's Office, White House

SERIES:

Rao, Neomi

FOLDER TITLE:

[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

10166

OA Num.:

6323

NARA Num.:

6124

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	Kavanaugh Moots - WHCO	3	N.D.	P5;

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COLLECTION:

Counsel's Office, White House

SERIES:

Rao, Neomi

FOLDER TITLE:

[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

10166

OA Num.:

6323

NARA Num.:

6124

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES**Presidential Records Act - [44 U.S.C. 2204(a)]**

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List	Kavanaugh Moots - WHCO	3	N.D.	P5;

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Counsel's Office, White House

SERIES:

Rao, Neomi

FOLDER TITLE:

[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

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2018-0009-P

RESTRICTION CODES**Presidential Records Act - [44 U.S.C. 2204(a)]**

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	BK Moots: 180 EEOB	5	N.D.	P5;

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COLLECTION:

Counsel's Office, White House

SERIES:

Rao, Neomi

FOLDER TITLE:

[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

10166

OA Num.:

6323

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6124

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
List	Brett Kavanaugh: Potential Moot Topics	3	N.D.	P5;

**This marker identifies the original location of the withdrawn item listed above.
For a complete list of items withdrawn from this folder, see the
Withdrawal/Redaction Sheet at the front of the folder.**

COLLECTION:

Counsel's Office, White House

SERIES:

Rao, Neomi

FOLDER TITLE:

[Brett Kavanaugh]: Kavanaugh - 2006

FRC ID:

10166

OA Num.:

6323

NARA Num.:

6124

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES**Presidential Records Act - [44 U.S.C. 2204(a)]**

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

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May Judicial Coalition—Kavanaugh

Last Updated
5/5/2006 2:30 PM

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
30	1 OPL Conservative Conference Call 4:30pm	2 12:00-12:30pm BK Courtesy Call w/ Sen. Schumer (D-NY) RNC Memo "leak"	3 Former Colleagues Letter of Endorsement 2:00-2:30pm BK Courtesy Call w/ Sen. Brownback (R- KS) 3:15 pm-3:45pm BK Courtesy Call w/ Sen. Graham (R-SC)	4 POTUS Nat'l Day Prayer Former Solicitors General Letter Yale Law School Alum Letter Judges Stapleton and Becker Letter of Endorsement WSJ Editorial	5 Former Attorneys General Letter	6
7	8 POTUS Judges Assoc. (TBD Press) WH Judicial Coalition Briefing Indian Treaty Room 2:30pm National Religious Broadcasters Call 4pm OPL Conservative Conference Call 4:30pm	9 <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: auto;">2pm Senate Committee Hearing</div>	10 <div style="background-color: black; color: white; padding: 5px; width: fit-content; margin: auto;">RNC Gala</div>	11 TBD Press Event Senate Committee Vote (T)	12	13
14	15 OPL Conservative Conference Call 4:30pm	16	17	18	19	20 Possible Radio Address (TBD)
		<div style="border: 1px solid black; padding: 5px; width: 100%;">TBD BK Courtesy Calls</div>				
21	22 Senate Floor Debate this week (T) OPL Conservative Conference Call 4:30pm	23	24	25	26	27
28	29 Memorial Day	30 OPL Conservative Conference Call 4:30pm	31	1	2	3

Rao, Neomi J.

From: Brown, Jamie E.
Sent: Tuesday, May 09, 2006 10:26 AM
To: (BJones@rnchq.org); (Elisebeth.C.Cook@usdoj.gov); (MRhoades@rnchq.org); Dixon, Grant; Dunne, Dianna L.; Goeglein, Tim; Healy, Erin E.; Jennings, Jeffery S.; Kristi Remington (Kristi.L.Macklin@usdoj.gov); Mamo, Jeanie S.; Perino, Dana M.; Rachel Brand (Rachel.Brand@usdoj.gov); Rao, Neomi J.; Rethmeier, Blain K.; Sinatra, Nicholas A.; Taylor, Sara M.
Subject: FW: KAVANAUGH/REID/A Closer look

From: Stewart, Don (Cornyn) [mailto:Don_Stewart@cornyn.senate.gov]
Sent: Tuesday, May 09, 2006 10:16 AM
Subject: KAVANAUGH/REID/A Closer look

A Closer Look: Brett Kavanaugh's Legal Credentials

***"It's beyond difficult to take Brett Kavanaugh's opponents seriously when after three years it is clear that they still haven't reviewed even basic facts about his record."
 -U.S. Sen. John Cornyn (R-Texas)***

The Minority Leader's Accusation

The Minority Leader told reporters recently that the D.C. Circuit nominee's **legal experience "is nonexistent."** Sen. Reid also said: **"I'm not sure he's ever been in a courtroom."** (5/2/06)

Since Mr. Kavanaugh was first nominated to the federal bench in July 2003, Democrats have had **ample opportunity to examine his resume and record.** The Minority Leader's flippant remark not only underscores his apparent lack of knowledge about Mr. Kavanaugh's experience—it also demonstrates that **Democrat opposition has little to do with Kavanaugh and everything to do with opposition to the President's judicial nominees generally.**

The Facts

Brett Kavanaugh is a dedicated public servant and accomplished attorney who has briefed, filed, and argued numerous cases before the highest federal appellate courts in the nation. His academic record, legal experience, and professional reputation are all of exceptional quality. A sample Brett Kavanaugh's legal experience and academic accomplishments include:

- *Three* prestigious federal appeals court clerkships, including as a law clerk to Justice Anthony M. Kennedy of the U.S. Supreme Court
- Attorney, Office of the Solicitor General of the United States
- Partner, Kirkland and Ellis LLP
- Argued and briefed appellate matters before the U.S. Supreme Court, the U.S. Courts of Appeals for the D.C., Eighth, and Eleventh Circuits, and the Appellate Division of the New Jersey

Superior Court

- Argued motions, filed briefs and tried cases before the U.S. District Court for the District of Maryland, the federal Judicial Panel on Multidistrict Litigation, the Circuit Court for Baltimore City, and the U.S. District Court for the Eastern District of Arkansas
- Filed amicus-briefs with the U.S. Supreme Court in Good News Club v. Milford Central School, 533 U.S. 98 (2001), and Lewis v. Brunswick, No. 97-288
- Filed briefs and conducted oral arguments on behalf of America Online (AOL) in a series of class-action lawsuits in a number of federal district courts around the country
- Legal Counsel to the President of the United States
- Associate Counsel, Office of Independent Counsel
- Yale Law School, J.D. (Notes Editor, *Yale Law Journal*)
- Authored scholarly articles for the Georgetown Law Journal and Yale Law Journal
- Taught as a guest lecturer at various law schools

<http://cornyn.senate.gov>

Rao, Neomi J.

From: Sinatra, Nicholas A.
Sent: Monday, May 08, 2006 11:40 AM
To: Morton Intern, James B.; Brian, Brown, Jamie E.; Danny D; Dixon, Grant; Elisebeth Cook; Goeglein, Tim; Healy, Erin E.; Kristi Remington; Perino, Dana M.; Rao, Neomi J.; Sara Taylor; Scott; Sinatra, Nicholas A.
Subject: Agenda for Judicial Briefing Today

Here is the agenda for the Briefing today. Please drop me a note if you plan to attend if you have not done so already. I would like to have a good head count for the layout of the room. thx Nick



Judicial Coalition
White House Briefing
Monday, May 8, 2006
2:30 p.m. – 3:30 p.m.
EEOB Indian Treaty Room

Agenda

- | | |
|-----------------------|--|
| 2:30 p.m. – 2:35 p.m. | The Honorable Tim Goeglein
Special Assistant to the President and Deputy Director of Public Liaison |
| 2:35 p.m. – 2:50 p.m. | The Honorable Karl Rove
Deputy Chief of Staff and Senior Advisor |
| 2:50 p.m. – 3:10 p.m. | The Honorable Harriet Miers
Counsel to the President |
| 3:10 p.m. – 3:30 p.m. | The Honorable Jamie Brown
Special Assistant to the President for Legislative Affairs |

Livingston?

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Handwritten Note	Meeting re: Brett	1	04/28/2006	P5;

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[Brett Kavanaugh]: Kavanaugh - 2006

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Rao, Neomi J.

From: Kavanaugh, Brett M.

Sent: Wednesday, May 03, 2006 10:04 AM

To: 'Kristi.R.Macklin@usdoj.gov'; Brown, Jamie E.; Rao, Neomi J.; Dixon, Grant; Kelley, William K.

Subject: Per Cornyn question, list of courts/states in which I have argued in court

I am confirming that there are no more, but I have this ...

Supreme Court of the United States

Fifth Circuit

D.C. Circuit

New Jersey

Maryland

District of Columbia

Texas

Alabama

Missouri

New York

Massachusetts

May Judicial Coalition—Kavanaugh

Last Updated
5/1/2006 8:30 PM

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7	8 POTUS Judges Assoc. (TBD Press) WH Judicial Coalition Briefing Indian Treaty Room 2pm National Religious Broadcasters Call 4pm OPL Conservative Conference Call 4:30pm	9 Former Solicitors General Letter (T)	10 <div style="text-align: center; border: 1px solid black; background-color: #cccccc; padding: 2px;">TBD BK Courtesy Calls</div> <div style="text-align: center; background-color: black; color: white; padding: 2px;">RNC Gala</div>	11 TBD Press Event Former Attorneys General Letter (T)	12	13 Possible Radio Address (TBD)
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28	29 Memorial Day	30 OPL Conservative Conference Call 4:30pm	31	1	2	3

May Judicial Coalition—Kavanaugh

Last Updated
4/29/2006 4:30 PM

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
30	1 OPL Conservative Conference Call 4:30pm	2 Former Colleagues Letter of Endorsement <i>Schumer</i> (WH, Senate or RNC) Memo	3 TBD Press Event Former Attorneys General Letter Former Solicitors General Letter	4 POTUS Nat'l Day Prayer Senate Committee Vote (T) 9:30 <i>Leonard - to target media outlets</i>	5	6
7 <i>open closed press</i>	8 POTUS Judges Event WH Judicial Coalition Briefing Indian Treaty Room 2pm National Religious Broadcasters Call 4pm OPL Conservative Conference Call 4:30pm	9 <i>RPC mtg -</i>	10	11	12	13 <i>Radio Address?</i>
14	15 Senate Floor Debate This week (T) OPL Conservative Conference Call 4:30pm	16 <i>*</i>	17 RNC Gala	18	19	20
21	22 OPL Conservative Conference Call 4:30pm	23	24	25	26	27
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May

Last Updated
4/29/2006 4:30 PM

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7	8 POTUS Judges Event WH Judicial Coalition Briefing EEOB 350 TBD Time OPL Conservative Conference Call 4:30pm	9	10	11	12	13
14	15 Senate Floor Debate This week (T) OPL Conservative Conference Call 4:30pm	16	17 RNC Gala	18	19	20
21	22 OPL Conservative Conference Call 4:30pm	23	24	25	26	27
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BRETT M. KAVANAUGH

Nominee to the U.S. Court of Appeals for the District of Columbia Circuit

- Throughout his career as an appellate lawyer, a government lawyer, and an Assistant to the President, Brett Kavanaugh has demonstrated legal excellence and the fair-minded temperament to serve as a federal appellate judge.
- Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him superbly qualified for the D.C. Circuit. He has dedicated the majority of his 16 years of practice to public service.
 - At present, Mr. Kavanaugh serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for coordinating virtually all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President, during which time he worked on the numerous constitutional, legal, and ethical issues handled by that office.
 - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.
 - Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.
- Mr. Kavanaugh specialized in appellate law and has extensive experience in the federal appellate courts, both as a law clerk and as counsel.
 - Mr. Kavanaugh has argued both civil and criminal matters before the U.S. Supreme Court and appellate courts throughout the country.
 - Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Alex Kozinski of the Ninth Circuit and Judge Walter Stapleton of the Third Circuit.
 - Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.
- The American Bar Association has consistently rated Mr. Kavanaugh "Well Qualified" or "Qualified" to serve on the D.C. Circuit.
- Mr. Kavanaugh has impeccable academic credentials. He received his B.A. from Yale College and his law degree from Yale Law School, where he served as Notes Editor of the Yale Law Journal.

- In addition to devoting most of his career to public service, Mr. Kavanaugh regularly offers his legal expertise and personal time to serving his community.
 - While in private practice, Mr. Kavanaugh took on pro bono matters, including representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop construction of a synagogue in the county.
 - At the request of the Democratic Mayor of Miami, Mr. Kavanaugh represented, on a pro bono basis, six-year-old Elian Gonzalez after the Immigration and Naturalization Service's decided to return him to Cuba.
- People from across the political spectrum support Mr. Kavanaugh's nomination to the D.C. Circuit and have expressed their admiration for his professional acumen and his personal integrity and fairness.
 - Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit said of Mr. Kavanaugh, "He really is a superstar. He is a rare match of talent and personality."
 - William P. Barr, Vice President and General Counsel of Verizon and former Attorney General, wrote, "Brett quickly established himself as one of the key outside lawyers I went to on some of my toughest legal issues. He has a keen intellect, exceptional analytical skills, and sound judgment. His writing is fluid and precise. I found that he was able to see all sides of an issue and appreciate the strengths and weakness of competing approaches. He was particularly effective in dealing with novel issues which required some original thinking. ... In addition to his powerful legal skills, I can say unequivocally that he possesses precisely the temperament we seek in our federal judges. He has a profound sense of humility and the intellectual curiosity and honesty to explore and consider contending positions. He is patient and highly considerate of others. Above all, he is blessed with a delightful sense of humor."
 - According to Mark H. Tuohey III, former President of the District of Columbia Bar, "[Mr. Kavanaugh] is exceptionally well qualified to serve on one of the nation's most important appellate courts, as he possesses keen intellectual prowess, superior analytical skills and a strong commitment to applying the role of law in a fair and impartial manner. As well, Mr. Kavanaugh's interpersonal skills will enable him to become a strong collegial member of a court where personal relationships lend themselves to a better administration of justice."
 - Pamela Harris, Washington, D.C. attorney and Yale Class of 1990, wrote, "At a time when politics and law have become so deeply divisive, Brett stands out as someone who refuses to personalize policy disagreements. He never belittles or condescends to those with whom he disagrees. His long-standing friendships with those outside his political circle attest to the fact that he continues to command the respect and affection of political adversaries."

BRETT M. KAVANAUGH
Nominee to the U.S. Court of Appeals for the DC Circuit

- **Brett Kavanaugh is a well-respected attorney and highly qualified candidate for the DC Circuit, with strong bi-partisan support from the legal community.** Mr. Kavanaugh has an extraordinary range of experience in the public and private sectors that makes him well-suited for the D.C. Circuit. **The ABA rated Mr. Kavanaugh “Well Qualified” to serve on the DC Circuit.**
 - ✓ He has practiced law in the private and public sectors, for 14 years. He was a partner at the law firm of Kirkland & Ellis, and has an outstanding reputation in the legal community.
 - ✓ Judge Walter Stapleton said of Mr. Kavanaugh, “He really is a superstar. He is a rare match of talent and personality.” Delaware Law Weekly, May 22, 2002.
 - ✓ After arguing against Mr. Kavanaugh in the Supreme Court, Washington attorney Jim Hamilton stated, “Brett is a lawyer of great competency, and he will be a force in this town for some time to come.” News Conference with James Hamilton, Federal News Service, June 25, 1998.
 - ✓ Mr. Kavanaugh graduated from Yale College and Yale Law School, and served as the Notes Editor on the prestigious Yale Law Journal.

- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**
 - ✓ Mr. Kavanaugh clerked for Supreme Court Justice Anthony Kennedy, as well as Judge Walter Stapleton of the Third Circuit and Judge Alex Kozinski of the Ninth Circuit.
 - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General’s office represents the United States before the Supreme Court.
 - ✓ Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

- **Mr. Kavanaugh has dedicated the majority of his career to public service in both the Executive and Judicial branches.**
 - ✓ In addition to his service for three appellate judges and his work at the Department of Justice, Mr. Kavanaugh has worked for President Bush since 2001.
 - ✓ He currently serves as Assistant to the President and Staff Secretary. In that capacity, he is responsible for the traditional functions of that office, including

coordinating all documents to and from the President. He previously served as Senior Associate Counsel and Associate Counsel to the President. In that capacity, he worked on the numerous constitutional, legal, and ethical issues traditionally handled by that office.

- ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.
- **Mr. Kavanaugh believes in giving back to his community.**
 - ✓ **While in private practice, Mr. Kavanaugh took on pro bono matters, including** representation of the Adat Shalom congregation in Montgomery County, Maryland against the attempt to stop the construction of a synagogue in the county.
 - ✓ In addition to being active in his church, Mr. Kavanaugh has coached youth basketball and participated in other community activities.

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's highly controversial judicial nominees. A look at the candidates Mr. Kavanaugh has helped select for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy.

Facts:

- The President selects judicial nominees. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
 - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees.
 - ✓ The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.
- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- Democratic senators had positive things to say about President Bush's first group of nominees at the time of their nomination.
 - ✓ Senator Leahy said on an NPR radio broadcast that he was encouraged by the President's efforts to balance his nominees: "Had I not been encouraged, I would not have been here today. Some have said that he might get more of a gridlock with a 50-50 Senate. I think it's just the opposite. I think this calls upon us to do the best to cooperate and make it work."
 - ✓ Senator Daschle stated: "If I might just say, as leader, I'm pleased that the White House has chosen to work with us on the first group of nominations."

Brett Kavanaugh – Executive Privilege

Allegation: When he worked for Independent Counsel Ken Starr, Brett Kavanaugh repeatedly challenged assertions of privilege by Clinton administration officials. Now that he works for President Bush, however, he defends the same assertions of privilege.

Facts:

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of a criminal investigation. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.
- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).
 - ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the crimes at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).
 - ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct 2081, 2090.
- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.
 - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.
 - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.

- ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.
- ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.
 - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).
- While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.
 - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.
 - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.
- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.
 - ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."
 - ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective

discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)

- ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." See *Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.
- Whether working as an attorney for the Independent Counsel or for the President of the United States, Mr. Kavanaugh makes the best legal arguments possible on behalf of his client. Such arguments do not necessarily reflect his personal views.
- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Rao, Neomi J.

From: Kristi.R.Macklin@usdoj.gov
Sent: Tuesday, May 02, 2006 10:25 AM
To: Brown, Jamie E.; Dixon, Grant; Rao, Neomi J.
Cc: Elisebeth.C.Cook@usdoj.gov
Subject: RE: Leahy's remarks

The legislative clerk read the nomination of Michael Ryan Barrett, of Ohio, to be United States District Judge for the Southern District of Ohio.

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The PRESIDING OFFICER. The Senator from Vermont is recognized for 5 minutes.

Mr. LEAHY. Mr. President, I assume the opponents of these nominations would want to be recognized, or the Republican majority supporting him. I understand there are three Republicans to speak on the judges and one Democrat is allowed to speak.

No one is here, so I will speak.

I will support this nominee, Michael Barrett. He has the support of his home State Senators. I have also heard from both Democrats and Republicans in Ohio. That makes it worth supporting. In fact, the nomination of such consensus nominees is an indication of what should be done in States, and would lead to the confirmation of more judges. In January 2001, we were following a shutdown of judges going through. As the distinguished Presiding Officer knows, the Republicans were determined to block virtually all of President Clinton's judges for a long period of time. I became chairman and for 17 months moved a record number of judges for President Bush, 100. Actually, since 2001, while the Republican majority has not moved President Bush's judicial nominees anywhere near as fast as I did, we have still moved 238. That includes two Supreme Court Justices, and 43 circuit court judges. However, we do have some that create problems.

Unfortunately, as demonstrated by the recent withdrawals of several nominees, all too often this White House seems more interested in rewarding cronies and picking political fights than in selecting lifetime appointments after thorough vetting. Sadly, the Republican Senate has proceeded to rubber stamp these important nominations and failed in its role as a constitutional check on the President.

The controversial nominations of Judge Terrence Boyle and Brett Kavanaugh are contemporary cases in point. With the extreme right-wing and special interest groups agitating for a fight over judicial nominations, the Republican leader of the Senate is answering their demands by seeking to force Senate debate on these controversial nominees. Rather than focus on proposals to end the subsidies to big oil and rein in gas prices, rather than devote our time to immigration reform legislation, rather than completing a budget, the Republican leader came to the floor last week to signal a fight over controversial judicial nominations is in the offing. Such a controversial maneuver serves only to divide and distract us from America's real problems. During this President's administration, gas prices have more than doubled and undocumented immigrants have doubled, but judicial vacancies have been cut in half from the time when Republicans in the Senate were stalling President Clinton's judicial nominations. Despite the real problems that confront Americans with respect to security, health insurance, rising health costs, rising energy costs, and spiraling deficits and debt, some would rather pick an election year fight over judicial nominations.

In fact, I mentioned Judge Boyle. I contrast his nomination to the nomination of Michael Barrett. Michael Barrett, as I said, will go through easily. I will support him. I will vote for him, as I told the distinguished Senator, the former Lieutenant Governor of Ohio, now senior Member of the U.S. Senate, Mr. DeWine.

But you take somebody like Judge Boyle. Here is somebody who has violated every judicial ethic you can think of. He ruled on multiple cases involving corporations in which he held investments. In at least one instance--this is chutzpah beyond all understanding--he was presiding over a case involving General Electric, and while doing

that, he bought stock in General Electric; then, 2 months later, he ruled in favor of General Electric.

Now, in the first year of law school you might get an example like this because it is so clear-cut and easy to understand. This is amazing--amazing--not withstanding all the other conflicts of interest he had in other cases. Whether or not it turns out that Judge Boyle broke Federal law or canons of judicial ethics, these types of conflicts of interest have no place on the Federal bench.

This is not the first judicial nominee to engage in these kinds of apparent ethical lapses. Less than two months ago, the President withdrew the nomination of Judge James Payne to the Court of Appeals for the 10th Circuit after information became public about that nominee's rulings in a number of cases in which he appears to have had conflicts of interest. Those conflicts were pointed out not by the administration's screening process or by the ABA, but by journalists.

During the last few months, President Bush also withdrew the nominations of Judge Henry Saad to the Court of Appeals for the 6th Circuit and Judge Daniel P. Ryan to the Eastern District of Michigan.

And we saw the arrest of another Bush administration official and former judicial nominee to the Court of Appeals for the 4th Circuit, Claude Allen, who had earlier withdrawn as a nominee and more recently resigned his position as a top domestic policy adviser to the President. When we are considering lifetime appointments of judicial officers who are entrusted with protecting the rights of Americans, it is important to be thorough. Unfortunately, all too often this White House seems more interested in rewarding cronies.

They add to the long list of nominations by this President that have been withdrawn. Among the more well known are Bernard Kerik to head the Department of Homeland Security and Harriet Miers to the Supreme Court. It was, as I recall, reporting in a national magazine that doomed the Kerik nomination. It was opposition within the President's own party that doomed the Miers nomination.

Over the weekend we heard that this administration's former FDA director is under investigation and its political director testified, again before a federal grand jury. Of course, Mr. Libby remains under indictment, and Messrs. Safavian, Scanlon, Abramoff and a number of House Republicans are caught up in another criminal probe.

In light of this long list of failures of the White House to fulfill its commitments to the American people to be above reproach and its lackluster vetting process, it is more important than ever that the Senate and the Senate Judiciary Committee afford nominees the kind of careful scrutiny that will yield enough information to decide on a nominee's fitness for an important appointment. In Judge Boyle's case, not only were his answers to the committee's questions evasive, but he failed to produce even the unpublished opinions he issued from the bench.

I am also concerned that the Senate Judiciary Committee is being required to consider the nomination of Brett Kavanaugh to the United States Court of Appeals for the DC Circuit without a complete record.

The Democratic members of the committee have twice asked for another hearing in connection with his nomination. Mr. Kavanaugh failed to provide meaningful and substantive responses to many of the questions posed to him at his first hearing and he delayed for seven months before providing evasive and incomplete answers to written questions.

In addition, a new hearing is warranted because several troubling issues have come to light since his initial nomination. As Associate White House Counsel and staff secretary, Mr. Kavanaugh has served in the inner circle of the White House at a time when many controversial policies and decisions were being considered. Senators have not had a chance to question him about his role in connection with those matters.

For example, what was Mr. Kavanaugh's role in connection with the warrantless spying on Americans? What was his involvement in the policies affecting détainee treatment and interrogation? What was his involvement in connection with military tribunals, torture, and rendition of prisoners to other countries? Given the scandals now plaguing the White House, it is important to know whether Mr. Kavanaugh has had a role in connection with the actions of Jack Abramoff, Michael Scanlon, David Safavian, the matters being investigated in connection with the Plame matter, and many other matters.

The wall of secrecy that the administration has maintained is no environment in which

carefully to consider an administration insider for a lifetime appointment to an important Federal judicial position.

I see the distinguished Senator from Ohio is in the Chamber. I urge people,

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do not just do a rubberstamp just because it is a member of your party who nominated these people. I think of the concern I heard from Republicans in this body when I objected to a judicial nominee to the Court of Appeals for the Fourth Circuit, Claude Allen. Nobody said a word when he got arrested for fraud. But I bet you they breathed a sigh of relief that I blocked it before.

I yield the floor.

-----Original Message-----

From: Jamie E. Brown@who.eop.gov [mailto:Jamie_E._Brown@who.eop.gov]
Sent: Tuesday, May 02, 2006 10:21 AM
To: Macklin, Kristi R; Grant_Dixton@who.eop.gov; Neomi_J._Rao@who.eop.gov
Subject: RE: Leahy's remarks

Attachment stripped. Can you please send as e-mail text?

-----Original Message-----

From: Kristi.R.Macklin@usdoj.gov [mailto:Kristi.R.Macklin@usdoj.gov]
Sent: Tuesday, May 02, 2006 10:07 AM
To: Dixon, Grant; Rao, Neomi J.; Brown, Jamie E.
Subject: FW: Leahy's remarks

fyi

From: Best, David T
Sent: Tuesday, May 02, 2006 10:06 AM
To: Macklin, Kristi R
Subject: Leahy's remarks

Leahy's remarks prior to the vote yesterday afternoon regarding Kavanaugh and Boyle (ethics problems.)

Brett Kavanaugh: ABA Rating

Issue: The American Bar Association (ABA) downgraded Mr. Kavanaugh's rating from Well Qualified/ Qualified to Qualified/Well Qualified. This demonstrates that he should not be confirmed.

Talking Points:

- The American Bar Association (ABA) has rated Mr. Kavanaugh three times, twice as "Well Qualified" and once as "Qualified." In those three reviews, all 42 individual ratings by the members of the committee have been "Well Qualified" or "Qualified" ratings.
- Mr. Kavanaugh is **highly qualified to serve on the D.C. Circuit**—he has a distinguished record of public service and private sector experience comparable to each of the sitting judges of that court.
 - As Assistant to the President and Staff Secretary, Mr. Kavanaugh has served at the highest levels of the Executive Branch. He previously served as Senior Associate Counsel and Associate Counsel to the President.
 - Prior to his service in this Administration, Mr. Kavanaugh was a partner at the law firm of Kirkland & Ellis, where his practice focused on appellate matters.
 - Mr. Kavanaugh also served as Associate Counsel in the Office of Independent Counsel, where he handled a number of novel constitutional issues presented during that investigation.
- **Mr. Kavanaugh's extraordinary range of experience and credentials most closely resemble those of now-Chief Justice John Roberts and Judge Merrick Garland, who was nominated by President Clinton.**

Brett Kavanaugh – Executive privilege

Allegation: Brett Kavanaugh has changed his position on executive privilege. While working for Independent Counsel Kenneth Starr during the Clinton Administration, Brett Kavanaugh argued for a narrow interpretation of the privilege. As Associate White House Counsel, however, he strongly asserted executive privilege for the Bush Administration in a variety of cases, including in his work drafting Executive Order 13233, which limits public access to presidential records.

Facts:

- While serving in the White House Counsel's Office, Mr. Kavanaugh's work on executive privilege has been consistent and evenhanded.
 - ✓ Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield records regarding the pardons issued by Bill Clinton at the end of his presidency and to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.
- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel (OIC) was consistent with his work on Executive Order 13233.
 - ✓ On behalf of the OIC, Mr. Kavanaugh argued that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation.
 - ✓ The federal courts of appeals agreed with the Independent Counsel's position in those cases.
 - ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.
- In a 1998 article for the *Georgetown Law Journal*, Mr. Kavanaugh argued that executive privilege may exist only with respect to national security and foreign affairs information in the context of grand jury and criminal trial subpoenas.
 - ✓ The President of the American Bar Association, in another article on the subject, complimented Mr. Kavanaugh's "well-reasoned and objectively presented recommendations" and noted his "most scholarly and comprehensive review of the issues of executive privilege."

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he is too young and lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials, significant legal experience in the federal appellate courts, and a proven commitment to public service.**
- The American Bar Association (ABA), has rated Mr. Kavanaugh three times, twice as “Well Qualified” and once as “Qualified.” In those three reviews, all 42 of the individual ratings by the members of the committee have been “Well Qualified” or “Qualified” ratings.
- **Mr. Kavanaugh’s illustrious and varied legal career allows him to bring a wealth of different experiences to the federal bench.**
 - ✓ Mr. Kavanaugh has specialized in appellate law and has argued before the U.S. Supreme Court and state and federal appellate courts throughout the country.
 - ✓ Mr. Kavanaugh has extensive public service as Assistant to the President and Staff Secretary, Senior Associate Counsel to the President, and as a special prosecutor.
 - ✓ Mr. Kavanaugh practiced as a partner at the law firm of Kirkland & Ellis where he specialized in appellate law.
 - ✓ Kavanaugh served as a law clerk to U.S. Supreme Court Justice Anthony Kennedy, and to Court of Appeals Judges Alex Kozinski and Walter Stapleton.
- Prior to his appointment to the U.S. Court of Appeals for the First Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh’s service.
 - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.
 - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy.

- Federal judges are appointed from diverse backgrounds in private practice and public service. Prior judicial experience is hardly a requirement for appointment to the federal bench.
 - ✓ Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.
 - ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**
- **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the D.C. Circuit.**

Brett Kavanaugh – Executive Privilege

Allegation: When he worked for Independent Counsel Ken Starr, Brett Kavanaugh repeatedly challenged assertions of privilege by Clinton administration officials. Now that he works for President Bush, however, he defends the same assertions of privilege.

Facts:

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of a criminal investigation. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.
- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).
 - ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the crimes at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).
 - ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct. 2081, 2090.
- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.
 - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.
 - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.

- ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.
- ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally based privileges. It does not address when an assertion of executive privilege should be made or would be successful.
 - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).
- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.
 - ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."
 - ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)
 - ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." *See Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.

Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school’s broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh’s radical argument, holding that the pre-game prayers in question violated the First Amendment’s Establishment Clause.

Facts:

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student’s religious speech.**
 - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message. A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
 - ✓ As Mr. Kavanaugh’s brief pointed out, **the school district’s policy did “not require or even encourage the student speaker to invoke God’s name, to utter religious words, or to say a ‘prayer’ of any kind. Nor, on the other hand [did] the school policy prevent the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech.”
 - ✓ Mr. Kavanaugh argued on behalf of his clients that the school district’s policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God’s name or say a “prayer” in his or her pre-game statement. **His brief pointed out: “The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God.”**
- **Mr. Kavanaugh’s arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech.
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**
- Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.

Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program. The program provided children in failing public schools with access to a high-quality education.**
 - ✓ The opportunity scholarship program is a **limited program** that allows **students at failing public schools** to transfer to a better public school or a private school at public expense.
 - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
 - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents.**
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials.** All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida. The Florida Supreme Court declined to review the Court of Appeal's decision. *See Bush v. Holmes*, 767 So. 2d 668 (2000).
- During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, *regardless* of whether they were religious or nonsectarian.
- **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population.** The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.
- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his clients in the Florida litigation.

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled President Clinton's sexual encounters with Monica Lewinsky.
- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law.**
 - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment.
- **The Independent Counsel's report never stated that President Clinton should have been impeached. The report explained that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**
 - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.
 - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.
 - ✓ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings." S.Res. 44, 106th Cong. (1999).**
 - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).
 - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for “giving false, misleading, and evasive answers that were designed to obstruct the judicial process” in Paula Jones’s sexual harassment lawsuit and ordered him to pay a fine of \$90,000.
- ✓ In January 2001, President Clinton admitted to giving “evasive and misleading answers, in violation of Judge Wright’s discovery orders” during his deposition in Paula Jones’s sexual harassment lawsuit. As a result, he agreed to pay a \$25,000 fine and give up his law license for five years.
- **The U.S. Senate already has confirmed numerous judicial and other nominees who worked for Independent Counsel Ken Starr. Nearly all of these nominees were confirmed either unanimously or by voice vote.**
 - ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the U.S. Court of Appeals for the Eighth Circuit on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.
 - ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001, by a vote of 97 to 0.
 - ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002, by a voice vote.
 - ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed for a seat on the U.S. District Court for Northern District of Georgia on June 16, 2004, by a vote of 97-0. He was previously confirmed to be the U.S. Attorney for the Northern District of Georgia, by a voice vote.
 - ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the Deputy Secretary of the Department of Health and Human Services on July 22, 2005, by a voice vote. Prior to that, he was confirmed as General Counsel of HHS on August 3, 2001, by a voice vote.
 - ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003, by a voice vote.
 - ✓ Rod Rosenstein served as Associate Independent Counsel from 1995-1997 and was confirmed to be the U.S. Attorney for the District of Maryland on July 1, 2005, by a voice vote.
 - ✓ Kevin Martin served as Associate Independent Counsel and was confirmed to be a Member of the Federal Communications Commission on May 25, 2001, by a voice vote.

Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
 - ✓ Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of Independent Counsel's report on Vince Foster's death.
 - ✓ In the report prepared by Mr. Kavanaugh, the Office of Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
 - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
 - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
 - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
 - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr. Kavanaugh because "[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious."
- **The Office of the Independent Counsel's investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

- ✓ The Special Division of the U.S. Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters “relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.”
- ✓ The death of Vince Foster fell within the Office of the Independent Counsel's jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

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- The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his clients in the Florida litigation.

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled President Clinton's sexual encounters with Monica Lewinsky.
- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law.**
 - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment.
- **The Independent Counsel's report never stated that President Clinton should have been impeached. The report explained that the Office of Independent Counsel had uncovered substantial and credible information that *may* constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**
 - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.
 - ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.
 - ✓ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton "gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings." S.Res. 44, 106th Cong. (1999).**
 - Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).
 - Then-Congressman Schumer, as Senator-elect stated that "it is clear that the President lied when he testified before the grand jury."

- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for “giving false, misleading, and evasive answers that were designed to obstruct the judicial process” in Paula Jones’s sexual harassment lawsuit and ordered him to pay a fine of \$90,000.
- ✓ In January 2001, President Clinton admitted to giving “evasive and misleading answers, in violation of Judge Wright’s discovery orders” during his deposition in Paula Jones’s sexual harassment lawsuit. As a result, he agreed to pay a \$25,000 fine and give up his law license for five years.
- **The U.S. Senate already has confirmed numerous judicial and other nominees who worked for Independent Counsel Ken Starr. Nearly all of these nominees were confirmed either unanimously or by voice vote.**
 - ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the U.S. Court of Appeals for the Eighth Circuit on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.
 - ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001, by a vote of 97 to 0.
 - ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002, by a voice vote.
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 - ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the Deputy Secretary of the Department of Health and Human Services on July 22, 2005, by a voice vote. Prior to that, he was confirmed as General Counsel of HHS on August 3, 2001, by a voice vote.
 - ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003, by a voice vote.
 - ✓ Rod Rosenstein served as Associate Independent Counsel from 1995-1997 and was confirmed to be the U.S. Attorney for the District of Maryland on July 1, 2005, by a voice vote.
 - ✓ Kevin Martin served as Associate Independent Counsel and was confirmed to be a Member of the Federal Communications Commission on May 25, 2001, by a voice vote.

Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
 - ✓ Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of Independent Counsel's report on Vince Foster's death.
 - ✓ In the report prepared by Mr. Kavanaugh, the Office of Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
 - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
 - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
 - ✓ While some have complained that the Independent Counsel's investigation of Vince Foster's death took too long and was unnecessary, a careful, thorough, and detailed investigation was necessary under the Independent Counsel's mandate.
- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
 - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr. Kavanaugh because "[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious."
- **The Office of the Independent Counsel's investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

- ✓ The Special Division of the U.S. Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters “relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.”

- ✓ The death of Vince Foster fell within the Office of the Independent Counsel's jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

Withdrawal Marker

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Draft	Brett M. Kavanaugh	16	N.D.	P5;

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For a complete list of items withdrawn from this folder, see the
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COLLECTION:

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[Brett Kavanaugh]: Kavanaugh - 2006

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FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES**Presidential Records Act - [44 U.S.C. 2204(a)]**

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

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Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

- Positive talkers
- Committee talkers

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's right wing judicial nominees, and he coordinated the nominations of Priscilla Owen and Janice Rogers Brown.

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
 - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.
- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."
- The President has made clear that he has no "litmus tests" for nominees to the federal courts. No candidate is ever asked for his or her personal opinion on any specific legal or policy issue. The President nominates individuals who are committed to applying the law, not their personal policy preferences.
- Judges Priscilla Owen and Janice Rogers Brown were confirmed once given an up-or-down vote by the full Senate.

Brett Kavanaugh – Privilege Arguments v. Work on E.O. 13233

Allegation: While working for Independent Counsel Kenneth Starr, Brett Kavanaugh fought the Clinton Administration for access to confidential communications. As Associate White House Counsel in the Bush Administration, however, Mr. Kavanaugh helped to draft Executive Order 13233, which dramatically limits public access to presidential records. Such a stark inconsistency demonstrates Mr. Kavanaugh's ideological and partisan agenda.

Facts:

- **Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.**
 - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information **relevant to a federal criminal investigation**.
 - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that the attorney-client privilege, once a client was deceased, did not apply with full force in **federal criminal proceedings**, and that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in **federal criminal proceedings**.
 - ✓ The federal courts of appeals agreed with Mr. Kavanaugh's position in those cases.
 - ✓ **Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.**
- Executive Order 13233 simply **establishes policies and procedures** to govern requests for presidential records and the assertion of constitutionally-based privileges. **It does not purport to set forth those circumstances under which an assertion of executive privilege should be made and/or would be successful.**
 - ✓ **Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges.** See Section 2(b).
 - ✓ In his *Georgetown Law Journal* article, which was authored during the Clinton Administration, Mr. Kavanaugh specifically recognized the difference between asserting executive privilege in a criminal context and outside of a criminal context.
 - ✓ He argued that a presumptive privilege for Presidential communications existed and that "it may well be absolute in civil, congressional, and FOIA proceedings."

Mr. Kavanaugh wrote: "it is only in the discrete realm of criminal proceedings where the privilege may be overcome." See Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2171 (1998).

- **While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues has been consistent and evenhanded, whether the issue at hand involved the Bush Administration or the Clinton Administration.**
 - ✓ For example, Mr. Kavanaugh worked in the Counsel's Office when the Bush Administration asserted executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his presidency.
 - ✓ Mr. Kavanaugh likewise was involved in the Bush Administration's assertion of executive privilege to withhold from Congress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.

Brett Kavanaugh – Experience

Allegation: Brett Kavanaugh is not qualified to be a federal appellate judge because he lacks the necessary experience.

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**
- **In his three successive ratings by the ABA, Kavanaugh has received two ratings of “well qualified” and one of “qualified.” In those three reviews, all 42 of the individual ratings by the members of the committee have been “well qualified” or “qualified” ratings.**
 - ✓ He has practiced law in the private and public sectors for 16 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.
 - ✓ Mr. Kavanaugh has dedicated a substantial portion of his career, 13 years, to public service.
- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**
 - ✓ While serving as an Associate Counsel in the Office of Independent Counsel, Mr. Kavanaugh handled a number of the novel constitutional and legal issues presented during that investigation.
 - ✓ Mr. Kavanaugh has specialized in appellate law, as opposed to trial practice. He has excelled in his field, arguing before the Supreme Court and state and federal appellate courts throughout the country.
 - ✓ Mr. Kavanaugh’s legal experience is substantially similar to that of many Democrat appointees to the D.C. Circuit, including Harry Edwards, who was appointed to the court at the same age as Mr. Kavanaugh is now.
- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**
 - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.

- ✓ He clerked on the Ninth Circuit for Judge Alex Kozinski of the U.S. Court of Appeals.
- ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.
- ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General's office represents the United States before the Supreme Court.
- **Only 4 of the 21 judges confirmed to the D.C. Circuit since President Carter's term began in 1977 previously had served as judges.**
 - ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**
- Prior to his appointment to the 1st Circuit, Justice Stephen Breyer held positions that were similar to Mr. Kavanaugh's service.
 - ✓ Justice Breyer served as a counsel for the Watergate Special Prosecution Force.
 - ✓ Justice Breyer served as Chief Counsel of the Senate Judiciary Committee, for then-Chairman Edward Kennedy
- In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that "we must not drastically shrink the number of judicial nominees who have substantial experience in private practice." The Chief Justice also noted in his Report that "the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice."
 - ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.
 - ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.
 - ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.
- **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	Circuit	Confirmed
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996
Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997
Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

Brett Kavanaugh – *Georgetown Law Journal* Article

Allegation: In a 1998 article for the *Georgetown Law Journal*, Brett Kavanaugh argued for a narrow interpretation of executive privilege and specifically stated that courts could only enforce executive privilege claims with respect to national security and foreign affairs information. As Associate White House Counsel, however, Mr. Kavanaugh was involved with asserting executive privilege in a variety of other contexts, including documents relating to Vice President Cheney’s energy policy task force, the Enron investigation, and the Marc Rich pardon.

Facts:

- **Mr. Kavanaugh’s *Georgetown Law Journal* article demonstrates his impartiality and ability to analyze issues without respect to ideological or partisan concerns.**
 - ✓ While President Clinton was in office and thus subject to possible criminal indictment for perjury and obstruction of justice, Mr. Kavanaugh called on Congress in his article to clarify that a sitting President is not subject to criminal indictment while in office. See Brett M. Kavanaugh, *The President and the Independent Counsel*, Geo. L.J. 2133, 2157 (1998).
- **The positions taken by Mr. Kavanaugh as Associate White House Counsel are consistent with the views regarding executive privileges that he expressed in his *Georgetown Law Journal* article.**
 - ✓ In his *Georgetown Law Journal* article, Mr. Kavanaugh was addressing only claims of executive privilege **in response to grand jury subpoenas or criminal trial subpoenas** when he stated that courts would only enforce such claims in the context of national security or foreign affairs information. *Id.* at 2162.
 - ✓ Mr. Kavanaugh also argued, however, that a presumptive privilege for Presidential communications existed, not limited to the areas of national security and foreign affairs, and that “it may well be absolute in civil, congressional, and FOIA proceedings.” Mr. Kavanaugh clarified that “it is only in the discrete realm of criminal proceedings where the privilege may be overcome.” *Id.* at 2171.
 - ✓ As Associate White House Counsel, **Mr. Kavanaugh has never worked on a matter where the President invoked or threatened to invoke executive privilege in responding to a grand jury subpoena or a criminal trial subpoena.** There is thus no contradiction between the views expressed in his *Georgetown Law Journal* article and his actions while working at the White House.
- **Mr. Kavanaugh’s article presented a thoughtful examination of the problems associated with the independent counsel statute and offered a moderate and sensible set of recommendations for reform.**

- ✓ Among the difficulties Mr. Kavanaugh identified with the independent counsel system existing at the time were the length and politicization of independent counsel investigations. *Id.* at 2135.
- ✓ He also argued that the appointment and removal provisions pertaining to independent counsels, both in theory and in fact, led to unaccountable independent counsels. *Id.*
- ✓ To solve these problems, Mr. Kavanaugh set forth several proposals. For example, Mr. Kavanaugh suggested that independent counsels should be nominated by the President and confirmed by the Senate, and that the President should have absolute discretion over whether and when to appoint an independent counsel. *Id.* at 2135-36.
- ✓ Jerome Shestack, the President of the American Bar Association at the time that Mr. Kavanaugh's article was published, **complimented his "well-reasoned and objectively presented recommendations"** and noted his **"most scholarly and comprehensive review of the issues of executive privilege."** Jerome J. Shestack, *The Independent Counsel Act Revisited*, 86 Geo. L.J. 2011, 2019 (1998).

Brett Kavanaugh – Executive Privilege

Allegation: When he worked for Independent Counsel Ken Starr, Brett Kavanaugh repeatedly challenged assertions of privilege by Clinton administration officials. Now that he works for President Bush, however, he defends the same assertions of privilege.

Facts:

- The Independent Counsel challenged assertions of privilege by the Clinton Administration because it was part of a criminal investigation. In his capacity as an attorney for the Bush administration, Mr. Kavanaugh has not defended any assertion of executive privilege or attorney-client privilege in connection with a criminal investigation.
- While working for the Independent Counsel's office, Mr. Kavanaugh argued a case before the U.S. Supreme Court seeking notes taken by Vince Foster's attorney during a conversation nine days before Foster's suicide. The notes were sought in connection with whether presidential aides covered up Mrs. Clinton's role in the dismissal of White House travel office personnel. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).
 - ✓ The federal appeals court had ruled that the attorney's notes could be produced to the Independent Counsel if "they bear on a significant aspect of the crimes at issue." *Swidler & Berlin v. United States*, 124 F.3d 230 (1998).
 - ✓ The Supreme Court reversed the decision of the appellate court. In dissent, Justice O'Connor wrote that, "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication." *Swidler*, 118 S. Ct 2081, 2090.
- Mr. Kavanaugh's work on privilege issues for the Office of the Independent Counsel was consistent with his work on Executive Order 13233.
 - ✓ Mr. Kavanaugh argued on behalf of the Office of the Independent Counsel that government attorneys in the Clinton Administration could not invoke the attorney-client privilege to block the production of information relevant to a federal criminal investigation. The federal courts of appeal agreed with Mr. Kavanaugh's position.
 - ✓ Mr. Kavanaugh also argued on behalf of the Office of Independent Counsel that federal courts should not recognize a new "protective function privilege" for Secret Service Agents in federal criminal proceedings. The federal court of appeals agreed with Mr. Kavanaugh's position.

- ✓ Mr. Kavanaugh argued before the Supreme Court that the attorney-client privilege, once a client was deceased, did not apply with full force in federal criminal proceedings.
- ✓ Nothing in Executive Order 13233 purports to block prosecutors or grand juries from gaining access to presidential records in a criminal investigation.
- Executive Order 13233 simply establishes policies and procedures to govern requests for presidential records and the assertion of constitutionally-based privileges. It does not address when an assertion of executive privilege should be made or would be successful.
 - ✓ Executive Order 13233 specifically recognizes that there are situations where a party seeking access to presidential records may overcome the assertion of constitutionally based privileges. *See* Section 2(b).
- While working in the White House Counsel's Office, Mr. Kavanaugh's work on privilege issues was consistent and evenhanded, whether Bush or Clinton Administration records were at issue.
 - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege to shield records regarding the pardons granted by President Clinton at the end of his presidency.
 - ✓ While Mr. Kavanaugh worked in the Counsel's Office, the Bush Administration asserted executive privilege in response to a Congressional request for Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton Administration.
- With respect to the role that Mr. Kavanaugh may or may not have played in the GAO's lawsuit against Vice President Cheney's energy task force, it is the President who decides whether to challenge a lawsuit. Mr. Kavanaugh's duty as his attorney, which is the duty of all lawyers, is to make the best legal arguments possible for his client in every circumstance.
 - ✓ As Vice President Cheney stated contesting the merits of the GAO lawsuit, "What I object to, and what the President's objected to, and what we've told the GAO we won't do, is make it impossible for me or future vice presidents to ever have a conversation in confidence with anybody without having, ultimately, to tell a member of Congress what we talked about and what was said."
 - ✓ As the U.S. Supreme Court has stated, "Unless [the President] can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective

discharge of his duties depends." *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)

- ✓ The case against Vice President Cheney's energy task force was dismissed by a federal judge. The court held that the Comptroller General did not have standing to pursue an action seeking to compel the Vice President to disclose documents relating to meetings of the energy task force over which he presided." *See Walker v. Cheney*, 230 F. Supp.2d 51 (2002). GAO chose not to appeal the decision.
- Whether working as an attorney for the Independent Counsel or for the President of the United States, Mr. Kavanaugh makes the best legal arguments possible on behalf of his client. Such arguments do not necessarily reflect his personal views.
- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Vince Foster Investigation

Allegation: Brett Kavanaugh's work for Independent Counsel Kenneth Starr while he investigated the Clinton Administration demonstrates Mr. Kavanaugh's partisan, right wing agenda. In particular, Mr. Kavanaugh investigated the circumstances surrounding former Deputy White House Counsel Vince Foster's death for three years after four separate investigations already had concluded that Mr. Foster committed suicide.

Facts:

- **Mr. Kavanaugh's work on the investigation of Vince Foster's death demonstrates his fairness and impartiality.**
 - ✓ While working for Independent Counsel Kenneth Starr, Mr. Kavanaugh was the line attorney responsible for the Office of Independent Counsel's investigation into Vince Foster's death. Mr. Kavanaugh also prepared the Office of Independent Counsel's report on Vince Foster's death.
 - ✓ **In the report prepared by Mr. Kavanaugh, the Office of Independent Counsel concluded that Vince Foster had committed suicide, thus debunking alternative conspiracy theories advanced by critics of the Clinton Administration.**
 - ✓ Mr. Kavanaugh's role in the Vince Foster investigation evidences his ability to assess evidence impartially and refutes any allegation that his decision-making is driven by ideological or partisan considerations.
- **Mr. Kavanaugh's work on the investigation of Vince Foster's death was careful and thorough and demonstrates his outstanding skills as a lawyer.**
 - ✓ In investigating Vince Foster's death, Mr. Kavanaugh was required to manage and review the work of numerous FBI agents and investigators, FBI laboratory officials, and leading national experts on forensic and psychological issues.
 - ✓ Mr. Kavanaugh conducted interviews with a wide variety of witnesses concerning both the cause of Vince Foster's death and his state of mind.
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- **The report prepared by Mr. Kavanaugh demonstrated sensitivity to Vince Foster's family.**
 - ✓ Although photographs taken of Vince Foster's body after his death were relevant to the investigation, they were excluded from the report prepared by Mr.

Kavanaugh because “[t]he potential for misuse and exploitation of such photographs [was] both substantial and obvious.” See *Report on the Death of Vincent W. Foster Jr., By the Office of Independent Counsel, In re: Madison Guaranty Savings & Loan Ass’n, to the Special Division of the United States Court of Appeals for the District of Columbia Circuit* (filed July 15, 1997), Section III.D.

➤ **The Office of the Independent Counsel’s investigation into the death of Vince Foster was compelled by its court-assigned jurisdiction.**

- ✓ The Special Division of the United States Court of Appeals for the District of Columbia Circuit asked the Office of the Independent Counsel to investigate and prosecute matters “relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.”
- ✓ The death of Vince Foster fell within the Office of the Independent Counsel’s jurisdiction both because of the way Whitewater-related documents from Mr. Foster's office were handled after his death, and because of Mr. Foster's possible role or involvement in Whitewater-related events under investigation by the Office of Independent Counsel.

➤ **The U.S. Senate has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees’ work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should be disqualified because of his work for Independent Counsel Starr.**

- ✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.
- ✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001, by a vote of 97 to 0.
- ✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002, by a voice vote.
- ✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed for a seat on the United States District Court for Northern District of Georgia on June 16, 2004, by a vote of 97-0. Prior to that he was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote.
- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the Deputy Secretary of the Department of Health and Human

Services on July 22, 2005, by a voice vote. Prior to that, he was confirmed as General Counsel of HHS on August 3, 2001, by a voice vote.

- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.
- ✓ Rod Rosenstein served as Associate Independent Counsel from 1995-1997 and was confirmed to be the U.S. Attorney for the District of Maryland on July 1, 2005, by voice vote.
- ✓ Kevin Martin served as Associate Independent Counsel from XXXX to XXXX and was confirmed to be a Member of the Federal Communications Commission on May 25, 2001, by a voice vote.

Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school’s broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh’s radical argument, holding that the pre-game prayers in question violated the First Amendment’s Establishment Clause.

Facts:

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student’s religious speech.**
 - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message.
 - ✓ A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
 - ✓ As Mr. Kavanaugh’s brief pointed out, **the school district’s policy did “not require or even encourage the student speaker to invoke God’s name, to utter religious words, or to say a ‘prayer’ of any kind. Nor, on the other hand [did] the school policy prevent the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech.”
 - ✓ Mr. Kavanaugh therefore argued on behalf of his clients that the school district’s policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God’s name or say a “prayer” in his or her pre-game statement. **His brief pointed out: “The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God.”**
- **Mr. Kavanaugh’s arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**
- **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**
 - ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.
- **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District*. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**
 - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**
 - ✓ The opportunity scholarship program is a **limited program** that allows **students at failing public schools** to transfer to a better public school or a private school at public expense.
 - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
 - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents.**
 - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools.** A 2003 study specifically found that **"voucher competition in Florida is leading to significant improvement in public schools"** and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials. All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida. The Florida Supreme Court refused to review the Court of Appeal's decision. See *Bush v. Holmes*, 767 So. 2d 668 (2000).**
- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**
- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, regardless of whether they were religious or nonsectarian.**

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.
- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.
- **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**
- **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**
 - ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.
 - ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.
- **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**
 - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Brett Kavanaugh – Defense of Ken Starr

Allegation: Brett Kavanaugh has vocally defended his former boss, Independent Counsel Kenneth Starr. He has called Starr “an American hero,” written that Starr’s “record is one of extraordinary accomplishment and integrity,” and praised Starr for “consistently perform[ing] with the highest skill and integrity.” This staunch defense of the overzealous Independent Counsel constitutes compelling evidence of Kavanaugh’s right-wing views.

Facts:

- **Many have expressed that the public criticism directed at Independent Counsel Kenneth Starr was vicious and unwarranted.**
 - ✓ The Washington Post editorial page said of Judge Starr:
 - “Yet the sum of Mr. Starr’s faults constituted a mere shadow of the villainy of which he was regularly accused. The larger picture is that Mr. Starr pursued his mandates in the face of a relentless and dishonorable smear campaign directed against him by the White House. He delivered factually rigorous answers to the questions posed him and, for the most part, brought credible indictments and obtained appropriate convictions. For all the criticism of the style of his report on the Monica Lewinsky ordeal, the White House never laid a glove on its factual contentions. The various ethical allegations against him have mostly melted away on close inspection. At the end of the day, Mr. Starr got a lot of things right.” Editorial, Wash. Post, Oct. 20, 1999, at A28.
 - “The temptation to make Mr. Starr into an emblem of something flows out of the need to make a neat story out of a complex and messy history. But it is exactly the complexity of Mr. Starr’s investigation that belies any attempt to make it stand simply for any set of virtues or vices in the legal system. Mr. Starr, in our view, should be remembered as a man who--hampered alike by intensely adverse conditions and by his own missteps--managed to perform a significant public service.” Editorial, Wash. Post, Oct. 20, 1999, at A28.
 - ✓ Ronald Rotunda, professor at George Mason University School of Law and assistant counsel for Democrats on the Senate Watergate Committee, explained in December 1996 that the attacks on Judge Starr’s integrity were belied by the fact that President Clinton’s attorney General continued to assign him new matters to investigate and had the power to fire Judge Starr if he acted unethically. Peter Baker, *Did President Order Attack on Investigator?*, Seattle Times, Dec. 4, 1996, at A3.
 - Rotunda stated: “This is basically a blatantly political attack on Starr that is inconsistent within the administration itself.” *Id.*
 - ✓ In a prescient editorial published shortly after Judge Starr’s appointment, law professor Garrett Epps – a self-described liberal and supporter of President Clinton – wrote: “If Starr’s investigation turns up no evidence of wrongdoing, he

may blight his own career prospects, which would be a loss to the nation. But if he does produce indictments, many Democrats will believe that he is the agent of a partisan conspiracy. If he obtains convictions, the defendants can claim to be victims of political persecution.” Garrett Epps, Editorial, *Take My Word, Starr Will Be Fair*; PORTLAND OREGONIAN, Aug. 17, 1994, at C7.

➤ **Kenneth Starr was a fair and impartial Independent Counsel with a substantial record of accomplishment.**

- ✓ The Washington Post editorial page said, upon Judge Starr’s appointment, “he is also a respected practitioner precisely because of his performance as judge and solicitor general, and he was on Clinton Attorney General Janet Reno’s own short list of likely candidates for independent counsel when she picked Mr. Fiske.” Editorial, *Kenneth Starr for Robert Fiske*, WASH. POST, Aug. 7, 1994, at C8.
- ✓ Upon Judge Starr’s appointment as Independent Counsel, Mark Gitenstein, former chief Democratic counsel to the Senate Judiciary Committee, said: “Starr was a good, fair judge, and I think he will be fair in this proceeding.” Nancy Roman, *Starr Hailed as Fair, Moderate*, WASH. TIMES, Aug. 6, 1994, at A6.
- ✓ Carter judicial appointee, Judge Patricia Wald said of Judge Starr: “Ken is definitely a conservative ... but he’s wholly undevious and never tries to slip anything by.” *National Briefing Whitewater I: Delay Seen as Biggest Danger*, THE HOTLINE, Aug. 8, 1994.
- ✓ Time magazine’s chief political correspondent, Michael Kramer, wrote about Judge Starr’s appointment in his column: “[Ken Starr’s] integrity and honesty have never been seriously questioned. When even a dues-paying liberal like the legal director of the American Civil Liberties Union says, ‘I’d rather have Starr investigate me than almost anyone I can think of,’ the case for bias is virtually closed.” Michael Kramer, *Fade Away, Starr*, TIME, Aug. 29, 1994, at 37.

➤ **Kenneth Starr initiated criminal prosecutions only where he uncovered strong evidence of criminal wrongdoing. Where he did not find overwhelming evidence of illegal behavior, he appropriately exercised prosecutorial restraint.**

- ✓ In his investigations of the death of Vince Foster, the firing of White House travel office employees, the Clinton White House’s potential misuse of FBI files, and the Clintons’ involvement in Whitewater and Madison Guaranty Savings and Loan, Kenneth Starr did not bring any criminal charges.
- ✓ In those areas, however, where he did find persuasive evidence of wrongdoing, Starr brought charges against and successfully obtained convictions of 14 individuals, including Jim and Susan McDougal, Arkansas Governor Jim Guy Tucker, and former Associate Attorney General Webster Hubbell.

➤ **Independent Counsel Starr prevailed in court in nearly every dispute between the Office of the Independent Counsel and those seeking to withhold evidence by asserting various privileges.**

- ✓ Federal appellate courts sided with Independent Counsel Starr in rejecting:
 - The creation of a “protective function privilege” that would authorize Secret Service agents to refuse to testify before a federal grand jury. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).
 - The claim that government lawyers may rely on attorney-client or work-product privilege to withhold information subpoenaed by a federal grand jury. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).
 - The claim that government attorneys could invoke the attorney-client privilege in response to grand jury questions seeking information relating to the possible commission of a federal crime. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

➤ **Independent Counsel Starr was required by law to refer to the House of Representatives any substantial and credible information that may have constituted grounds for impeachment, and his referral was clearly justified as demonstrated by subsequent events.**

- ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of “any substantial and credible information” uncovered during the course of his investigation that might constitute grounds for impeachment. *See* 28 U.S.C. § 595(c).
- ✓ The Independent Counsel’s report detailed substantial and credible information that may have constituted grounds for impeachment. It summarized specific evidence supporting the charges that President Clinton lied under oath and attempted to obstruct justice.

➤ **The Independent Counsel’s report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**

- ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.
- ✓ After a trial in the U.S. Senate, fifty Senators voted to remove President Clinton from office for obstructing justice.
- ✓ U.S. District Court Judge Susan Webber Wright later held President Clinton in contempt for “giving false, misleading, and evasive answers that were designed to obstruct the judicial process” in Paula Jones’s sexual harassment lawsuit and ordered him to pay a fine of \$90,000.

- ✓ In January 2001, President Clinton admitted to giving “evasive and misleading answers, in violation of Judge Wright’s discovery’s orders” during his deposition in Paula Jones’s sexual harassment lawsuit. As a result, he agreed to pay a \$25,000 fine and give up his law license for five years.

➤ **Numerous Democrats co-sponsored a censure resolution introduced by Senator Feinstein that stated that President Clinton “gave false or misleading testimony and his actions [] had the effect of impeding discovery of evidence in judicial proceedings.”** S.Res. 44, 106th Cong. (1999).

- ✓ Members of the Senate who co-sponsored the censure resolution included: Senator Durbin (D-IL), Senator Kennedy (D-MA), Senator Kohl (D-WI), Senator Schumer (D-NY), Minority Leader Tom Daschle (D-SD), and Senator John Kerry (D-MA).
- ✓ Then-Congressman Schumer, as Senator-elect stated that “it is clear that the President lied when he testified before the grand jury.”

Brett Kavanaugh – Starr Report

Allegation: Brett Kavanaugh was a co-author of Independent Counsel Ken Starr's report to the House of Representatives, in which Starr alleged that there were grounds for impeaching President Clinton. Kavanaugh's participation in Starr's investigation of the Monica Lewinsky affair evidences his partisan, right-wing agenda.

Facts:

- **According to numerous press reports, Mr. Kavanaugh did not author the narrative section of the Independent Counsel's report that chronicled in detail President Clinton's sexual encounters with Monica Lewinsky.**
- **Mr. Kavanaugh has since criticized the House of Representatives for releasing the report to the public before reviewing it.** See Brett M. Kavanaugh, "First Let Congress Do Its Job," *The Washington Post*, Feb. 26, 1999, at A27.
- **The section of the Independent Counsel's report co-authored by Mr. Kavanaugh – grounds for impeachment – was required by law, and the allegations contained in that section were confirmed by subsequent events.**
 - ✓ Federal law required Independent Counsel Starr to advise the House of Representatives of "any substantial and credible information" uncovered during the course of his investigation that may constitute grounds for impeachment. See 28 U.S.C. § 595(c).
 - ✓ According to press reports, Mr. Kavanaugh co-authored the section of the Independent Counsel's report that explained the substantial and credible information that may constitute grounds for impeachment. This section summarized the specific evidence supporting the allegations that President Clinton made false statements under oath and attempted to obstruct justice.
- **The Independent Counsel's report never stated that President Clinton should have been impeached. Rather, it only explained that the Office of Independent Counsel had uncovered substantial and credible information that may constitute grounds for impeachment. This conclusion was clearly borne out by subsequent events.**
 - ✓ The House of Representatives determined that the information presented by the Independent Counsel constituted grounds for impeachment. By a vote of 228-206, the House voted to impeach President Clinton for perjuring himself before a grand jury. And by a vote of 221-212, the House voted to impeach President Clinton for obstructing justice.
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➤ **The U.S. Senate already has confirmed judicial and other nominees who worked for Independent Counsel Ken Starr. If these nominees’ work for the Independent Counsel was not disqualifying, then there is no reason why Brett Kavanaugh should not be confirmed because of his work for the Office of Independent Counsel.**

✓ Steven Colloton served as Associate Independent Counsel from 1995 to 1996 and was confirmed for a seat on the Eighth Circuit Court of Appeals on September 4, 2003 by a vote of 94 to 1. He was confirmed to be the U.S. Attorney for the Southern District of Iowa on September 5, 2001, by a voice vote.

✓ John Bates served as Deputy Independent Counsel from 1995 to 1997 and was confirmed for a seat on the U.S. District Court for the District of Columbia on December 11, 2001, by a vote of 97 to 0.

✓ Amy St. Eve served as Associate Independent Counsel from 1994 to 1996 and was confirmed for a seat on the U.S. District Court for the Northern District of Illinois on August 1, 2002, by a voice vote.

✓ William Duffey served as Associate Independent Counsel from 1994 to 1995 and was confirmed for a seat on the United States District Court for Northern District of Georgia on June 16, 2004, by a vote of 97-0. Prior to that he was confirmed to be the U.S. Attorney for the Northern District of Georgia on November 6, 2001, by a voice vote.

- ✓ Alex Azar served as Associate Independent Counsel from 1994 to 1996 and was confirmed to be the Deputy Secretary of the Department of Health and Human Services on July 22, 2005, by a voice vote. Prior to that, he was confirmed as General Counsel of HHS on August 3, 2001, by a voice vote.
- ✓ Karin Immergut served as Associate Independent Counsel in 1998 and was confirmed to be the U.S. Attorney for the District of Oregon on October 3, 2003 by a voice vote.
- ✓ Rod Rosenstein served as Associate Independent Counsel from 1995-1997 and was confirmed to be the U.S. Attorney for the District of Maryland on July 1, 2005, by voice vote.
- ✓ Kevin Martin served as Associate Independent Counsel from XXXX to XXXX and was confirmed to be a Member of the Federal Communications Commission on May 25, 2001, by a voice vote.