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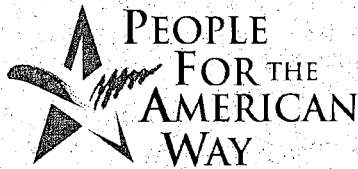
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**Report of People For the American Way
in Opposition to the Confirmation of
Brett M. Kavanaugh to the United States
Court of Appeals for the D.C. Circuit**

People For the American Way
Ralph G. Neas, President
April 26, 2004

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Introduction

President Bush's nomination of Starr Report co-author Brett Kavanaugh to the U.S. Court of Appeals for the D.C. Circuit has created significant controversy. The *New York Times* has termed the nomination part of the Administration's "further effort to remake the federal courts in its own ideological image."¹ The *Washington Post* commented that the nomination would "only inflame further the politics of confirmation to one of the country's highest-quality courts."²

In fact, the D.C. Circuit has not only seen many high quality jurists appointed to it, but it is also widely recognized for its uniquely important role in reviewing federal agency action. Congress has given the court exclusive jurisdiction to review some agency conduct, such as important Federal Communications Commission and environmental matters, and the D.C. Circuit is often the last word on federal agency actions, since the Supreme Court reviews so few lower court decisions.

Kavanaugh's **relative inexperience** and record, however, including his **extraordinary dedication to partisan priorities**, make him a particularly inappropriate choice for this critically important court. A 1990 graduate of Yale Law School, Mr. Kavanaugh's legal resume is thin at best. When asked in the Senate Judiciary Committee's questionnaire to state the **number of cases he has tried to verdict or judgement**, he replied "[n]one, as I have not been a trial lawyer."³ In the same questionnaire, when asked to name his ten most significant litigated matters, Kavanaugh was apparently hard pressed to fill out the list, citing a number of cases in which he made no courtroom appearance at all and only submitted briefs, including two cases in which he authored only the friend-of-the-court brief of someone who was not even a party to the litigation. Kavanaugh is not a prolific legal scholar either, with only two law journal publications to his credit.⁴

This stands in marked contrast to the D.C. Circuit judges previously appointed by presidents of both parties. **Of the 22 judges appointed to the D.C. Circuit since the Nixon administration, only one – Kenneth Starr – had less legal experience at the time of his appointment than Kavanaugh.** A number had previously been judges, high-ranking

¹ Editorial, *More Conservatives for the Courts*, *New York Times*, July 29, 2003.

² Editorial, *Fueling the Fire*, *Washington Post*, Aug. 1, 2003.

³ Answers to Senate Judiciary Committee Question 17(c)(4).

⁴ *Id.* at Questions 18, 12. One of his law journal publications is a student note arguing that defendants must be present at, and allowed to offer a rebuttal during, *Batson* hearings (hearings held to determine whether the prosecution improperly removed members from the jury pool because of their race). Brett Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 *Yale L.J.* 187, Oct. 1989. The other publication is an article examining the Independent Counsel law. Brett Kavanaugh, *The President and the Independent Counsel*, 86 *Geo. L.J.* 2133, July 1998. Other than judicial clerkships and work for Kenneth Starr and the Bush White House, Kavanaugh's questionnaire states that his experience consists of one year at the Solicitor General's Office and approximately four years at the law firm of Kirkland & Ellis. Answers to Senate Judiciary Questions 6, 17.

Justice Department attorneys, and distinguished professors. Kavanaugh's resume simply pales by comparison.

Furthermore, most of Kavanaugh's relatively brief legal career has consisted largely of partisan political activities that militate strongly against his confirmation to the D.C. Circuit. In particular, Kavanaugh has spent most of his legal career in Kenneth Starr's Office of the Independent Counsel or in the Office of the White House Counsel in the current Bush Administration where he helped direct the Administration's effort to pack the courts with extreme right-wing nominees. Kavanaugh was responsible for drafting Starr's articles of impeachment against President Clinton, which were widely criticized as "strain[ing] credulity"⁵ and being based on "shaky allegations,"⁶ and later defended even the most questionable conduct by Starr. In the White House Counsel's Office, Kavanaugh has had major responsibility for selecting and "marshalling the fleet"⁷ of far-right appellate judicial nominees by the Bush Administration, and for seeking to expand unilateral presidential privilege and secrecy, despite his contrary efforts under Kenneth Starr to defeat such claims of privilege. Indeed, a presidential order that reportedly resulted from Kavanaugh's efforts on behalf of the Bush Administration was described by one prominent historian as "a victory for secrecy in government" that was "so total that it would make Nixon jealous in his grave."⁸

As more than 200 law professors wrote to the Senate Judiciary Committee in July 2001, no federal judicial nominee is presumptively entitled to confirmation.⁹ Because federal judicial appointments are for life and significantly affect the rights of all Americans, and because of the Senate's co-equal role with the President in the confirmation process, nominees must demonstrate that they meet the appropriate criteria. These include not only an "exemplary record in the law" and an "open mind to decision-making," but also a "commitment to protecting the rights of ordinary Americans" and a "record of commitment to the progress made on civil rights, women's rights, and individual liberties."¹⁰ Based on these criteria, as discussed below, Kavanaugh's confirmation to a lifetime position on the critical Court of Appeals for the D.C. Circuit should be rejected.

Choosing Judicial Nominees

⁵ Glenn R. Simpson, *Starr's Report Makes Powerful Case – but for what?*, *Wall Street Journal*, Sept. 14, 1998 (hereinafter Simpson).

⁶ Stephen Hedges and Ken Armstrong, *Starr's Case Unique and Hardly Airtight*, *Chicago Tribune*, Sept. 13, 1998 (hereinafter Hedges).

⁷ Neil A. Lewis, *Bush Selects Two for Bench, Adding Fuel to Senate Fire*, *New York Times*, July 26, 2003 (hereinafter Lewis).

⁸ Carl M. Cannon, *For the Record*, *National Journal*, Jan. 12, 2002 (hereinafter Cannon) (quoting Hugh Graham). Kavanaugh was also a regional coordinator for Lawyers for Bush / Cheney in 2000, went to Florida after the 2000 election for Bush / Cheney "to participate in legal activities related to the recount, and has been an active member of the Federalist Society." Answers to Senate Judiciary Committee Questions II6, 6, 9, 10.

⁹ See Law Professors' Letter of July 13, 2001 (available from People For the American Way).

¹⁰ *Id.*

Kavanaugh has been “deeply involved”¹¹ in one of the most controversial undertakings of the current Administration: the selection of the president’s judicial nominees. This is, in Kavanaugh’s words, “one of [the president’s] most important responsibilities.”¹² As Associate Counsel to the President from 2001 – 2003, Kavanaugh served directly under White House Counsel Alberto Gonzalez as his “main deputy on the subject” of judicial nominees.¹³ This position earned Kavanaugh membership in the Administration’s critical Judicial Selection Committee, a joint enterprise between White House staff and the Justice Department’s Office of Legal Policy, chaired by Gonzalez, which has been responsible for the selection of judicial nominees.¹⁴ Kavanaugh has thus played a key role in Administration efforts at “remaking the judiciary” to “place on the bench those who share the president’s judicial philosophy.”¹⁵

Kavanaugh has reportedly “been responsible for marshaling the fleet of largely conservative judicial nominees the president has sent to the Senate,”¹⁶ and a look at the candidates Kavanaugh has helped select and support for lifetime appointments to the federal judiciary speaks volumes about his own legal philosophy and interest in seeing the American judiciary remade in a right-wing “ideological image.” According to several accounts, Kavanaugh personally “coordinated” the Administration’s nominations of Priscilla Owen to the Fifth Circuit and Miguel Estrada to the D.C. Circuit.¹⁷ Priscilla Owen’s nomination continues to be blocked because her record as a far right judicial activist is so extreme that even White House Counsel Alberto Gonzalez once accused her and her dissenting colleagues of committing “an unconscionable act of judicial activism.”¹⁸ Widely termed a “stealth candidate,” Estrada’s nomination was withdrawn after an extended filibuster.¹⁹

One of the most controversial aspects of the Estrada confirmation battle, which directly contributed to the failure of the nomination, was Estrada’s persistent refusal to answer questions concerning his jurisprudential views or philosophy. Because Estrada had a limited “paper trail” and the Department of Justice refused to release any legal memoranda he wrote while serving in the Department, a particularly important way for Senators to learn important information about his jurisprudential views was by directly

¹¹ Sheldon Goldman, *W. Bush Remaking the Judiciary: Like Father Like Son?*, *Judicature* at p. 284, May-June, 2003 (hereinafter Goldman).

¹² *Id.*

¹³ Jeffrey Toobin, *Advice and Dissent*, *The New Yorker*, May 26, 2003 (Kavanaugh was the “main deputy” to Alberto Gonzalez who “control[s]” the nomination process in the Bush White House). In July 2003, Kavanaugh left the White House Counsel’s office and became Assistant to the President and Staff Secretary.

¹⁴ Goldman

¹⁵ *Id.* at 782.

¹⁶ Lewis.

¹⁷ Dana Milbank, *Whitewater Lawyer Turns Proponent of Presidential Power*, *Washington Post*, Oct. 15, 2002 (hereinafter “Milbank”); Jack Newfield, *More Bad Judges*, *The Nation*, Jan. 26, 2004 (hereinafter Newfield) (Kavanaugh “coordinated” the Estrada and Owen nominations).

¹⁸ See People For the American Way, *Why the Senate Judiciary Committee Was Right to Reject the Confirmation of Priscilla Owen to the United States Court of Appeals for the Fifth Circuit*, Jan. 23, 2003.

¹⁹ Dana Bash, *Judicial Nominee Estrada Withdraws His Name*, CNN, Sept. 4, 2003, available at <http://www.cnn.com/2003/LAW/09/04/estrada.judgeship/index.html>; Jonathan Groner, *Estrada – Just One Vote Away?*, *Legal Times*, Sept. 30, 2002 (hereinafter Groner).

questioning Estrada during his Senate Judiciary Committee hearing. Estrada's refusal to answer a number of their questions made it impossible for committee members to learn enough about Estrada to responsibly carry out their constitutionally mandated duty to give "advice and consent" to the President's judicial nominees. Disturbingly, one report indicates that Estrada refused to answer these questions at the direct advice of the Administration,²⁰ suggesting a deliberate effort to subvert the Senate's co-equal role in the nomination process. Given Kavanaugh's apparent "coordination" of the Estrada nomination, this issue raises further troubling concerns about Kavanaugh's actions.

Kavanaugh also publicly praised Estrada and Owen, along with the rest of Bush's first eleven picks for the courts of appeals, as being what the President "was looking for. A group of nominees, in terms of their excellence, which they all shared, and their integrity, which they all shared, and support, which is huge, which they all shared. It was a diverse group, a well qualified group, a bi-partisan group. It was an incredibly credentialed group."²¹ While the group Kavanaugh described included some of the administration's most controversial nominees to date, such as Priscila Owen, Miguel Estrada, Terrence Boyle, Dennis Shedd, and Jeffrey Sutton, few would argue that many exemplified exactly what the President "was looking for": lawyers or judges with extreme right-wing records who would assist the Administration in seeking to "remake the federal courts in its own ideological image." Owen and Estrada were such troublesome nominees that they earned the distinction of being among the six nominees – out of a total of 179 considered by the Senate thus far – to be blocked on the Senate floor by filibuster. Boyle's record on civil rights and other issues is so troubling that one of his home state senators, John Edwards, has refused to return his "blue slip," which has effectively brought his nomination to a halt for the present.²² That three of the first eleven candidates were so extreme that they have been unable to be approved by the Senate seems to indeed confirm that they were what the Administration "was looking for."

Of the initial nominees that were approved by the Senate, many received a great deal of opposition during their confirmation process. Several have already written opinions that seek to limit civil rights and constitutional liberties and implement dangerous "federalist" philosophies. For example, Dennis Shedd and Michael McConnell have used their positions to seek to overturn National Labor Relations Board rulings against anti-union discrimination and unfair labor practices by employers.²³ Edith Brown Clement joined dissents arguing that the Hobbs Act (an important federal criminal law prohibiting robbery and extortion affecting interstate commerce) should be severely limited on "federalism" grounds²⁴ and supporting the unlawful firing of a public school

²⁰ Groner.

²¹ Goldman at 296.

²² See Letter of Senator John Edwards to Senate Judiciary Chairman Hatch, March 31, 2002; Kevin Begos, Dole, Edwards at Odds Over Judicial Nominee, *Winston-Salem Journal*, May 10, 2003.

²³ National Labor Relations Board v. Transpersonnel, Inc., 349 F.3d 175, 2003 U.S. App. LEXIS 23133 (4th Cir. 2003) (Shedd wrote the majority opinion); National Labor Relations Board v. Interstate Builders, Inc., 2003 U.S. App. LEXIS 24153 (10th Cir. 2003) (J., McConnell, dissenting in part).

²⁴ United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (en banc), cert. denied, 124 S.Ct. 1749 (2003).

teacher who was dismissed without the required hearing.²⁵ Jeffrey Sutton authored a dissent that sought to severely cut back federal arson law due to federalism concerns.²⁶ One John Roberts dissent questioned the constitutionality of the Endangered Species Act.²⁷ Kavanaugh's praise of such nominees, as well as his hand in selecting them, calls into serious question his own legal philosophy.²⁸

A number of other Bush Administration nominees selected during Kavanaugh's tenure as Associate Counsel to the President have also come from "the far right of the political spectrum."²⁹ Many, who like Kavanaugh, Sutton, and Clement, have been Federalist Society members, have had their sights set on limiting federal power, weakening the Commerce Clause, and severely limiting congressional authority, even to the point of literally rolling back the New Deal.³⁰ These adherents to Federalist Society ideals, such as William Pryor and Carolyn Kuhl, have been among the most right-wing people nominated by the Administration to serve in any capacity.

Just as troubling as the legal and ideological views of Bush Administration candidates is a report that suggests the White House officials involved in judicial selection have imposed a rigorous anti-reproductive choice litmus test on potential judicial nominees. Last year, the *Philadelphia Daily News* reported that Republican Senators Arlen Specter and Rick Santorum had requested that the Administration nominate a western Pennsylvania woman to fill a vacancy on the Third Circuit Court of Appeals left by the passing of a female jurist. They recommended four women they believed were qualified for the job, but all were rejected. The *Daily News* reported that all but one of the women were rejected because they were not "sufficiently conservative or pro-life."³¹ One source was quoted as saying, "[n]o western [Pennsylvania] woman could be found that was acceptable to the White House."³² Instead, the nomination was given to Pennsylvania Attorney General Mike Fisher, who unsuccessfully ran for

²⁵ *Coggin v. Longview Independent School District*, 337 F.3d 459 (5th Cir. 2003) (en banc), cert. denied, 124 S.Ct. 579 (2003).

²⁶ *United States v. Laton*, 2003 U.S. App. LEXIS 24770 (6th Cir. 2003) (Sutton, J., dissenting).

²⁷ *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (Roberts, J., dissenting).

²⁸ Bush nominees who have written and joined disturbing opinions and dissents are not limited to this first group of eleven. To learn more about the records of the new Bush judges that Kavanaugh helped select, see People For the American Way Foundation, *Confirmed Judges, Confirmed Fears*, Jan. 23, 2004, available at www.pfaw.org.

²⁹ David Margolick, *Bush's Court Advantage*, *Vanity Fair*, Dec. 2003, at 146 (hereinafter Margolick).

³⁰ See e.g. People For the American Way, *Report of People For the American Way In Opposition to the Confirmation of William H. Pryor to the United States Court of Appeals for the Eleventh Circuit*, June 10, 2003 at 4 – 11; People For the American Way, *Report of People For the American Way in Opposition to the Confirmation of Carolyn Kuhl to the United States Court of Appeals for the Ninth Circuit*, March 31, 2003. See also, People For the American Way Foundation, *The Federalist Society: From Obscurity to Power*, Aug. 2001 (updated Jan. 2003), at 17 – 22. See also, *Id.* at 33 (reporting that of the first eleven Bush appellate court nominees, six were Federalist Society members).

³¹ Gar Joseph, *Ball in Fisher's Court to Replace Judge; PA. Senators Want a Woman After White House Says It Couldn't Find One*, *Philadelphia Daily News*, Apr. 11, 2003. The fourth woman was reportedly unacceptable because "the Republicans didn't want to lose her as a candidate for the state Supreme Court [that] year." *Id.*

³² *Id.*

governor on an anti-choice platform the year before.³³ In fact, one Pennsylvania newspaper specifically criticized the fact that “the abortion issue was put forth by the Bush Administration as the sole litmus test” leading to Fisher’s nomination.³⁴ Such a frightening anti-choice litmus test for judicial nominees recalls the Reagan and Bush I administrations, when potential nominees – and even their colleagues – were vigorously interrogated about their abortion views as a prerequisite for earning a nomination to the federal bench.³⁵ As one of the top White House officials working on judicial nominations, serious questions are presented about Kavanaugh’s role in the reported revival of this deplorable practice.

Another dangerous tactic used by some in seeking to promote the President’s judicial nominees was the theft by several Republican staffers of over 4,000 files containing confidential internal memos authored by Democratic Judiciary staff over the last two years in a scandal popularly known as “memogate.”³⁶ Remarkably, many right-wing advocates have been so unapologetic for the unethical, and likely illegal, theft that they have criticized Judiciary Committee Chairman Orrin Hatch for authorizing an investigation of the tampering.³⁷ The result of that investigation was a report by Senate Sergeant-at-Arms William Pickle that strongly suggested wrongdoing by the Senate aides and was referred to the Justice Department for possible criminal investigation and prosecution.³⁸ It remains unclear how widely the memos were circulated, though it is certainly possible that Kavanaugh, as one of the top White House officials involved in the nomination process during the period in question, would have been privy to the improperly obtained information. The Senate Judiciary Committee should fully question Kavanaugh on this subject. In any event, Kavanaugh’s key role in the Administration’s judicial nominations efforts raises serious concerns about his own nomination.

“A Starr Protégé”

³³ Pennsylvania Catholic Conference, Primary Election 2002: Candidates for Governor and Lieutenant Governor Answer Pennsylvania Catholic Conference Questionnaire, Viewpoint: Newsletter of the Pennsylvania Catholic Conference (Vol. 18, Issue 1); Pennsylvania Catholic Conference, Primary Election 2002: Candidates for Governor and Lieutenant Governor Answer Pennsylvania Catholic Conference Questionnaire, Viewpoint: Newsletter of the Pennsylvania Catholic Conference (Vol. 18, Issue 3), both available at <http://www.pacatholic.org/election%20archive/primary%202002.pdf> (visited 3/02/04). Fisher received the nomination despite the fact he had just had a \$220,000 civil rights judgement entered against him for violating the civil rights of employees under his control (*Micewski v. Fisher*, No. 3:00-CV-0521 (M.D.Pa. Feb. 12, 2003) (special verdict judgment)).

³⁴ Editorial, Fisher as an Appeals Judge: Attorney General has done a yeoman job, but selection shouldn’t be based mainly on his abortion position, *Harrisburg Patriot News*, April 30, 2003.

³⁵ Transcript of “All Things Considered” broadcast, National Public Radio report, Aug. 28, 1985 (“One female [prospective Reagan nominee] . . . said she was asked repeatedly how she would rule on an abortion case if it came before her. Another . . . said her fellow judges were called by Justice Department officials and asked for her views on abortion.” See also People For the American Way, Assault on Liberty, (1992) at p. 6, available from People For the American Way.

³⁶ Helen Dewar, GOP Aides Implicated in Memo Downloads, *Washington Post*, March 5, 2004. Some memos were also taken from Senator Hatch’s computer files.

³⁷ *Id.*

³⁸ Dori Meinert, Theft of Democrats’ Computer Memos Referred to Justice Department, *Copley News Service*, March 11, 2004.

One of the most significant chapters in Kavanaugh's brief legal career has been the five years he spent as part of Kenneth Starr's Office of Independent Counsel, participating in several investigations concerning the conduct of President Clinton. Frequently described as a "Starr protégé,"³⁹ Kavanaugh began his stint in the Special Prosecutor's office by heading up the investigation into White House Deputy Counsel Vince Foster's suicide.⁴⁰ As the Whitewater investigation appeared to be winding down, Kavanaugh returned to private practice for a brief period, but then re-joined Starr's office when the Monica Lewinsky scandal broke. Reflecting on why Kavanaugh chose to return to the Special Prosecutor's office at that point, one lawyer close to the case reportedly noted "[t]hat was slime time. He wanted to be there for the kill."⁴¹

Of course, the Special Prosecutor's investigation culminated with the release of the Starr Report, of which Kavanaugh was a co-author.⁴² The report consisted of two parts: the narrative, which offered what journalists called "an exhaustive chronology of Clinton's sexual escapades,"⁴³ and the grounds for impeachment, which outlined the 11 specific counts that the Special Prosecutor believed justified impeaching the President for "high crimes and misdemeanors." Kavanaugh was one of the two authors of the grounds for impeachment.⁴⁴

The eleven specific counts Kavanaugh outlined against the President included five allegations of perjury, five allegations of obstruction of justice, and one allegation that Clinton's actions were "inconsistent [with his] . . . constitutional duty to faithfully execute the laws."⁴⁵ Even conservative commentators and legal scholars were largely unimpressed by Kavanaugh's work. The *Wall Street Journal* noted that a number of former prosecutors and legal scholars found the case against the President to "strain credulity" and to be based on "suppositional reasoning."⁴⁶ The *Chicago Tribune* described Kavanaugh's tortured arguments as "[u]nique and [h]ardly [a]irtight" and reported that many experts accused the report of "using explicit descriptions of sexual acts to paper over shaky allegations."⁴⁷ For example, Kavanaugh's assertion that Clinton could be convicted of obstruction of justice because he lied to friends who later repeated his stories to the grand jury was "a real stretch," according to Miami lawyer Neal Sonnett, who noted it was a "theory that I've never seen or heard of in the criminal law."⁴⁸ Even the strongest parts of Kavanaugh's argument were weaker than many believed would be necessary to win a conviction. Richard Phelan, the Chicago attorney who led the investigation concerning House Speaker Jim Wright in the late 1980s, noted

³⁹ See Susan Schmidt and Dan Morgan, *Starr: Witnessing for the Prosecution*, *Washington Post*, Nov. 19, 1998; Michael Lind, *All the President's Messes*, *New York Times*, July 11, 1999; David W. Chen and Neil A. Lewis, *Testing of a President: The Authors*, *New York Times*, Sept. 12, 1998 (hereinafter Chen).

⁴⁰ Margolick at p. 162.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Ronald Brownstein, *For Clinton Foes, Morality Clouds Political Storm Over Starr Report*, *Los Angeles Times*, Sept. 14, 1998 (hereinafter Brownstein).

⁴⁴ Questionnaire at Question 17(b)(1); Chen.

⁴⁵ Hedges.

⁴⁶ Simpson.

⁴⁷ Hedges.

⁴⁸ *Id.*

that while the case that Clinton had lied under oath was relatively strong, perjury was rarely successful as a stand-alone charge, and was usually tacked onto a more weighty fraud or drug indictment. "If you prosecuted every guy who lied in a deposition about something," Phelan noted, "we'd have half the people in this country locked up."⁴⁹ Many members of Congress on both sides of the aisle were equally unimpressed. Senator Specter said he believed many senators would vote that the allegations in the report were "not proved" if they were given that option.⁵⁰ The fact that Kavanaugh's most significant legal accomplishment to date was a listing of dubious legal charges -- bolstered by evidence many still believe was only brought to light to embarrass the President -- raises serious questions about his work as a lawyer as well as his willingness to twist legal theory to suit his political ends.

While Kavanaugh has taken pains to point out that he did not personally have a hand in authoring the even more controversial narrative section of the Starr Report,⁵¹ he has nonetheless fully defended Starr's conduct as Special Prosecutor. Rarely missing an opportunity to praise Starr, Kavanaugh authored a series of op-eds in the fall and summer of 1999 fiercely defending his mentor and his actions in the face of growing criticism.⁵² Kavanaugh wrote that "Starr [] conducted thorough and fair investigations . . . ; exercised discretion where appropriate and firmness where necessary; . . . and displayed honor and determination in the face of relentless political attacks."⁵³ Kavanaugh repeatedly lauded Starr as a man of "extraordinary accomplishment and integrity," even calling him "an American hero."⁵⁴ In one instance, Kavanaugh sent a letter to the editor of the *New York Times* specifically to rebut an article that had mistakenly claimed Kavanaugh had found certain of Starr's tactics inappropriate.⁵⁵ In another letter, Kavanaugh praised Starr's "honor" and insisted that "Judge Starr has consistently performed with the highest skill and integrity and [I] . . . feel sick about the abuse he has suffered."⁵⁶

Most Americans will recall that Starr's tactics included not only releasing "an exhaustive chronology of Clinton's sexual escapades"⁵⁷ despite the fact that most legal experts found it "difficult to see the legal purpose of such disclosures,"⁵⁸ but also a wide array of questionable acts which were highly offensive to Clinton supporters and foes alike. Monica Lewinsky was reportedly taken to a hotel room and interrogated for 12

⁴⁹ *Id.*

⁵⁰ CNN, Three GOP Moderates Will Vote Against Conviction, Feb. 10, 1999, available at cnn.com.

⁵¹ Questionnaire Answer 17(b)(1) (Kavanaugh notes that the report is "a matter of some continuing controversy" and states that he was only involved in writing the grounds for impeachment).

⁵² Brett M. Kavanaugh, Op-Ed, We All Supported Kenneth Starr, *Washington Post*, July 1, 1999; Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999; Robert Bittman and Brett M. Kavanaugh, Op-Ed, Indictment of an Ex-President?, *Washington Post*, Aug. 31, 1999; Robert Bittman, Brett M. Kavanaugh, and Solomon Wisenberg, Op-Ed, To Us, Starr Is an American Hero, *Washington Post*, Nov. 15, 1999.

⁵³ Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999.

⁵⁴ *Id.* and Robert Bittman, Brett M. Kavanaugh, and Solomon Wisenberg, Op-Ed, To Us, Starr Is an American Hero, *Washington Post*, Nov. 15, 1999.

⁵⁵ Brett M. Kavanaugh, Letter to the Editor, *New York Times*, Aug. 1, 1999.

⁵⁶ Brett M. Kavanaugh, Op-Ed, We All Supported Kenneth Starr, *Washington Post*, July 1, 1999.

⁵⁷ Brownstein.

⁵⁸ *Id.*

hours while her requests to call her attorney were denied,⁵⁹ and her mother was forced to testify before the grand jury.⁶⁰ According to several reports, secret grand jury information was intentionally leaked by Starr's office in an effort to undermine the president.⁶¹ Innumerable public servants were subpoenaed and harassed – from the lowest staffers to the highest government officials – in what 14 Democratic members of the House Judiciary Committee described as “a means of preventing or intimidating them from criticizing [Starr] . . . [a method which is] clearly outrageous and may be prohibited by federal law.”⁶² Starr's tactics were so extreme as to alienate many, including Republicans. A number of prominent Republicans, including Senators Arlen Specter and John McCain, criticized Starr for being too aggressive in the course of his investigation.⁶³ Especially in light of such concerns, Kavanaugh's unqualified praise and endorsement of Starr and his tactics raises disturbing concerns about Kavanaugh's own legal judgment.

A Malleable View on Privilege

Kavanaugh's work as one of the architects of the Bush Administration judicial nominations effort and his willingness to align himself with Kenneth Starr are not the only examples of his devotion to right-wing political causes. Rather, his stunning willingness to twist and shift legal theories and philosophies to best serve partisan interests is highly disturbing as well. An examination of the roles Kavanaugh has played in the Clinton and Bush II Administrations demonstrates the point. During the Clinton Administration, as discussed above, Kavanaugh was a key figure in the office of Special Prosecutor Kenneth Starr and, before ascending to the role of Starr Report co-author, worked to gain unprecedented access to the records of the President of the United States. In his role in the Bush administration, however, Kavanaugh seems to have radically changed his views on presidential privilege and has worked diligently to ensure that the current President works with an unprecedented ability to keep presidential actions and records secret from Congress and the public. As summed up in the *Washington Post*, “within a few years, Kavanaugh's work has gone from being described as ‘a serious blow to the presidency,’ as Clinton lawyer Lloyd Cutter put it, to promoting an ‘imperial presidency,’ as Rep. Henry A. Waxman (D-Calif.) put it.”⁶⁴

As a member of Starr's Whitewater team, Kavanaugh was directly involved in a number of pivotal cases challenging long-held ideas of privilege and presidential privacy. Apparently intent on working to diminish presidential power and privilege, Kavanaugh played a key role in the following controversial cases:

⁵⁹ Michael Grunwald, *Hardball at the Ritz Puts Starr on the Spot*, *Washington Post*, Sept. 23, 1998.

⁶⁰ Dan Balz, *Week 4: All Eyes on Grand Jury, Lewinski's Mother*, *Washington Post*, Feb. 15, 1998.

⁶¹ Joe Conason, *Starr Springs a Leak*, *Salon*, Oct. 1998, available at http://www.salon.com/news/1998/10/cov_30newsc.html.

⁶² CNN, *Clinton Aide Appears Before Grand Jury*, Feb. 26, 1998, available at www.cnn.com/ALLPOLITICS/1998/02/26/lewinskiscandal/.

⁶³ Howard Kurtz, *Starr Is Urged to Curtail Inquiry*, *Washington Post*, Mar. 2, 1998; Dan Carney and Carrol J. Doherty, *GOP Struggles to find Strategy to Deal with Starr Fallout*, *CNN*, Mar. 14, 1998, available at [cnn.com](http://www.cnn.com).

⁶⁴ Milbank.

- In *Swidler v. Berlin*,⁶⁵ Kavanaugh unsuccessfully argued for access to privileged communications between deceased Deputy White House Counsel Vince Foster and his attorney. The Supreme Court rejected Kavanaugh's arguments by a 6-3 vote, holding that attorney-client privilege does survive the death of the client. This disturbing challenge to well-established common law proves how far Kavanaugh and Starr were willing to go in pursuit of truly privileged information.
- In *In Re: Bruce Lindsey*,⁶⁶ Kavanaugh successfully argued that that the President does not enjoy attorney-client privileges in his relationship with White House attorneys, despite evidence that White House legal work and Clinton's private attorneys' legal work frequently intersected.⁶⁷
- In *Rubin v. U.S.*⁶⁸, Kavanaugh briefed the Special Prosecutor's position in an appeal of the D.C. Circuit's ruling that Secret Service agents could be forced to testify before grand juries concerning information they learned about the president while on the job. Kavanaugh advanced this point despite the very real danger that the ruling could cause future presidents to separate themselves from their protective detail during private or sensitive conversations – an act that would make the agents' jobs more difficult and put the president's life at risk. The Supreme Court denied certiorari, effectively upholding the appellate court's decision.⁶⁹

Kavanaugh's role in these critically important privilege cases might suggest that Kavanaugh believes strongly in the right to obtain information about the government and government leaders, particularly the president. Since President Bush took office, however, Kavanaugh seems to have had a startling change of heart: He now uses his position to argue in favor of privilege and presidential secrecy at least as vehemently as he once argued against it.

In one of his first acts in the Bush White House, Kavanaugh served as a leading force in the development of the controversial Executive Order #13233, which effectively eviscerated the Presidential Records Act (PRA).⁷⁰ President Carter signed the PRA in the aftermath of Watergate to clarify that presidential records belong to the public and cannot be destroyed or controlled by a president after he has left office. It dictated that most presidential records would be available through Freedom of Information Act requests five years after the end of a president's administration. Other documents, including those

⁶⁵ 524 U.S. 399 (1998).

⁶⁶ 158 F.3d 1263 (D.C. Cir. 1998) *cert. denied*, *Office of the President v. Office of Independent Counsel*, 525 U.S. 996 (1998).

⁶⁷ Previously, Kavanaugh had taken a similar position in *In Re: Grand Jury*, when he co-wrote a brief arguing that the First Lady did not enjoy attorney-client privileges in her relationship with White House counsel. 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).

⁶⁸ 525 U.S. 990 (1998), *denying cert. to In Re: Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998).

⁶⁹ Following *Rubin v. U.S.*, there have been several attempts to use legislation to create a secret service privilege, (including a bi-partisan attempt in 1998), but none have been successful thus far. See Herbert L. Abrams, *The Contemporary Presidency: Presidential Safety, Prosecutorial Zeal, and Judicial Blunders: The Protective Function Privilege*, *Presidential Studies Quarterly*, June 1, 2001. See also S. 1360, 106th Cong. (1999); S.22, 108th Cong. (2003).

⁷⁰ Milbank.

containing confidential advice a president received from his advisors, known as “P-5” documents, would not be available until 12 years after an administration’s end. At that time, the P-5 documents would be released unless the current or former president was able to successfully argue a “constitutionally based privilege” that would justify withholding the materials.⁷¹

President Ronald Reagan was to be the first president to have his P-5 documents released in January of 2001. Roughly 68,000 documents were to be available to scholars, researchers, and the general public for the first time. The Bush Administration was given 30 days notice to review the P-5 documents for information that could compromise national security before the documents would be released.⁷²

However, the Administration took action far beyond merely evaluating the sensitivity of the documents. After receiving a series of 90-day extensions, the White House finally responded in November of 2001 by issuing executive order #13233, reportedly written by Kavanaugh.⁷³ The controversial order gave both the sitting president *and* the former president or his designees the right to refuse the release of any P-5 document without cause and apparently in perpetuity.⁷⁴ Many speculated that the motivation behind the order was to protect Bush advisors, many of whom served under President Reagan, from embarrassing revelations about advice they gave the former president. A researcher’s only recourse would be to bring a lawsuit against the objecting president or presidents. This would be a daunting task for most academic researchers, who would not only be pitted against one, possibly two presidents, but also forced to retain counsel to file suit, even with limited funding.⁷⁵

Kavanaugh was given the task of defending the order before a group of presidential scholars invited to the White House shortly after the executive order was issued. He attempted to assure the group that the researchers would be “happy with the [new] procedures” once they were in place. On the contrary, the researchers raised serious concerns. Robert Spitzer, president of the Presidency Research Group of the American Political Science Association, noted that “Kavanaugh’s promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . [t]he situation continues to be deeply troubling.”⁷⁶ Hugh Graham, Reagan historian and professor emeritus at Vanderbilt University, was also troubled by Kavanaugh’s efforts. He described the executive order as being “a victory for secrecy in government” that is “so total that it would make Nixon jealous in his grave.”⁷⁷

Other examples of Kavanaugh’s sudden zeal for presidential secrecy abound. *The Nation* has reported that Kavanaugh was central to the White House’s efforts to keep notes from Vice President Dick Cheney’s energy task force meetings, which some

⁷¹ Cannon.

⁷² *Id.*

⁷³ Milbank.

⁷⁴ Cannon.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

speculate contain proof that the White House acted to aid Enron prior to its collapse, secret from the Senate Governmental Affairs Committee.⁷⁸ The White House cited an interest in preserving “the ability of the president and vice president to receive unvarnished advice” as the reason for concealing the documents.⁷⁹ Likewise, Kavanaugh reportedly played a key role in preventing congressional access to documents pertaining to presidential pardons.⁸⁰ The *Washington Post* said that the Administration’s claim of executive privilege over pardon documents, “represents a hard line the government has never taken” – namely that executive privilege extends beyond communications from presidential advisors in the White House to include “government papers he has never seen and officials he has never talked to, such as the sentencing judge in a particular case.”⁸¹ The *Post* noted that “[i]n the past, even pardon recommendations sent directly to the president from the Justice Department have been routinely made public by government archivists after several years.”⁸² The Bush Administration, by contrast, is even claiming privilege to keep secret pardon documents nearly 80 years old, asserting privilege over documents generated in considering the pardon of back-to-Africa movement leader Marcus Garvey, who was released from prison in 1927 after a fraud conviction.⁸³

Such unprecedented claims of executive privilege serve as a sharp contrast to the insatiable appetite for access to presidential records and information exhibited by Kavanaugh during the Clinton administration. They suggest a view of the law that seriously threatens government openness and is of particular concern for a nominee to the D.C. Circuit, which often considers such issues. In addition, Kavanaugh’s apparent willingness to shift his legal philosophy and twist legal theory so dramatically shows an enthusiasm for serving partisan political ends over the law that is extremely troubling for a nominee for a lifetime seat on the federal bench.

Religious Liberty and the Public Schools

Although Kavanaugh’s legal work (other than for Kenneth Starr and the Bush White House) is scant, the legal position he advocated in one case on religious liberty and church-state separation raises additional concerns. In 1999, Kavanaugh authored an *amicus* brief on behalf of members of Congress that was submitted to the Supreme Court in the case of *Santa Fe Independent School District v. Doe*.⁸⁴ In that case, the school district argued that its “student-led” prayers over the school loudspeaker at public school

⁷⁸ Newfield. John Nichols, *Enron: What Dick Cheney Knew*, *The Nation*, March 28, 2002.

⁷⁹ CNN, *Cheney Defends Refusal to Hand Over Energy Task Force Notes*, Jan. 27, 2002, available at <http://cnn.allpolitics.com>. The issue of whether Cheney will be allowed to keep all such documents secret from the public is to be partially addressed by the Supreme Court this spring. See Charles Lane, *High Court Will Review Ruling on Cheney Task Force Records*, *Washington Post*, Dec. 16, 2003. Kavanaugh’s Judiciary Committee hearing was scheduled on the same day as the Supreme Court oral argument in that case.

⁸⁰ Milbank.

⁸¹ George Lardner, *Bush Seeks Secrecy for Pardon Discussions*, *Washington Post*, Aug. 27, 2002.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Brief of *amicus curiae* Congressmen Steve Largent and J.C. Watts in *Santa Fe Independent School District v. Doe*, 199 U.S. Briefs 62, Dec. 30, 1999. (hereinafter “Santa Fe Brief”)

football games did not infringe on students' rights under the Establishment Clause of the First Amendment.

At issue in the case was a public school's policy of allowing the student body to elect a student representative each school year who would deliver an "invocation and/or message" over the school loudspeaker before football games.⁸⁵ In his brief, Kavanaugh argued that because the student body's chosen speaker was not specifically required to pray during the "invocation and/or message," any prayer offered by the speaker was essentially private religious speech, which is not only permissible under, but is also protected by, the First Amendment.⁸⁶ Kavanaugh claimed that the "sole question" raised in the case was "whether . . . the high school must actively prohibit that student speaker from invoking God's name, uttering religious words, or saying a prayer."⁸⁷ He further asserted that ruling against the school district in the case would force schools "to monitor and censor religious words."⁸⁸

In a 6-3 decision, the Court squarely rejected Kavanaugh's claim, finding that prayer was both "explicitly and implicitly"⁸⁹ encouraged by the policy which "involve[d] both perceived and actual endorsement of religion."⁹⁰ The Court noted that while the speaker was not explicitly required to pray, an "invocation" was the only type of message expressly endorsed by the school and prayer is the most obvious means of "solemnizing the event," one of the purposes of the invocation acknowledged by Kavanaugh's brief.⁹¹ Pointing out that its decision does nothing to inhibit truly voluntary religious practice, as Kavanaugh appeared to argue, the Court explained that "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."⁹²

In sum, the Court wholly rejected Kavanaugh's arguments, finding that an invocation on school property, at school-sponsored events, "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer . . . is not properly characterized as 'private' speech."⁹³ The Court's clear and unequivocal opinion, and the fact that Kavanaugh failed to even properly frame the question before the Court in his brief, raises serious questions about both his legal philosophy and his skill as a lawyer. If given the opportunity to advocate these same views from the federal bench, the right of schoolchildren to be free from religious coercion and school-sponsored promotion of religion at school could be in jeopardy.

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 3 – 5.

⁸⁷ *Id.* at 5.

⁸⁸ *Id.* at 4.

⁸⁹ *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) at 301.

⁹⁰ *Id.* at 305.

⁹¹ *Id.* at 306 – 307.

⁹² *Id.* at 313.

⁹³ *Id.* at 310.

Conclusion

Brett Kavanaugh is an unsuitable candidate for a lifetime appointment to the D.C. Circuit bench, the second highest court in the nation. While Kavanaugh's scant legal resume does not reveal much about his legal skills, the highly charged partisan items that it does contain tell a great deal about his loyalties, ideology, and legal philosophy. Kavanaugh has eagerly allied himself with the highly questionable tactics of former Special Prosecutor Ken Starr. He has proven himself willing to change his view of the law to bend with the political winds. He has recently argued for extensive presidential and governmental secrecy and privilege that would severely undermine the rights of the public and Congress, particularly if implemented from a powerful lifetime position on the D.C. Circuit. Kavanaugh has played a key role in the Bush Administration's judicial nominations policy, and the judicial nominees that Kavanaugh had a hand in selecting and promoting have too often been extremists who would strip Congress of much of its power and remove the American people from much of Congress' protection. Throughout most of his career, Kavanaugh has shown a dedication to extreme right wing ideas that undermine the freedoms and liberties that most Americans cherish. A lifetime appointment to a powerful federal appellate court should not become a political reward for a highly partisan political warrior. The nomination of Brett Kavanaugh to the United States Court of Appeals for the D.C. Circuit should be rejected.



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I. INTRODUCTION

In accordance with 28 U.S.C. § 594(h), the Office of Independent Counsel In re: Madison Guaranty Savings & Loan Association (the OIC) files this summary report on the 1993 death of Deputy White House Counsel Vincent W. Foster, Jr.

On July 20, 1993, police and rescue personnel were called to Fort Marcy Park in suburban Northern Virginia. They found Mr. Foster lying dead with a gun in his right hand and gunshot residue-like material on that hand. There were no signs of a struggle. There was a gunshot wound through the back of his head and blood under his head and back. The autopsy determined that Mr. Foster's death was caused by a gunshot through the back of his mouth exiting the back of his head. The autopsy revealed no other wounds on Mr. Foster's body.

The police later learned that Mr. Foster had called a family doctor for antidepressant medication the day before his death. He had told his sister four days before his death that he was depressed, and she had given him the names of three psychiatrists. He had written in the days or weeks before his death that he "was not meant for the job or the spotlight of public life in Washington. Here, ruining people is considered sport."

Two law enforcement investigations – the initial United States Park Police investigation and a subsequent investigation conducted under the direction of regulatory Independent Counsel Robert B. Fiske, Jr. – concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Two inquiries in the Congress of the United States reached the same conclusion. After analysis of the evidence gathered during those investigations, and further investigation including adducing evidence before the federal grand jury in Washington, D.C., the OIC likewise has concluded that Mr. Foster committed

suicide by gunshot in Fort Marcy Park.

The OIC's conclusion is based on analyses and conclusions of a number of experienced experts and criminal investigators retained by the OIC. They include Dr. Brian D. Blackbourne, a forensic pathologist who is the Medical Examiner for San Diego County, California; Dr. Henry C. Lee, an expert in physical evidence and crime scene reconstruction who is Director of the Connecticut State Police Forensic Science Laboratory; Dr. Alan L. Berman, an expert suicidologist who currently is Executive Director of the American Association of Suicidology; and several experienced investigators with extensive service in the Federal Bureau of Investigation (FBI) and other law enforcement agencies. These experts and investigators reviewed the evidence gathered during the prior investigations and conducted further investigation as necessary.

Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."

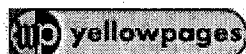
Dr. Lee reported that "[a]fter careful review of the crime scene photographs, reports, and reexamination of the physical evidence, the data indicate that the death of Mr. Vincent W. Foster, Jr. is consistent with a suicide. The location where Mr. Foster's body was found is consistent with the primary scene," that is, the location where he committed suicide. Dr. Berman stated that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion." OIC investigators concurred, based on investigation and analysis of the evidentiary record, that Mr. Foster committed suicide by gunshot in Fort Marcy Park.

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II. BACKGROUND

A. 1993 Park Police Investigation

Because Mr. Foster's body was found in Fort Marcy, a park maintained by the National Park Service, the United States Park Police conducted the investigation of his death. On the night of the death (July 20, 1993), Mr. Foster's body was transported to Fairfax County Hospital in Fairfax, Virginia. The next day, Dr. James C. Beyer, Deputy Chief Medical Examiner, Northern Virginia District of the Virginia Office of the Chief Medical Examiner, conducted an autopsy in the presence of an assistant and four Park Police officers.

The FBI assisted the Park Police in certain aspects of the ensuing death investigation, as did other federal and Virginia agencies. Moreover, the FBI, at the direction of the Department of Justice, opened a separate investigation of possible obstruction of justice after a note was reportedly found on Monday, July 26, 1993, in Mr. Foster's briefcase at the White House.

On August 10, 1993, the Department of Justice, FBI, and Park Police jointly announced the results of the death and note investigations. The Park Police concluded that Mr. Foster committed suicide by gunshot in Fort Marcy Park. Robert Langston, Chief of the Park Police, explained:

The condition of the scene, the medical examiner's findings and the information gathered clearly indicate that Mr. Foster committed suicide. Without an eyewitness, the conclusion of suicide is deducted after a review of the injury, the presence of the weapon, the existence of some indicators of a reason, and the elimination of murder. Our investigation has found no evidence of foul play. The information gathered from

associates, relatives and friends provide us with enough evidence to conclude that Mr. Foster's ... that Mr. Foster was anxious about his work and he was distressed to the degree that he took his own life.

Based on the evidence the FBI gathered in its investigation, the Department of Justice did not seek criminal charges for obstruction of justice relating to the handling of the note.

B. 1994 Fiske Investigation

In 1992 and 1993, the Resolution Trust Corporation (RTC) examined the operations of Madison Guaranty Savings & Loan, a defunct savings and loan in Little Rock, Arkansas, that had been operated by James and Susan McDougal. The McDougals also had been partners with William Jefferson Clinton and Hillary Rodham Clinton in an Arkansas real estate venture known as the Whitewater Development Company. In October 1993, the RTC sent nine criminal referrals to the United States Attorney's Office in Little Rock concerning the activities of Madison Guaranty.

Also in 1993, the FBI investigated the activities of Capital Management Services, Inc., a small business investment company in Little Rock that had been operated by David L. Hale. Mr. Hale was indicted by a federal grand jury in the Eastern District of Arkansas on September 23, 1993.

Both the Hale prosecution and the Madison investigation were transferred in November 1993 from the United States Attorney's Office in Little Rock to the Fraud Section of the Department of Justice in Washington. On December 20, 1993, the White House confirmed that Whitewater-related documents had been in Mr. Foster's White House office at the time of his death. On January 12, 1994, President Clinton asked Attorney General Reno to appoint an independent counsel, and on January 20, 1994, the Attorney General appointed Robert B. Fiske, Jr., to take over the investigation.

Mr. Fiske's jurisdictional mandate vested him with authority to investigate whether any individuals or entities committed federal crimes "relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association, (2) Whitewater Development Corporation, or (3) Capital Management Services." After his appointment, Mr. Fiske took over both the Hale prosecution and the

continuing Madison investigation.

Mr. Fiske also opened a new investigation of Mr. Foster's death, utilizing FBI resources and a panel of distinguished and experienced pathologists. On June 30, 1994, Mr. Fiske issued a report concluding that "[t]he overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide in Fort Marcy Park on July 20, 1993."

C. Congressional Inquiries

On February 24, 1994, Congressman William F. Clinger, Jr., then the Ranking Republican on the Committee on Government Operations of the United States House of Representatives, initiated a probe into the death of Mr. Foster. Mr. Clinger's staff interviewed emergency rescue personnel, law enforcement officials, and other persons involved in the Park Police investigation of Mr. Foster's death. Mr. Clinger's staff obtained access to the Park Police reports and to photographs taken at the scene and at the autopsy. Mr. Clinger issued a report on August 12, 1994, concluding that "all available facts lead to the undeniable conclusion that Vincent W. Foster, Jr. took his own life in Fort Marcy Park, Virginia on July 20, 1993."

The United States Senate Committee on Banking, Housing, and Urban Affairs conducted an inquiry into the Park Police investigation of Mr. Foster's death. The Committee concluded its inquiry with a report issued on January 3, 1995, stating that "[t]he evidence overwhelmingly supports the conclusion of the Park Police that on July 20, 1993, Mr. Foster died in Fort Marcy Park from a self-inflicted gun shot wound to the upper palate of his mouth." The additional views of Senators D'Amato, Faircloth, Bond, Hatch, Shelby, Mack, and Domenici stated that "[w]e agree with the majority's conclusion that on July 20, 1993 Vincent Foster took his own life in Fort Marcy Park."

D. Appointment of the Independent Counsel

On August 5, 1994, after enactment of the Independent Counsel Reauthorization Act of 1994, the Special Division of the United States Court of Appeals for the District of Columbia Circuit appointed Kenneth W. Starr as Independent Counsel In re: Madison Guaranty Savings & Loan Association. The OIC was given jurisdiction 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."

Due to continuing questions about Mr. Foster's death, the relationship between Mr. Foster's death and the handling of documents (including Whitewater-related documents) from Mr. Foster's office after his death, and Mr. Foster's possible role or involvement in other events under investigation by the OIG, the OIG reviewed and analyzed the evidence gathered during prior investigations of Mr. Foster's death and conducted further investigation.

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The gunshot death of a high-ranking White House lawyer who had been a law partner of the First Lady of the United States and friend to both the President and the First Lady was bound to be heavily scrutinized -- and it has been. Many persons have publicly identified specific issues regarding Mr. Foster's death that, in their view, might raise broader questions about the ultimate conclusion that Mr. Foster committed suicide in Fort Marcy Park. Those questions have arisen and to some extent persisted for many of the same reasons that numerous suicides are questioned. In this case, as in many suicides, no identified eyewitness saw Mr. Foster commit suicide, and Mr. Foster apparently did not leave a suicide note (that is, a note that specifically refers to or contemplates suicide).

The primary issues that have been raised regarding the cause and manner of Mr. Foster's death can be grouped into several broadly defined categories: (1) forensic issues; (2) apparent differences in statements of private witnesses, Park Police personnel, and Fairfax County Fire and Rescue Department (FCFRD) personnel regarding their activities and observations at Fort Marcy Park on July 20; (3) physical evidence (such as the fatal bullet) that could not be recovered; and (4) the conduct of the Park Police investigation and the autopsy.

B. OIC Personnel

To ensure that these issues were fully considered, carefully examined, and properly assessed in analyzing the cause and manner of Mr. Foster's death, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman.

Dr. Blackbourne has been County Medical Examiner for San Diego County, California, since 1990. He was Chief Medical Examiner for the Commonwealth of Massachusetts from 1983 to 1990; Deputy Chief Medical Examiner in Washington, D.C., from 1972 to 1982; and Assistant Medical Examiner in Metropolitan Dade County, Florida, from 1967 to 1972. He has taught and written widely, and

has testified in court on numerous occasions. He has performed over 5,500 autopsies, over 700 of which have involved gunshot wounds. The autopsies have included over 800 homicides and over 700 suicides. He is a Fellow of the American Academy of Forensic Sciences and a member of the National Association of Medical Examiners.

Dr. Lee has served as Director of the Connecticut State Police Forensic Science Laboratory since 1980. He has numerous professional affiliations and has served as a consultant to a variety of organizations. He has received over 400 awards and commendations, including a 1986 Distinguished Service Award and a 1994 Distinguished Fellow Award from the American Academy of Forensic Sciences. He has been qualified in many state and federal courts as an expert witness or an expert involved in forensic science, forensic serology, bloodspatter analysis, crime scene investigation, crime scene profiling, crime scene reconstruction, fingerprints, imprints, and general physical evidence. He has written or edited many books and articles, including Physical Evidence (1995), Crime Scene Investigation (1994), Physical Evidence and Forensic Science (1985), and Physical Evidence and Crime Scene Investigation (1983).

Since 1995, Dr. Berman has been Executive Director of the American Association of Suicidology. He was President of that Association in 1984-85. From 1991 to 1995, he was Director of the National Center for the Study and Prevention of Suicide. Since 1971, he has engaged in the private practice of psychotherapy and psychological consultation. In 1982, he received the Edwin S. Shneidman Award for outstanding contribution in research by the American Association of Suicidology. He has taught and written extensively on the subject of suicide, and has testified before committees of the United States House of Representatives and the United States Senate. He is a Distinguished Adjunct Professor of Psychology at the American University in Washington, D.C., and was a tenured professor in the Department of Psychology from 1979 to 1991. He was co-editor of Assessment and Prediction of Suicide (1992). He has been a Consulting Editor of the journal Suicide and Life Threatening Behavior since 1981.

OIC investigators who worked with these outside, independent experts included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington, D.C. Agents with the Cold Case Squad work with MPD homicide detectives in reviewing and

attempting to solve homicides that have remained unsolved for more than one year. Another OIC investigator has extensive homicide experience as a detective with the MPD in Washington, D.C., for over 20 years. Two other OIC investigators assigned to the Foster death matter have experience as FBI agents investigating homicides of federal officials and others.

C. Methodology

The OIC devoted substantial effort to gathering, examining, and analyzing evidence to render as conclusive a determination as possible of the cause and manner of Mr. Foster's death. In this kind of investigation – a reconstruction based in part on evidence gathered and tested during prior investigations -- the important information in assessing the cause and manner of death includes testimonial, documentary, and photographic evidence relating to the scene and the autopsy; physical and forensic evidence gathered at the scene and the autopsy; a variety of tests and analyses of the evidence; and testimonial and documentary evidence revealing the decedent's activities and state of mind in the days and weeks before his death.

In particular, the OIC obtained information gathered during the prior investigations of Mr. Foster's death, including physical evidence; photographs taken at the scene and the autopsy; and incident reports, interview reports, and other documents produced or gathered by the Park Police, the FCFRD, the FBI, and Mr. Fiske's Office. The OIC questioned the known and identified civilian witnesses who were in Fort Marcy Park in the late afternoon of July 20, the Park Police and FCFRD personnel who responded to Fort Marcy Park, and the medical personnel who were involved in the Foster matter. Many of these persons were questioned before the federal grand jury.

As to forensic information, the OIC attempted to obtain certain physical and forensic evidence in addition to that which had been gathered in prior investigations. Experts retained by the OIC reviewed and examined the evidence. Dr. Lee reviewed and studied scene and autopsy photographs and documentation; studied, re-examined, and tested physical evidence; reviewed FBI Laboratory tests and the autopsy results; met with FBI Laboratory personnel and Dr. Beyer, the medical examiner who conducted the autopsy; and toured and examined the Fort Marcy Park scene. Dr. Lee submitted a report summarizing his work on the physical and forensic evidence and setting forth his analysis.

Dr. Blackburne reviewed the relevant reports and the scene and

autopsy photographs; reviewed microscopic slides; examined the Fort Marcy Park area; and interviewed Dr. Beyer, Dr. Haut (the medical examiner who responded to the Fort Marcy scene on July 20), and FBI and Virginia laboratory personnel. Dr. Blackbourne prepared a report summarizing his work on the forensic issues and setting forth his analysis.

As to information regarding Mr. Foster's activities and state of mind before his death, the OIC both re-interviewed certain persons who had been interviewed during prior investigations and interviewed persons not previously interviewed. These individuals included a variety of family members, friends, and associates who could potentially shed light on Mr. Foster's activities and state of mind. The OIC reviewed documents gathered in prior investigations, and sought and reviewed new documents.

The OIC provided Dr. Berman with relevant state-of-mind information (the bulk of which consisted of interview reports and transcripts), which he studied and analyzed. Dr. Berman submitted a report to the OIC summarizing his work and providing his analysis.

The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, considering the analyses and conclusions of the OIC experts and investigators, and preparing this report.

D. Report

This report will describe the factual background; the forensic evidence and analyses, including the autopsy findings; the analysis of Dr. Lee; and the analyses and reports prepared by Dr. Blackbourne and the pathologists retained by Mr. Fiske's Office. Above all, the Foster death case is a forensic matter, and the forensic evidence and analyses provide the foundation for the ultimate conclusion. The report then will discuss investigative work conducted with respect to other, specific issues. Finally, the report will summarize Dr. Berman's conclusions regarding Mr. Foster's state of mind.

The OIC has filed this summary report with the Special Division of the United States Court of Appeals. Because of the secrecy restrictions of Federal Rule of Criminal Procedure 6(e), the OIC has not submitted the report to the Congress or released it directly to the public. The Special Division retains discretion to authorize public release of this report, and the OIC has prepared the report with the assumption that the Special Division, consistent with past practice,

would see fit to authorize public release. While some descriptions of forensic evidence are necessarily graphic, the OIC has sought to comply with the 1994 Independent Counsel Reauthorization Act regarding the contents of reports.

Some of the best evidence of the condition of Mr. Foster's body at the time of his death is contained in photographs taken by Park Police officers at Fort Marcy Park and in photographs taken at the autopsy. However, based on traditional privacy considerations, this report does not include death scene or autopsy photographs. The potential for misuse and exploitation of such photographs is both substantial and obvious.

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IV. FACTUAL SUMMARY

A. Mr. Foster's Background and Activities on July 20, 1993

Vincent W. Foster, Jr., was born on January 15, 1945, in Hope, Arkansas, to Alice Mae and Vincent W. Foster. He had two sisters, Sheila and Sharon. He was graduated from Hope High School in 1963 and from Davidson College in 1967. He married Elizabeth (Lisa) Braden in 1968, and they had three children, two boys and a girl. Mr. Foster was graduated first in his class from the University of Arkansas School of Law in 1971, where he was Managing Editor of the Law Review. He joined the Rose Law Firm in Little Rock in 1971 as an associate, and he became a Member of the Firm in 1974. Mr. Foster left the Rose Law Firm and moved to Washington in January 1993 to serve as Deputy White House Counsel. He initially lived in Washington with his sister Sheila Anthony and her husband Beryl Anthony. Mrs. Lisa Foster moved to Washington in early June 1993, and the family lived in a house in the Georgetown section of Washington.

On the morning of Tuesday, July 20, 1993, six months into the Clinton Administration, Mr. Foster drove his gray Honda Accord to the White House from the house in Georgetown where he and his family were living. After dropping off his older son and his daughter on the way to work, Mr. Foster arrived at the suite on the second floor of the White House's West Wing where White House Counsel Bernard Nussbaum and Mr. Foster had offices. Three assistants (Mr. Nussbaum's assistants Betsy Pond and Linda Tripp and Mr. Foster's assistant Deborah Gorham) and an intern (Thomas Castleton) had desks in the outer office of the suite.

According to the testimony of a number of witnesses, Mr. Foster attended the morning Rose Garden ceremony announcing the nomination of Louis J. Freeh to be Director of the FBI. According to

Ms. Tripp and Ms. Pond, at about 12:00 or 12:30 p.m., Mr. Foster asked them for lunch from the White House mess.

After eating lunch in his office, Mr. Foster left the Counsel's suite. He was seen leaving by Ms. Tripp, Ms. Pond, and Mr. Castleton. The OIC, like the other investigative bodies before us, has not learned of or located anyone who definitively saw Mr. Foster from the time he left the White House until near 6:00 p.m., at which time a private citizen found Mr. Foster dead in Fort Marcy Park.

B. Fort Marcy

Fort Marcy was constructed as a Civil War earthwork fortification. It is located between the George Washington Memorial Parkway (GW Parkway) and Chain Bridge Road in the Virginia suburbs of Washington, D.C., approximately 6.5 miles by car from downtown Washington. The GW Parkway, on which there is virtually constant automobile traffic, runs along the Virginia side of the Potomac River from Mount Vernon to the Capital Beltway. Several bridges connect the Parkway (or roads leading to the Parkway) to Washington. A parking lot for the park is adjacent to the outbound side of the GW Parkway. Inside the park, as of July 1993, were two cannons – one closer to the GW Parkway and a second (the one near which Mr. Foster was found) closer to Chain Bridge Road. That second cannon is approximately 200 yards from the parking area.

Thirty-one witnesses, 19 of whom observed Mr. Foster's body, have provided relevant testimony about their activities and observations in and around the Fort Marcy Park area on July 20, 1993. They include:

- 6 private citizens (one of whom discovered and observed Mr. Foster's body);

- 13 Park Police personnel (9 of whom observed Mr. Foster's body);

- 11 Fairfax County Fire and Rescue Department (FCFRD) personnel (8 of whom observed the body); and

- Dr. Haut, the doctor representing the Medical Examiner's Office who responded to the scene and examined the body.

Between about 2:45 and 3:05 p.m., a citizen (C1) driving outbound on GW Parkway saw "a dark metallic grey, Japanese sedan" occupied

by a single, white male abruptly enter Fort Marcy Park. C1 said in his initial 1993 statement to the Park Police that the license plate was from Ohio or Arkansas. Months later, on April 18, 1994, during Mr. Fiske's investigation, C1 was shown photographs of Mr. Foster's car. C1 stated that the car in the photographs looked "similar" to the car he recalled, but that the license plate on it differed from that which he recalled.

Another citizen (C2) drove his rental car into the Fort Marcy parking lot at approximately 4:30 p.m. While there, C2 saw one unoccupied car, which he described as a "rust brown colored car with Arkansas license plates." C2 also saw another nearby car; that car was occupied by a man who exited his car as C2 exited his own car. C2 described this man as having "a look like he had a ... an agenda," although "everything I based my observation of this guy, was from my gut, more than anything else." C2 and the man did not speak to one another. C2 went into the park to urinate, and the other man had reentered his car by the time C2 returned to the parking lot. C2 then left the park in his car.

A man (C3) and woman (C4) pulled into the Fort Marcy parking area in C4's white Nissan at about 5:00 p.m. and were still at Fort Marcy when police and rescue personnel arrived shortly after 6:00 p.m. While C3 and C4 were at Fort Marcy, another citizen (C5) drove his white van into the parking lot to urinate. C5 said that he exited his van, and while walking through the park, found Mr. Foster's body near the second cannon, the cannon closer to Chain Bridge Road. C5 then left Fort Marcy and drove approximately 2.75 miles further outbound on the GW Parkway to a parking area near GW Parkway Headquarters; there, C5 reported the dead body to two off-duty Park Service employees who called 911. Numerous Park Police and FCFRD personnel then responded to Fort Marcy Park.

In the initial response, two groups of FCFRD personnel, as well as Park Police Officer Kevin Fornshill, arrived at Fort Marcy Park at approximately the same time – about 6:10 p.m. They then split into teams to search the park. Officer Fornshill and FCFRD personnel George Gonzalez and Todd Hall composed one group; FCFRD personnel Richard Arthur, James Iacone, Jennifer Wacha, and Ralph Pisani formed the other. The Fornshill-Hall Gonzalez group first reached the body of Mr. Foster, and the other group joined them soon thereafter.

Twelve additional Park Police personnel subsequently arrived at Fort

Marcy Park. Officer Franz Ferstl was the responding beat officer and, as such, was responsible for preparing the incident report. He responded to the scene at the same time as Officer Julie Spetz. Sergeant Robert Edwards, the District supervisor, also arrived on the scene. Ferstl, Spetz, and Edwards arrived before approximately 6:15 p.m., according to the report of Officer Christine Hodakievic, who arrived at approximately 6:15 p.m. and recorded the names of those officers already on the scene (Fornhill, Ferstl, Spetz, and Edwards). Lieutenant Patrick Gavin arrived in a supervisory role at roughly 6:30 p.m., according to his recollection.

According to their reports, Investigators Cheryl Braun and John Rolla, the lead Park Police investigators, arrived along with Investigator Renee Abt at about 6:35 p.m. They received investigative assistance from Officer Hodakievic, who was an investigator in training at that time. Peter Simonello, the Park Police identification technician responsible for gathering physical evidence, arrived shortly thereafter.

At the scene, Park Police investigators and the Park Police identification technician conducted interviews, examined the body and Mr. Foster's car, made notes, took photographs, and collected evidence. Later, five of the Park Police personnel prepared typed reports: the responding beat officer (Ferstl), the two lead investigators (Rolla and Braun), Officer Hodakievic, and the identification technician (Simonello). Several evidence receipts were prepared to record physical evidence obtained at the scene.

When the Park Police and rescue personnel found Mr. Foster's body, he was lying on his back on a berm in front of the second cannon, the cannon nearer Chain Bridge Road. He was dead and had a gun in his right hand (with his thumb trapped in the trigger guard). Gunshot residue-like material was observed on his right hand. When the Park Police lifted and turned over the body later that evening, they noted a wound out the back of his head, and blood on the ground underneath his head and back. They observed no signs of a struggle.

Park Police also found a gray, 4-door Honda Accord with Arkansas plates in the parking lot; that car, the police discovered later that evening, was registered to Mr. Foster. The two lead Park Police investigators (Braun and Rolla) photographed and examined the car and, during that examination, found Mr. Foster's White House identification. The car was towed to a Park Police impoundment lot

that night. The next day, the car was further photographed and examined at the impoundment lot.

Dr. Haut, the medical examiner's representative, arrived at Fort Marcy Park at approximately 7:40 p.m. on July 20 and confirmed the death. The body was then transported by FCFRD ambulance personnel to a morgue at Fairfax Hospital in Fairfax, Virginia.

The witnesses' recollections of precise details at Fort Marcy Park vary in some respects (the differences will be explored below). Nonetheless, the evidence from the scene – including the gun, the apparent residue, the nature of the wound, the blood, the lack of any signs of a struggle -- points to the conclusion that death resulted from suicide by gunshot. A final determination of the manner of death depends on a variety of further investigative steps – most importantly, those associated with forensic science.

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V. FORENSIC ANALYSES

The forensic analyses, in conjunction with the evidence from the scene, confirm that Mr. Foster committed suicide in Fort Marcy Park.

A. Autopsy

The autopsy occurred on July 21, 1993, in the presence of six persons. Dr. James Beyer, Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner, conducted the autopsy, aided by an assistant. Park Police Sergeant Robert Rule and Officer James Morrissette observed the autopsy. Park Police Identification Technicians Hill and Johnson took photographs at the autopsy and collected evidence such as clothing, blood samples, and hair samples. Dr. Beyer prepared an autopsy report. He has supplemented the report with testimony on several occasions. Dr. Beyer has performed over 20,000 autopsies. His responsibility is to determine cause of death and, in the case of a gunshot wound, to determine with the police the manner of death – suicide, homicide, accident, or undetermined.

Dr. Beyer said Dr. Haut contacted him early on July 21, 1993, to advise him of Mr. Foster's death. Dr. Beyer recalled that Dr. Haut indicated that there was a perforating gunshot wound (that is, a gunshot wound with an entrance and exit) and that the Park Police was the investigating agency.

Dr. Beyer recalled that when he opened the body bag, there was blood on the right side of the face and on the right shoulder area of the shirt. Dr. Beyer found a large amount of blood in the body bag.

The autopsy report states that Mr. Foster's height was 6 feet and 4 1/2 inches and his weight was 197 pounds. The report indicates no problems or abnormalities with the cardiovascular system, respiratory

system, liver, gall bladder, spleen, pancreas, adrenal and thyroid glands, gastrointestinal tract, genitourinary tract, kidneys, urinary bladder, or genitalia. The report states that the "[s]tomach contains a considerable amount of digested food material whose components cannot be identified."

As to the head, the report indicates:

Perforating gunshot wound mouth-head; entrance wound is in the posterior oropharynx at a point approximately 7 1/2" from the top of the head; there is also a defect in the tissues of the soft palate and some of these fragments contain probable powder debris. The wound track in the head continues backward and upward with an entrance wound just left of the foremen magnum with tissue damage to the brain stem and left cerebral hemisphere with an irregular exit scalp and skull defect near the midline in the occipital region. No metallic fragments recovered.

The report contains a diagram of the head and brain area that depicts the entrance wound and the fracture line. A separate diagram depicts the fracture lines, exit, and skull damage. A third page of diagrams of the head area states "perforating gunshot wound" and describes the entrance wound as follows: "Entrance - mouth - posterior oropharynx - large defect -- soft palate defect / powder debris identified." It describes the exit wound as a wound of 1 1/4" x 1". The report indicates "backward" and "upward" as the direction of the bullet through the head.

With respect to the wound, Dr. Beyer stated: "The entrance wound was in the back of the mouth, what we call the posterior oropharynx, where a large defect was present. There was also a soft palate tissue defect, and powder debris could be identified in the area of the soft palate and the back of the mouth. The exit wound is depicted [in the autopsy report] as being present three inches from the top of the head, approximately in the midline, and there is an irregular wound measuring one and one quarter inch by one inch." There was "good alignment" between the entrance and exit wounds, and there was "no reason to think that this was not an entrance and exit defect configuration." As the report indicates, Dr. Beyer did not recover any bullets or bullet fragments from the body.

The report states that "[s]ections of soft palate" were "positive for powder debris," and Dr. Beyer said that the gunpowder debris in the mouth was "grossly present," meaning that it could be seen with the

naked eye, and was present in a "large amount." Thus, Dr. Beyer stated that "the obvious finding was that the muzzle of the weapon had to be in his mouth, close to the back of his throat, back of his mouth."

Dr. Beyer said that he performed "an external examination of the body, with photography of the body. We then examine the body for any identifying marks, such as scars, tatoos or wounds." Dr. Beyer stated that he recalls observing powder debris on the right hand. He recalled gunpowder debris on the left hand to a much lesser degree. (The diagrams in the autopsy report indicate "black material" on both the right hand and the left hand.) Dr. Beyer also recalled a "tannish brown indentation" across the back of the right thumb (the thumb which had been in the trigger guard).

Dr. Beyer said that observation of Mr. Foster's body revealed no wounds on the neck, hands, buttocks, shoulder, back, or any portion of the body other than the head; he said, moreover, that any such wounds would have been registered on the anatomic diagram. Dr. Beyer stated that "[t]here was no evidence of any trauma to the individual other than the gunshot wound."

Dr. Beyer concluded that this was a self-inflicted wound based upon the fact that there was no evidence of any trauma other than the gunshot wound, and "no evidence of any central nervous system depression or diseased state that would have permitted, in my estimation, somebody to walk up and put a gun in his mouth and pull the trigger."

Dr. Beyer's conclusions were reviewed by two sets of experts, one set retained by the OIC and the other by Mr. Fiske's Office. Their analyses of Dr. Beyer's findings and of the relevant laboratory analyses are outlined below. They confirm the conclusions reached at the autopsy.

B. Laboratory Analyses

A number of photographs were taken at Fort Marcy Park and at the autopsy. In addition, at both the scene and the autopsy, the Park Police obtained physical evidence. Evidence receipts show that, at the Fort Marcy scene, the Park Police obtained physical evidence and clothing, including the following:

* Colt Army Special .38 caliber revolver, 4", 6-shot (obtained

from "right hand victim")

* round .38 caliber RP 38 SPL HV (from "revolver")

* casing .38 caliber RP 38 SPL HV (from "revolver")

* eyeglasses (from berm)

* Seiko quartz wrist watch (from "Deceased left wrist")

* pager (from "Deceased right side waist area")

* silver colored ring (from "Deceased right ring finger")

* gold colored band type ring (from "Deceased left ring finger")

* black suit jacket (from "front passenger seat of gray Honda")

* blue silk tie with swans (on "top of coat on front passenger seat")

* White House Identification (from "under coat on front passenger seat")

* brown leather wallet (from "inside suit jacket pocket of suit jacket from front passenger seat")

At the autopsy, the Park Police obtained physical evidence and clothing, including the following:

* one vial of blood

* lock seal envelope containing pulled head hairs

* white colored long sleeve button down shirt with blood stain

* white colored short sleeve t-shirt with blood stain

* pair white colored boxer shorts

* pair blue gray colored pants with black colored belt

* pair black colored socks

* pair black colored dress shoes, size 11M

The Park Police and Medical Examiner's Office caused several laboratory tests of the evidence to be performed during the initial 1993 investigation. In addition, Mr. Fiske's Office and the OIC submitted physical evidence collected during the investigation of Mr. Foster's death to the FBI Laboratory, which has produced reports analyzing physical evidence. The OIC also submitted physical evidence to Dr. Lee, and he, too, produced a report based on his laboratory analyses. The following summarizes the relevant laboratory analyses.

1. Gun

a. Operation

The .38 caliber revolver recovered from Mr. Foster's hand at Fort Marcy Park had a four-inch barrel and a capacity of six shots. It had one live round and one spent casing. Had the trigger been pulled again, the next shot would have fired the remaining round.

In August 1993, at the request of the Park Police, the Bureau of Alcohol, Tobacco and Firearms (ATF) Laboratory examined the revolver and found that it functioned. The ATF Laboratory determined that the cartridge case found in the cylinder under the hammer was fired in that gun. The FBI Laboratory also test-fired the gun and determined that it "functioned normally" and that the trigger pulls were normal. The .38 caliber cartridge case "was identified as having been fired in the . . . revolver." Like the expended cartridge, the unexpended cartridge was .38 caliber manufactured by Remington. They bore similar headstamps. Dr. Lee also test-fired the revolver and found that it was operable.

b. Serial Numbers

An ATF report on the gun's two serial numbers revealed a purchase at the Seattle Hardware Company in Seattle, Washington, on September 14, 1913, and at the Gus Habich Company in Indianapolis, Indiana, on December 29, 1913. The gun could not be further traced. Laboratory examination of the gun

found no indication of any alteration of the serial number of the weapon. . . . The additional serial number on the crane of the firearm most likely occurred at some time when the eighty year-old weapon was repaired. There is no realistic way to determine when such a repair occurred. The exchange of the two numbers between the frame and the crane is a condition

noted on many similar firearms in the Laboratory's Reference Firearms Collection and is not considered significant.

c. Ammunition

Dr. Lee noted that the ammunition found in this weapon was type "RP .38 SPL HV," manufactured by Remington Peters. Dr. Lee stated that information from the manufacturer indicated that this ammunition was discontinued in 1975, and that the cartridge therefore would have been manufactured prior to that time.

d. DNA

DNA consistent with Mr. Foster's DNA was detected on the muzzle portion of the barrel of the revolver. In particular, DNA type DQ alpha 2, 4 was detected on the gun and in Mr. Foster's blood.

e. Blood

The gun was recovered at the scene by Park Police Technician Simonello and subsequently packaged in brown paper for storage in an evidence locker. While the Park Police's subsequent examinations for fingerprints and other evidence could have removed some trace evidence that might have existed on the gun, Dr. Lee examined the gun and reported that "[s]mall specks of brownish-colored deposits were noted." Dr. Lee found that "[s]ome of these deposits gave positive results with a chemical test for blood" although the "quantity of sample present was insufficient for further analysis."

Dr. Lee also reported that "[m]acrosopic and microscopic examination of [the] piece of paper" originally wrapped around the barrel of the revolver for evidence storage "revealed the presence of reddish-colored particles. These stains also gave positive results with a chemical test for blood." Dr. Lee stated that "[t]his fact suggests that the barrel of the weapon was in contact or at close range to a source of liquid blood."

Dr. Lee further stated that "[b]lood spatters and tissuelike materials were noted on the fingerprint lift tape from the weapon." Dr. Lee concluded that "[t]he presence of blood and tissue-like materials on the lifts is another strong indication that this weapon was fired while in contact with or close to a blood source."

f. Fingerprints

Identification Technician E.J. Smith of the Park Police examined the gun for latent fingerprints on July 23, 1993. The results were negative. The FBI Laboratory later examined the gun and similarly detected no latent prints on the exterior surface of the weapon.

In his report to the OIC, Dr. Lee explained that "[t]he handle grip area of [the .38 Colt revolver] is textured and is not typical of the type of surface which commonly results in the development of identifiable latent fingerprints." He also noted that the fingerprint powder method was used when the Park Police initially tested the gun; "[a]lthough the fingerprint powder method is one of the most common techniques used in the latent print field, there are also newer technologies, such as cyanoacrylate fuming, laser, and forensic lighting techniques which could have been used in this case. It is unknown at this time whether these techniques would have provided additional information" had they initially been employed.

The FBI Laboratory also noted that a lack of fingerprints is not extraordinary and that "[g]enerally, the determining factors in leaving latent prints are having a transferable substance, i.e., sweat, sebaceous oil or other substance on the fingers, and having a surface that is receptive to receiving the substance that forms the latent prints. A clean, smooth, flat surface is most receptive for transfer of any substance from the fingers," and the surface of the grip handle at issue here was textured, not smooth.

g. Marks on Body from Gunshot and Gun

(1) Gunshot Residue on Hands

The photographs of Mr. Foster's right hand taken at Fort Marcy Park and during the autopsy depict black gunshot residuelike material on the right forefinger and the area between the thumb and forefinger. The autopsy report also noted material on the forefinger area of the left hand.

During the Park Police investigation, the ATF Laboratory found that gunshot residue patterns reproduced in the laboratory were consistent with those seen in the photographs taken by the Park Police at the scene. The FBI Laboratory similarly stated that gunshot residue on the right forefinger area of the right hand is "consistent with the disposition of smoke from muzzle blast or cylinder blast when the . . . revolver is fired using ammunition like that represented by" the cartridge and casing recovered from the gun "when this area of the

right hand is positioned near the front of the cylinder or to the side of and near the muzzle."

Dr. Lee conducted test firings using a laboratory standard weapon and the same kind of ammunition that was found in the revolver recovered from Mr. Foster's hand. With the standard weapon, little or no observable gunpowder particles were released from the cylinder area or onto the shooter's hand. However, Dr. Lee reported that each test-fired shot of the revolver found in Mr. Foster's hand at Fort Marcy Park produced a significant amount of unburned and partially burned gunpowder. Relatedly, Dr. Lee reported that the gun had an "extraordinary front cylinder gap" (the space between the cylinder and the barrel) of .01 inch through which gunpowder residue is expelled when the gun is fired. Dr. Lee stated that the gap was one "possible cause[] of the deposit of a large amount of gunshot residue particles on Mr. Foster's body and clothing."

(2) Indentation on Thumb

The revolver was recovered from Mr. Foster's right hand at the scene at Fort Marcy Park by Park Police Technician Simonello. Technician Simonello reported that Mr. Foster's thumb was trapped in the trigger guard of the gun. Consistent with Technician Simonello's observation, the autopsy photographs depict an indentation mark on the inside of the right thumb.

The mark on the inside of the right thumb which is visible in the [autopsy] photograph is consistent with a mark produced by the trigger of the . . . revolver when this portion of the right thumb is wedged between the front of the trigger and the inside of the front of the trigger guard of the . . . revolver when the trigger rebounds (moves forward). The trigger of the . . . revolver automatically rebounds when released after firing (single or double action) or whenever the trigger is released after it is moved to the rear. This mark is consistent with the position of the right thumb of the victim in the trigger guard of the revolver in [three Polaroid] photographs.

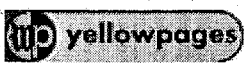
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h. Summary: Gun

Dr. Lee concluded, "[b]ased on laboratory observations and the examination of the scene photographs," that "the revolver . . . is consistent with the weapon which resulted in the death of Mr. Vincent Foster. The barrel of this weapon was likely in Mr. Foster's mouth at the time the weapon was discharged. Gunshot residue noted on Mr. Foster's right hand and the lesser amount of deposits on his left hand indicated that Mr. Foster held the weapon when it was fired."

2. Clothing

At the autopsy, clothing was removed from Mr. Foster's body and placed on a table in the autopsy room. Park Police Officer Johnson took this clothing and placed it in a single bag for return to the Park Police offices. There, brown wrapping paper was laid on the floor of a photography room and the clothes placed on that paper. The clothes were left to dry in the photography room until Monday, July 26, when Technician Simonello packaged the clothing and put it into an evidence locker.

The FBI Laboratory and Dr. Lee independently examined the clothing, examined debris collected from the clothing by the FBI Laboratory during the 1994 investigation conducted by Mr. Fiske's Office, studied photographs taken at the scene and autopsy, and reported a number of findings related to the clothing.

a. Gunshot Residue

Dr. Lee, in his examinations, reported "[s]mall deposits of gunpowder residue and partially burned gunpowder particles" on the

shirt. Earlier FBI Laboratory examination of the shirt resulted in a positive reaction for vaporized lead and very fine particulate lead on the front of the shirt. "This type of reaction is consistent with the type of reaction expected when a firearm is discharged in close proximity to this portion of the shirt. It is consistent with muzzle blast or cylinder blast from a revolver like the [submitted] revolver using ammunition like" the cartridge and cartridge case submitted with the gun. The FBI Laboratory further stated that

[s]ubsequent chemical processing of the . . . shirt in the Laboratory revealed lead residues in a small area near the sixth button from the collar on the front of the . . . shirt. This reaction could have been caused by contact with a source of lead residues. Lead residues were also detected on the underside of the edge of the collar on the left side of the . . . shirt. This small area of lead residues could have been caused by the discharge of a firearm consistent with the positive reaction noted above when the [submitted] shirt was received in the Laboratory.

The FBI Laboratory reported that these gunshot residues "are consistent with the cylinder blast or the muzzle blasts" which would be produced if the revolver was fired "in close proximity to the front of th[is] shirt."

Similarly, when the ATF Laboratory, at the request of the Park Police, tested Mr. Foster's shirt, it found "a positive reaction consistent with the discharge of a revolver in close proximity to the upper front of the shirt."

b. Bloodstain Patterns as Depicted in Photographs From Scene

The FBI Laboratory examined the bloodstain patterns depicted in the Polaroids taken at the scene. The Laboratory Report stated:

Photographs of the victim at the incident scene depict apparent blood stains on his face and the right shoulder of his dress shirt. The staining on the shirt covers the top of the shoulder from the neck to the top of the arm and consists of saturating stains typical of having been caused by a flow of blood onto or soaking into the fabric. The stains on his face take the form of two drain tracks and one larger contact stain. . . .

The contact stain on the right cheek and jaw of the victim is typical of having been caused by a blotting action, such as

would happen if a blood-soaked object was brought in contact with the side of his face and taken away, leaving the observed pattern behind. The closest blood-bearing object which could have caused this staining is the right shoulder of the victim's shirt. The quantity, configuration and distribution of the blood on the shirt and the right cheek and jaw of the victim are consistent with the jaw being in contact with the shoulder of the shirt at some time.

Dr. Lee also examined the photographs taken at Fort Marcy Park. He noted that the photographs of the shirt show several areas of bloodstains, including "saturated-type bloodstains" on the "shoulder and collar region."

On a separate bloodstain issue, Dr. Lee examined the photographs and reported that "[h]igh velocity impact type blood spatters were observed on Mr. Foster's face, hands, and shirt." Dr. Lee stated that "[t]his type of blood spatter typically is produced at the time when a weapon is discharged and the spatters result from the backspatter of the gunshot wound." Dr. Lee reported that "[t]hese blood spatters are intact and no signs of alteration or smudging were observed." This finding is in conflict with any theory that the fatal shot was fired elsewhere and the head wrapped during movement or cleaned upon arrival -- because those actions likely would have altered, smudged, or eliminated the blood spatters, contrary to what Dr. Lee found.

c. Blood Drainage After Movement From Fort Marcy Park and Bloodstains on Clothing at Autopsy

Dr. Lee noted that Dr. Beyer had "observed a large amount of liquid blood in the body bag and in Mr. Foster's body," which "further indicates that the location where the body was found is consistent with the primary scene [and that it] is, therefore, unlikely that Mr. Foster's body was moved to the Fort Marcy Park scene from another location."

The shirt itself, which was removed at the autopsy after movement of the body to the morgue, contains bloodstains on areas where blood does not appear in the photographs of the body at the scene. Dr. Lee stated that these stains on the shirt "most likely occurred when the body was placed into the body bag and moved from the scene and/or when in the body bag, prior to the collection of the decedent's clothing." As noted below, the experts concluded that the shirt likely would have been more extensively stained when the body was found at the second cannon area at Fort Marcy Park had the body been

moved from another location.

d. Mineral/Vegetative Material

Dr. Lee reported that examination of a photograph of Mr. Foster's shoes taken by the FBI Laboratory at the time of its initial examination revealed brownish smears on the left heel. Dr. Lee further stated that his own macroscopic and microscopic examinations of the shoes revealed the presence of soil-like debris. (The FBI Laboratory photo of the shoes, taken in 1994 at the time of the Laboratory's examination of the clothing, shows traces of soil visible to the naked eye.) Dr. Lee found that "[t]race materials were located embedded in the grooves of the sole patterns at the heel of [the left shoe]. A portion of this material subsequently was removed. Microscopic and macroscopic examination showed this material to contain mineral particles, including mica, other soil materials, and vegetative matter." Dr. Lee stated that this fact "indicates the sole of the shoe had direct contact with a soil surface containing these materials."

e. Lack of Rips, Tears, or Scraping on Clothing

Dr. Lee found a small amount of vegetative material on Mr. Foster's shirt that could have resulted from contact with the ground in the park. Dr. Lee found no ripping, tearing, or scratch or scraping-type marks on the shirt. Dr. Lee stated that this fact "suggests that no prolonged moving contact with a soil surface occurred which would cause the type of damage commonly resulting from dragging or similar action."

Dr. Lee reported that soil and grasslike materials were similarly present on the pants in the area of the rear pocket, which indicates that the pants had direct contact with a soil surface. Dr. Lee reported that "[n]o dragging-type soil patterns or damage which could have resulted from dragging-type action were observed on these pants."

f. Bone Chip

Dr. Lee examined debris collected from Mr. Foster's clothing and reported that the debris was "found to contain a bone chip." Dr. Lee stated that DNA was extracted from this bone fragment and amplified, and the DNA profile generated for this bone sample was consistent with the DNA types of Mr. Foster. Based on his analysis of the evidence, Dr. Lee concluded that "[t]his bone chip originated from Mr. Foster and separated from his skull at the time the projectile

exited Mr. Foster's head."

g. Pants Pocket and Oven Mitt

William Kennedy, Associate White House Counsel, eventually took possession of Mr. Foster's car on behalf of the Foster family after the Park Police released it on July 28, 1993. Mr. Kennedy maintained contents of the car that had not been taken into evidence by the Park Police, and he produced those contents to investigators from Mr. Fiske's Office. The contents included a kitchen oven mitt that had been in the glove compartment in Mr. Foster's car (the mitt is depicted in the glove compartment in the Park Police photographs of the car taken at the impoundment lot on July 21).

Dr. Lee's examinations of this oven mitt and of Mr. Foster's pants (taken into evidence by the Park Police at the autopsy on July 21) produced circumstantial evidence relevant to the investigation.

Dr. Lee reported that "[m]acrosopic and microscopic examination of the inside of the front pants pockets revealed the presence of fibers and other materials, including a portion of a sunflower seed husk in the front left pocket. Instrumental analysis of particles removed from the pocket surface revealed the presence of lead. These materials were also found inside the oven mitt located in the glove compartment of Mr. Foster's vehicle. . . . The presence of these trace materials could indicate that they share a common origin. These materials in the pants pocket clearly resulted from the transfer by an intermediate object, such as the Colt weapon."

As noted, Dr. Lee also examined the oven mitt recovered from Mr. Foster's car. He reported: "Dark particle residues were located inside of the oven mitt. Instrumental analysis revealed the presence of the elements lead and antimony in these particles; this finding could indicate that an item which had gunshot residue on it, such as the revolver . . . , came in contact with the interior of [the oven mitt]."

Dr. Lee further stated that "[s]unflower-type seed husks were located on the inner surfaces of this oven mitt. These sunflower seed particles were similar to the sunflower seed husks found in Mr. Foster's front, left pants pocket." Dr. Lee stated that "[t]his finding suggests that the sunflower seed husk found inside the pants pocket could have been transferred from the oven mitt through an intermediate object, such as the revolver."

Virtually all theories that the manner of death was not suicide assume

that Mr. Foster did not previously possess the gun recovered from his hand at Fort Marcy Park. Apart from a variety of other compelling circumstantial and testimonial evidence (discussed below) that the gun belonged to Mr. Foster, the evidence regarding the pants pocket and oven mitt also tends to link Mr. Foster to the gun. Mr. Foster was found by police and rescue personnel with the gun that fired the fatal shot in his hand, and the oven mitt was found in the glove compartment in his car. There is no evidence, moreover, that anyone other than Mr. Foster did place or would have placed this or any other gun into Mr. Foster's pants pocket and into the oven mitt. Those pieces of evidence, when considered together and with all of the other evidence, tend to link Mr. Foster to the gun and thus tend to refute a theory that the manner of death was not suicide. The evidence regarding the pants pocket and oven mitt does not itself compel a finding as to location of death, but it is consistent with a scenario in which Mr. Foster transported the gun from the Foster home in the oven mitt, and carried the gun in his pants pocket as he walked from his car in Fort Marcy Park to the berm near the second cannon.

h. Hairs and Fibers

In debris collected from Mr. Foster's clothing, the FBI Laboratory reported finding two blond to light brown head hairs of Caucasian origin that were suitable for comparison purposes and dissimilar to those of Mr. Foster. The hairs did not appear to have been forcibly removed. Hair evidence can become important or relevant in a criminal investigation when there is a known suspect and a significant evidentiary question whether the suspect can be forensically linked to another person (a rape or murder victim, for example) or to a particular location. If the suspect is a stranger to the victim or the scene, the presence of the suspect's hair is relevant in assessing whether he or she had contact with the victim or scene. In this case, however, the only known individuals who reasonably might have been compelled to provide hair samples were persons already known to have had contact with Mr. Foster.

The FBI Laboratory reported 35 definitive carpet-type fibers in the debris collected from the clothing. Of those fibers, 23 were white fibers. OIC investigators sought to determine a possible source for the fibers – for the white fibers in particular, in light of the number of white fibers in comparison to the limited number of fibers of other colors. The logical known sources for possible comparison were carpets from locations with which Mr. Foster was known to have

been in contact – his car, home, and workplace. OIC investigators obtained carpet samples from those sources, including from a white carpet located in 1993 in the house in Washington where Mr. Foster lived with his family. The FBI Laboratory determined that the white fibers obtained from Mr. Foster's clothing were consistent with the samples obtained from that carpet.

In sum, therefore, the carpet fiber evidence – the determination that the white fibers were consistent with a carpet from the Fosters' house and the variety and insignificant number of other fibers – does not support speculation that Mr. Foster was wrapped and moved in a carpet on July 20. Indeed, the fiber evidence, when considered together with the entirety of the evidence, is inconsistent with such speculation.

3. Eyeglasses

When found, Mr. Foster's body was located on a steep berm with his head higher than his feet and his feet pointed essentially straight down the berm. Mr. Foster's eyeglasses were recovered by Park Police Technician Simonello approximately 13 feet below Mr. Foster's feet.

a. Blood

Dr. Lee stated that "[b]loodstains were found on both sides of the lenses" of Mr. Foster's eyeglasses. These bloodstains "were less than or equal to 1 mm in size. In addition, bloodlike and tissue-like materials were identified on the [fingerprint] lifts of the eyeglasses. "

b. Gunpowder

The FBI Laboratory found one piece of ball smokeless powder on the eyeglasses, and it was "physically and chemically similar" to the gunpowder identified in the cartridge case.

c. Summary: Eyeglasses

Dr. Lee stated that the above facts "support the interpretation that Mr. Foster was wearing his eyeglasses at the time the gun was discharged." The analyses and conclusions of the experts and investigators in this and prior investigations reveal that the location where the glasses were found is consistent with the conclusion that Mr. Foster was wearing the glasses at the time the shot was fired.

4. Surrounding Area

a. Gunshot Residue in Soil

As part of his examination, Dr. Lee went to Fort Marcy Park with OIC investigators and obtained soil and other materials from the berm on which Mr. Foster's body was found. Dr. Lee examined the soil samples; he reported that "[a] few unburned and partially deformed gunpowder-like particles were recovered from the soil in the area where Vincent Foster's body was found." It cannot be determined "[w]hether these particles were deposited on the ground at the time of Mr. Foster's death or at any other period of time."

b. Possible Bloodstains on Vegetation at Scene

Dr. Lee stated that one photograph of the scene "shows a view of the vegetation in the areas where Mr. Foster's body was found. Reddish-brown, blood-like stains can be seen on several leaves of the vegetation in this area." He also noted that "[a] close-up view of some of these blood-like stains can be seen in [a separate] photograph."

Part V Continues

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5. Contents of Bodily Fluid

During the 1993 investigation, the Laboratory of the Virginia Division of Forensic Science found that the blood, vitreous humor, and urine were negative for alcohols and ketones. The Laboratory did not detect "phencyclidine, morphine, cocaine, [or] benzoylecgonine"; "other alkaline extractable drugs"; or "acidic [or] neutral drugs."

The FBI Laboratory later conducted more sensitive testing and determined that the blood sample from Mr. Foster contained trazodone. Trazodone was an antidepressant medication prescribed as Desyrel by Mr. Foster's physician on July 19, 1993, and Mr. Foster took one tablet that night, according to his wife.

C. Review by Pathologists

Because of the importance of the forensic evidence to the conclusion about cause and manner of death, the OIC retained Dr. Brian Blackbourne as an expert pathologist to assist the investigation. Dr. Blackbourne reviewed the relevant reports, photographs, and microscopic slides; toured Fort Marcy Park; and interviewed Dr. Beyer, Dr. Haut, and FBI and Virginia laboratory personnel. He provided a report to the OIC summarizing his work on the forensic issues and setting forth his analysis.

Dr. Blackbourne concluded that Mr. Foster "died of a contact gunshot wound of the mouth, perforating his skull and brain." Dr. Blackbourne based that conclusion "upon the autopsy report, diagrams and photographs and my examination of the microscopic slides of the entrance wound in the soft palate and posterior oropharynx which demonstrated extensive soot."

Dr. Blackbourne concluded that Mr. Foster was alive at the time the shot was fired. Dr. Blackbourne based this conclusion

upon the autopsy report and photographic evidence that there was bleeding beneath the scalp about the gunshot exit wound and beneath the fractures of the back of the skull. Such

bleeding requires the heart to be beating at the time these injuries occurred. The autopsy report and my microscopic observation that blood was aspirated into the lungs requires that the person be breathing in order to suck the blood into the small air sacks of the lung.

Dr. Blackbourne concluded that Mr. Foster "fired the gun with the muzzle in his mouth, his right thumb pulling the trigger and supporting the gun with both hands and with both index fingers relatively close to the cylinder gap (the space between the cylinder and the barrel)." Dr. Blackbourne reasoned that "the dense deposit of soot on the soft palate and oropharynx indicated that the gun was discharged in close proximity to the soft palate." In addition, the DNA from the muzzle of the gun was consistent with that of Mr. Foster. Furthermore, "[t]he right thumb was entrapped within the trigger guard by the forward motion of the trigger after the revolver was fired." Finally, Dr. Blackbourne stated that "[w]hen a revolver is fired, smoke issues out of the space between the cylinder and the barrel. This smoke will be deposited on skin, clothing or other objects close to the cylinder gap. The autopsy report documents that smoke deposits were noted on the radial aspect of both right and left index fingers. Dr. Beyer told me that there was more deposit on the right as compared to the left index fingers."

Dr. Blackbourne concluded that "[a]t the time of his death Vincent Foster was not under the influence of alcohol, narcotics, [or] cocaine." Dr. Blackbourne based this conclusion upon the toxicology reports of the Virginia Division of Forensic Science Toxicology Laboratory and the FBI Laboratory; a meeting with the personnel of the FBI Laboratory; and a discussion with the toxicologist for the Virginia Division of Forensic Science who performed work on the Foster case in 1993.

Dr. Blackbourne concluded that the gunshot wound that caused Mr. Foster's death occurred in Fort Marcy Park at the location where his body was discovered. Dr. Blackbourne based this conclusion

upon the fact that he would be immediately unconscious following the gunshot wound through the brain. Movement of the body, after the gunshot, by another person(s) would have produced a trail of dripping blood and displaced some of his clothing. If he had been transported from another location, such movement would have resulted in much greater blood soilage of his clothing (as was seen when he later was placed

in a body bag and transported to Fairfax Hospital and later to the Medical Examiner's Office). No trail of dripping blood was observed about the body on the scene. His clothing was neat and not displaced. The blood beneath the head and on the face and shoulder is consistent with coming from the entrance and exit wounds.

Dr. Blackbourne concluded that the blood draining from the right nostril and right side of the mouth, as documented by Polaroid scene photographs, suggests that an early observer may have caused movement of the head. Dr. Blackbourne based this conclusion

upon the fact that blood will pool in the mouth and nasopharynx while the heart is still beating following a gunshot wound of the back of the mouth. This blood may drain toward the dependent side of the head if the volume of blood exceeds the capacity of the mouth. There will be a thin trickle. The broad area of blood covering the right lower face, chin and right side of his neck and extending over the right shoulder and right collar of his shirt would result from the sudden drainage of all of the blood in his mouth. . . . This event occurred prior to taking the Polaroid scene photographs.

Based on all of the above evidence, analyses, and conclusions, Dr. Blackbourne concluded that "Vincent Foster committed suicide on July 20, 1993 in Ft. Marcy Park by placing a .38 caliber revolver in his mouth and pulling the trigger. His death was at his own hand."

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VI. ISSUES RELATING TO EVIDENCE AT SCENE

Evidence from the scene and regarding the activities and observations of persons in and around Fort Marcy Park on July 20, 1993, raised certain issues requiring further investigative work.

A. Blood Transfer Stain

The Polaroids of the body at the scene depict, and many witnesses who observed the body at the scene describe, the position of the head as facing virtually straight, not tilting noticeably to one side or the other. The Polaroids depict a blood transfer stain in the area of the right side of the face. As explained in previous sections, the expert pathologists and Dr. Lee analyzed this blood evidence and the Polaroid photographs. They concluded, based on the blood transfer stain, that the head made contact with the right shoulder at some point before the Polaroids were taken. The testimony and contemporaneous reports point to the conclusion that rescue personnel at the scene handled the decedent's head to check for vital signs and open an airway.

B. Quantity of Blood

Many who saw the body at Fort Marcy Park after it was lifted and rolled over at the scene described a quantity of blood behind Mr. Foster's head, under his body, and on the back of his shirt. A reporter and Park Police officers separately visited the scene on July 21 and 22, 1993, and stated that they could identify the spot where the body had been located by the blood soaked into the ground. A reporter placed a stick into the ground where the blood spot was located and estimated the blood depth at one-eighth inch.

In addition, as Dr. Lee stated regarding the quantity of blood, the photographs at the autopsy reveal blood staining on the clothes that

was not depicted at the scene. Moreover, Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag. These facts indicate that still more blood drained from the body during movement from the Fort Marcy scene to the autopsy.

There has been occasional public suggestion, premised on the supposedly low amount of blood observed at the Fort Marcy scene, that blood must already have drained from the body elsewhere and that the fatal shot therefore must have been fired elsewhere. As revealed by the foregoing descriptions of the evidence, the underlying premise of this theory is erroneous: A quantity of blood was observed at the park under the body and on the back of the head and shirt. Moreover, the suggestion fails to account for the blood that subsequently drained from Mr. Foster's body during movement to the autopsy. The blood-quantity evidence, even when considered in isolation from other evidence, does not support (and indeed contravenes) a suggestion that the fatal shot was fired at a place other than where Mr. Foster was found at Fort Marcy Park.

C. Unidentified Persons and Cars

The evidence establishes that at least three cars belonging to civilians were in and around the Fort Marcy parking lot area when the first Park Police and FCFRD personnel arrived: (1) Mr. Foster's gray Honda Accord with Arkansas tags; (2) the white Nissan with Maryland tags driven by C4; and (3) the broken-down blue Mercedes driven by C6. The three cars belonging to Mr. Foster, C4, and C6 are the only cars positively identified and known to law enforcement and the OIC that were in the Fort Marcy Park parking lot area in the 6:00- 8:30 p.m. time frame and that belong to persons other than FCFRD personnel, Park Police personnel, towing personnel, and Dr. Haut.

During the afternoon, before Park Police and FCFRD personnel were called to the scene at Fort Marcy Park, C2 saw a man in a car next to him; C3 and C4's statements suggest the presence of at least one man in the parking lot and perhaps a jogger; and C6, after her car broke down, saw a man on the entrance ramp to the parking lot who asked her if she needed a ride. Law enforcement and the OIC are not aware of the identities of the persons (other than C5) described by C2, C3, C4, and C6. There is no evidence that any of those unidentified persons (or any identified persons, for that matter) had any connection to Mr. Foster's death; and the totality of the forensic, circumstantial, testimonial, and state-of-mind evidence contrasts with

any such speculation.

D. Car Locks

The Park Police investigators (Braun and Rolla) who entered and searched Mr. Foster's car at Fort Marcy Park said that they were able to enter the car without keys because the car was not locked. James Iacone of the FCFRD stated that he had tried at least one of the doors and that it was locked. That statement contrasts with that of Ralph Pisani of the FCFRD, who said that he, Jennifer Wacha, and Iacone looked into the Honda, but that no one tried the doors. In any event, even were Iacone's recollection more accurate than the others, the statement would be of uncertain significance, inasmuch as it is, of course, possible that one or more of the four doors was locked and one or more unlocked.

E. Neighborhood

OIC investigators canvassed the area surrounding Fort Marcy Park to determine whether anyone observed, heard, or had knowledge of relevant activity on July 20. That effort did not yield relevant information.

F. Pager

A Park Police evidence control receipt indicates that at the scene, Investigator Rolla took possession of Mr. Foster's pager from his right waist area. The receipt reveals that the pager, along with other personal property such as Mr. Foster's wallet, rings, and watch, were released to the White House on the evening of July 21 to be returned to the Foster family. Investigator Rolla said that Mr. Foster's pager was off when he recovered it. White House records of pager messages do not indicate messages sent to or from Mr. Foster on July 20.

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VII. ISSUES RELATING TO CONDUCT OF INITIAL INVESTIGATION

Certain issues related to the conduct of the initial 1993 investigation into Mr. Foster's death warrant discussion in this report.

A. Photographs

Park Police Identification Technician Simonello took 35 millimeter photographs of Mr. Foster's body and of the scene. Park Police investigators also took a number of Polaroids of Mr. Foster's body and of the scene. Polaroids taken at a crime or death scene develop immediately, and thus are useful in the event that problems subsequently occur in developing other film (as occurred here).

Thirteen of the Polaroids provided to Mr. Fiske's Office and the OIC are of the body scene, and five are of the parking lot scene. Of the 13 Polaroids of the body scene, eight are initialed by Investigator Rolla. The backs of the other five say "from C202 Sgt. Edwards 7-20-93 on scene." Officer Ferstl said that he took Polaroids and, without initialing or marking them, gave them to Sergeant Edwards, who gave them to the investigators. Sergeant Edwards does not recall taking Polaroids himself.

B. Keys

Investigator Rolla said he felt into Mr. Foster's pants pockets at the scene in looking for personal effects. Later, when it became apparent to Investigators Rolla and Braun that they did not have the keys to the car, they went to the hospital to check more thoroughly for keys. The hospital logs indicate that Investigators Rolla and Braun were at the morgue at 9:12 p.m. Investigator Braun thoroughly searched the pants pockets by pulling the pockets inside out, and she found two sets of keys. She prepared an evidence receipt indicating that the

keys were taken from the right pants pocket, and she subsequently placed the keys in an evidence locker.

C. X-Rays

Although no x-rays were produced from the autopsy, the gunshot wound chart in the autopsy report has a mark next to "x-rays made." Dr. Beyer has stated that either he did not take x-rays because the machine was not functioning properly at the time, or that if he attempted to take x-rays, they did not turn out. He stated:

I had intended to take x-rays, but our x-ray machine was not functioning properly that day. And if we took any all we got was a totally black, unreadable x-ray, so I have no x-rays in the file. . . . I could very well have tried to use it on the Foster autopsy and got an unreadable x-ray. If his wound had been a penetrating wound, where there was only a wound of entrance, and the missile was retained within the body, then there would have been a requirement that I have an x-ray. Since this was a perforating wound, where there was a wound of entrance and a wound of exit, and I was going to examine the tissue through which the missile path had taken, I concluded we could proceed without the x-ray, rather than delay it six to eight hours.

Dr. Beyer's assistant recalled that, at the time of the Foster autopsy, the laboratory had recently obtained a new x-ray machine and that it was not functioning properly. The assistant stated that the machine sometimes would expose the film and sometimes would not. In this case, the assistant recalled moving the machine over Mr. Foster's body in the usual procedure and taking the x-ray. He said that he did not know until near the end of the autopsy that the machine did not expose the film. In addition, like Dr. Beyer and the assistant, the administrative manager of the Medical Examiner's Office recalled "numerous problems" with the x-ray machine in 1993 (which, according to records, had been delivered in June 1993).

With respect to the check of the x-ray box on the report, Dr. Beyer stated that he checked that box before the autopsy while completing preliminary information on the form and that he mistakenly did not erase that check mark when the report was finalized.

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VIII. OTHER ISSUES

Several other issues have arisen and been examined by the OIC.

A. Gun Observations and Ownership

The OIC conducted investigation and analysis with respect to the gun, both as to observations of the gun at the scene and ownership of the gun.

1. Observations of Gun at Scene

According to the testimony of the first three official personnel to find the body (Park Police Officer Fornshill and FCFRD personnel Hall and Gonzalez), the gun was in Mr. Foster's hand when they found the body (although Officer Fornshill himself did not see or look for it, but rather was told of it by the others). Those statements contrast with the testimony of C5, the individual who first saw Mr. Foster's body and did not see a gun. Careful evaluation of all of the circumstances and evidence leads to the conclusion that C5 simply did not see the gun that was in Mr. Foster's hand.

First, when questioned by the OIC, C5 agreed with a statement attributed to him in an interview report that "there was extreme dense and heavy foliage in the area and in close proximity to the body, and the possibility does exist that there was a gun on rear of hand that he might not have seen." That is supported, moreover, by the testimony of several witnesses establishing that the gun was difficult to see in Mr. Foster's hand when standing in a position above the head on the top of the berm. That is further confirmed by Polaroids taken from above the head that reveal the difficulty of seeing the gun from that angle.

The forensic evidence and analyses outlined above also support the

conclusion that the gun was in Mr. Foster's hand when C5 saw him. As explained by the pathologists and Dr. Lee, Mr. Foster's DNA was consistent with that on the muzzle of the gun, traces of blood evidence were derived from the gun, residue was on his hand, and residues were on his shirt. In addition, an indentation mark on his thumb suggests that the gun was in the hand for some period of time. The totality of the evidence leads to the conclusion that the gun recovered from Fort Marcy Park was in fact in Mr. Foster's hand when C5 happened upon the body, but that C5 simply did not see it.

There are discrepancies in the descriptions of the color and kind of gun seen in Mr. Foster's hand. However, the descriptions provided by the first two persons to observe the gun, as well as of numerous others, are consistent with the gun retrieved from the scene and depicted in the on-the-scene Polaroids. That gun was taken into evidence by Technician Simonello on July 20, and has been maintained by law enforcement since then.

2. Ownership of Gun

One follow-up investigative issue concerning the gun relates to its ownership. Virtually all theories that the manner of death was not suicide rest on an assumption that the gun did not belong to Mr. Foster. But testimony, circumstantial evidence, and forensic evidence support the conclusion that the gun did in fact belong to Mr. Foster.

Mrs. Alice Mae Foster, Mr. Foster's mother, stated that Mr. Foster, Sr., died in 1991. He had kept a revolver in a drawer of his bedside table, in addition to other guns in the house. In 1991, when Mr. Foster, Sr., had been ill and bedridden for a period of time, Mrs. Alice Mae Foster had all the handguns in the house placed in a box and put into a closet. Subsequent to the death of Mr. Foster, Sr., in 1991, Mrs. Alice Mae Foster gave Mr. Foster, Jr., the box of handguns.

Mrs. Lisa Foster similarly recalls that her husband took possession of several handguns from his parents' house near the time of his father's death. She recalled that, after they moved to Washington in 1993, some guns were kept in a bedroom closet. She recalled what she described as a silver-colored gun (she also has referred to it as a "cowboy gun"), which had been packed in Little Rock and unpacked in Washington. She also recalled a .45 caliber semi-automatic pistol. She said she found one gun in its usual location on July 20, 1993, the .45 caliber semi-automatic pistol. She did not find the other gun on or after July 20, 1993.

On July 29, 1993, Mrs. Foster was shown a photograph of the gun retrieved from the scene and, according to the Park Police interview report, was unable to identify it from the photograph. On May 9, 1994, she was shown the actual gun that was recovered and said, according to the interview report, that the gun "may be a gun which she formerly saw in her residence in Little Rock, Arkansas" and that "she may have seen the handgun . . . at her residence in Washington." She stated to the OIC in November 1995, when viewing the gun recovered from Mr. Foster's hand, that it was the gun she unpacked in Washington but had not subsequently found, although she said she seemed to remember the front of the gun looking lighter in color when she saw it during the move to Washington.

Webster Hubbell stated that, on the night of Mr. Foster's death, Lisa Foster went upstairs in the Foster house with him. While there, she looked into the top of a closet, pulled out a "squared-off" gun, and said, according to Hubbell, that one of the guns was missing. To Hubbell's knowledge, the "other gun" was never found at the Foster house.

Sharon Bowman, one of Mr. Foster's sisters, recalled that her father kept a black revolver in a drawer of his bedside table. She said that she had retrieved various handguns from her parents' house, placed them in a shoebox, and put them in her mother's closet (and Ms. Bowman said they later were given to Mr. Foster, Jr.) During the 1993 Park Police investigation, John Sloan, a family friend of the Fosters, wrote a letter to Captain Hume of the Park Police, stating that he had shown Sharon Bowman a photograph of the gun. According to the letter, Ms. Bowman stated that it "looked like a gun she had seen in her father's collection," and particularly pointed out the "'wavelike' detailing at the base of the grip." Ms. Bowman was later shown the revolver recovered from Fort Marcy Park. She indicated that it looked like one that her father kept in the house in Hope, but she could not positively identify it.

Mr. Foster's other sister, Sheila Anthony, said she had no personal knowledge about the gun found in Mr. Foster's hand at Fort Marcy Park. She recalled, however, that her sister, Sharon Bowman, and her brother had removed guns from their father's house near the father's death.

Mr. Foster's older son said he knew his father had an old .38 caliber revolver. He saw it being unpacked at their house in Washington when they moved there. Mr. Foster told his son that he had received

this gun from his father (Vincent Foster, Sr.). The older son did not know where the gun was kept in Washington. The son was unable to conclusively identify the gun recovered on July 20, 1993, from Mr. Foster's hand as the one he had previously seen.

Mr. Foster's younger son stated that he saw one or two handguns in a shoebox along with a number of loose bullets while unpacking in Washington. The younger son stated that these items came from his grandfather's house. He described his grandfather's guns as a small, pearl-handled gun, and one or two revolvers. He believes his father placed the guns in a closet in Washington.

Mr. Foster's daughter stated she recalled someone unpacking a handgun at the house when they initially moved to Washington, although she never saw any other guns in their Washington house.

To sum up, the testimony establishes that, near the time of his father's death, Mr. Foster took possession of some handguns that had belonged to his father. The testimony also establishes that guns, including (according to the older son) a .38 caliber revolver, were taken to Washington by the Foster family in 1993. Mrs. Lisa Foster said that she recalls two guns in a bedroom closet in Washington, one of which was missing when she looked in the closet after Mr. Foster's death, and that the missing gun was the one found at the scene. Ms. Bowman has said the gun found at the scene looks like a gun previously kept by her father.

In addition, forensic examinations of Mr. Foster's pants pocket and the oven mitt support the conclusion that Mr. Foster carried, and thus possessed, a gun at a time close to his death. As explained above, that evidence tends to link Mr. Foster to the gun recovered from his hand.

This combination of testimonial, circumstantial, and forensic evidence supports the conclusion that the gun found in Mr. Foster's hand belonged to Mr. Foster.

B. Briefcase

There are some discrepancies in statements regarding whether a briefcase was in Mr. Foster's car at Fort Marcy Park.

Mr. Foster's black briefcase was in his office on July 22 when documents in the office were reviewed by Mr. Nussbaum in the presence of law enforcement officials. Four days later, a torn note was reportedly found in that briefcase by an Associate White House

Counsel. To determine whether a briefcase (and perhaps that black briefcase) was in Mr. Foster's car at Fort Marcy Park, five related questions must be considered:

1. Did those who saw Mr. Foster leave the White House on July 20 see him with a briefcase?
2. Was a briefcase observed in Mr. Foster's car at Fort Marcy Park?
3. Did the Park Police return a briefcase to the Secret Service that evening?
4. Was a briefcase in Mr. Foster's office at the White House after his death?
5. How many briefcases did Mr. Foster use?

1. Mr. Foster's Departure From the White House

Linda Tripp, Betsy Pond, and Tom Castleton – all of whom worked in the Counsel's suite of offices – said they saw Mr. Foster leave the Counsel's suite on July 20. They were interviewed separately by the Park Police on July 22, 1993.

The Park Police report of the interview with Ms. Tripp states:

Ms. Tripp makes it a habit to notice what the staff members are taking with them when they leave the office in order to determine for herself how long she may expect them to be away from the office. Ms. Tripp was absolutely certain that Mr. Foster did not carry anything in the way of a briefcase, bag, umbrella, etc. out of the office.

Ms. Tripp confirmed to the OIC that this report accurately reflected her recollection.

The relevant portion of the Park Police report of Ms. Pond's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. In a later interview, Ms. Pond stated that "I think I remember his jacket swung over his shoulder" and said "[n]ot that I recall" to the question whether Mr. Foster was carrying a briefcase.

The Park Police report of Mr. Castleton's interview of July 22, 1993, does not address what Mr. Foster carried when he left the office. When questioned over eight months later, Mr. Castleton recalled Mr.

Foster carrying a briefcase, and Mr. Castleton has said that it "looked very much like the one" that was in Mr. Foster's office on July 22.

The testimony of Ms. Tripp, Ms. Pond, and Mr. Castleton thus conflicts as to whether Foster carried a briefcase when he left the Counsel's suite -- two saying that he did not and one saying that he did.

2. Mr. Foster's Car at Fort Marcy

The Park Police officers who searched Mr. Foster's car at Fort Marcy Park (Braun and Rolla) stated there was no briefcase in the car. The Park Police technician who inventoried the car on July 21, E.J. Smith, stated that no briefcase was found. The Polaroids of the interior of Mr. Foster's car taken at Fort Marcy Park, and the photographs taken the next day at the impoundment lot, do not show a briefcase in the car. (The photos from Fort Marcy show a white canvas bag in front of the rear seat on the driver's side of the car.)

In addition, four other persons at Fort Marcy Park specifically recall looking into Mr. Foster's car but do not recall a briefcase. Officer Fornshill of the Park Police stated that he looked into the car (although not closely) but did not see a briefcase. Wacha, Iacone, and Pisani of the FCFRD also said that they did not recall seeing a briefcase.

Four other persons have varying, but imprecise, degrees of recollection of a briefcase in some car at Fort Marcy Park.

Todd Hall of the FCFRD stated in a March 18, 1994, interview and in a January 5, 1995, statement to the OIC, that he recalled a briefcase of uncertain color in the car with Arkansas plates. However, in a July 20, 1994, Senate deposition, he stated "We saw a suit coat and I think his briefcase, something like that. . . . All I know for sure I saw was his suit coat. And I thought I may have seen, he may have had a briefcase or something in there."

George Gonzalez of the FCFRD said in one statement that he saw a black briefcase/attache case in the car with Arkansas plates. In a later statement, however, Gonzalez stated, "I can't say if I saw a briefcase or papers. I can't correctly say whether I saw it or not. . . . I think the tie was in there and the jacket was in there. That's what I remember. That's all I can really remember." He also said that what he recalled could have been a canvas bag that was found in Mr. Foster's car. Gonzalez was not present when the Park Police entered the Honda.

C5 testified that he "would just about bet" that a "brown briefcase" was in the car, although he "wouldn't bet [his] life on it." C5's statements and a reenactment conducted with C5 at the scene by investigators reveal, however, that C5 was describing the car of C4, not Mr. Foster's car, when he referred to the briefcase.

C2 testified that he saw a briefcase – as well as wine coolers – in a car with Arkansas plates that was parked in the parking lot. He stated: "I looked and I saw the briefcase and saw the jacket, saw the wine coolers, it was two of them. I remember exactly how they were laying in the back seat of the car." (There is no other evidence that wine coolers were in Mr. Foster's car.)

3. Park Police Communications With Secret Service

An official Secret Service report prepared at 10:01 p.m. on July 20 states in relevant part:

SA Tom Canavit, WFO PI squad, advised that he has been in contact with US Park Police and was assured that if any materials of a sensitive nature (schedules of the POTUS, etc.) were recovered, they would immediately be turned over to the USSS. (At the time of this writing, no such materials were located).

4. Mr. Foster's Office at the White House

White House employee Patsy Thomasson testified that she saw Mr. Foster's briefcase by the desk in Foster's office on the night of July 20 and indeed looked into the top of that briefcase for a note. As noted above, the testimony of White House, Department of Justice, FBI, and Park Police personnel confirms that Mr. Foster's black briefcase was in his White House office on July 22, two days after his death, during the review of documents in Mr. Foster's office.

5. Mr. Foster's Briefcase

The OIC is aware of only one briefcase used in Washington by Mr. Foster, the black briefcase that Ms. Thomasson observed in Mr. Foster's White House office on the night of July 20 and that a number of other witnesses observed there on July 22.

6. Summary: Briefcase

Based on careful consideration of all of the evidence, the conclusions

significantly supported are: (a) Mr. Foster's black briefcase remained in his office when he left on July 20; and (b) neither it nor another briefcase was in his car at Fort Marcy Park.

C. Notification

According to Secret Service records, the Secret Service was notified of Mr. Foster's death at about 8:30 p.m. Eastern time on July 20. The records reflect that various White House officials were then contacted.

An Arkansas Trooper has stated that, while on duty at the Arkansas Governor's Mansion, he was notified of Mr. Foster's death by Helen Dickey, at the time a 22-year-old personal assistant of the Clintons who lived on the third floor of the White House Residence. The trooper described Dickey as "hysterical" and "very upset" when she called. The trooper, who was working a shift until 10:30 p.m. Arkansas time that night, stated that Dickey called him before 7:30 p.m. Arkansas time (8:30 p.m. Eastern time); according to the interview report, he said "he could possibly be mistaken about the time the call from Dickey was received. The call could have been as late as 8:30 PM, Arkansas time. However, he still felt his best recollection was that the call was received sometime between 4:30 PM and 7:30 PM [Arkansas time]."

Helen Dickey stated that she was first notified of Mr. Foster's death by an employee of the White House Usher's Office at about 10:00 p.m. and that she became very upset. (The Dickeys had lived next door to the Fosters in Little Rock when Helen was younger.) She then contacted her mother in Virginia and her father in Georgia from a phone on the second floor of the White House Residence. Dickey stated that she later called (from a different phone) the Arkansas Governor's Mansion and talked to the trooper at approximately 10:30 p.m. Eastern time.

There are two other pieces of relevant evidence with respect to Ms. Dickey's statement. First, Ms. Dickey's diary entry for July 20 (written within a few days of the event) states in relevant part:

I watched [Larry King Live] and about 10:30 [the Usher's Office employee] came up and told me they had found Vince Foster's body and that he'd killed himself. I waited for the punchline and lost it. I called Mom and Dad We went to Lisa's, and everyone was there . . .

Second, the Usher's Office employee confirmed that he notified Ms. Dickey of Mr. Foster's death shortly after 10:00 p.m. and said that Ms. Dickey immediately became hysterical, started screaming and crying, and ran downstairs. The Usher's Office employee "firmly believes he was the first to inform Dickey of the news of Foster's death because of her extreme reaction to the news."

The totality of the evidence – including the diary entry, the testimony of the Usher's Office employee, and the lack of any other evidence that White House or Secret Service personnel had knowledge of Mr. Foster's death at a time earlier than when the Park Police first notified the Secret Service -- does not support a conclusion that Ms. Dickey knew about Mr. Foster's death at some earlier time.

D. Search for Bullet

During the Park Police, Fiske, and OIC investigations, searches were conducted of Fort Marcy Park for the bullet that caused Mr. Foster's death.

On July 22, 1993, four Park Police personnel (Hill, Johnson, Rule, and Morrissette) searched with a metal detector the immediate area where the body was found. Their search for the bullet was unsuccessful.

Investigators in Mr. Fiske's Office conducted a search in the area where Mr. Foster's body was found. Their search for the bullet fired from Mr. Foster's gun was unsuccessful.

With the assistance of Dr. Lee, the National Park Service, and a large number of investigators, the OIC organized a broader search of Fort Marcy Park for the fatal bullet. The search was led by Richard K. Graham, an expert in crime scene metal detection. The search plan was devised utilizing information obtained through ballistics tests performed by the Army Research Laboratory, Aberdeen Proving Grounds, Maryland.

The search did not locate a bullet fired from the gun recovered from Mr. Foster's hand. That the search did not uncover the fatal bullet does not affect the conclusion that Mr. Foster committed suicide in Fort Marcy Park. Because a search covering the maximum range estimates "would have included a vast area . . . , a search which was limited in scope to the highest probability areas, closer to the minimum range estimates, was undertaken." In other words, while the OIC search covered a broader area than previous searches, "the

maximum range estimates" predicted the possibility that "the bullet could have cleared the tree tops in Ft. Marcy and landed well outside the park." Moreover, although lines ultimately were laid out within the park along the outer limits of a 90 degree arc to a distance of 175 meters, which represented the "highest probability areas," a full search of even the 90 degree-175 meter range would have included areas outside the park that were not searched. In addition, because "dense foliage and trees surround the area where Foster's body was discovered, and since there is a . . . cannon approximately 12.5 feet directly behind the location where the body lay, there is a distinct possibility the bullet's trajectory was altered due to its striking or ricocheting off a natural or man-made obstruction." Another variable is that "Foster's head could have been turned to one side or the other when the shot was fired."

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IX. STATE OF MIND

In a death investigation, state-of-mind evidence can buttress the forensic and other evidence and, in that respect, is an issue within the scope of the investigation. For that reason, the OIC intensively examined Mr. Foster's state of mind and activities before his death. The OIC reconstructed and examined previously unreviewed documents from Mr. Foster's White House office. The OIC sought relevant documents from other sources. The OIC interviewed Mr. Foster's wife, sisters, mother, children, and other relatives; numerous friends in Arkansas and Washington; many colleagues who worked closely with him at the Rose Law Firm or the White House; and various other persons with potentially important information. During this effort, the OIC gathered extensive evidence relating to Mr. Foster's state of mind and activities.

The OIC is grateful to the Foster family members – including Alice Mae Foster, Lisa Foster, Sharon Bowman, Sheila Anthony, Beryl Anthony, and the Foster children, among others – for cooperating with this and prior investigations under painful and difficult circumstances. Lisa Foster and Mr. Foster's mother, Alice Mae Foster, not only spoke with OIC investigators at some length, but also provided additional information and assistance at their homes in Arkansas.

A. Dr. Berman's Analysis

Suicide, perhaps contrary to popular understanding, is a common manner of death in the United States. According to the Centers for Disease Control (CDC), suicide was the ninth leading cause of death among Americans in the period from 1980 through 1992. The CDC's statistics reveal that more individuals in the United States died by suicide than by homicide in every year since 1981. In the United States in 1993, 31,102 individuals committed suicide, and 18,940 of

them committed suicide with a firearm. During 1993, therefore, there were approximately 85 suicides per day, and 52 suicides by firearm per day, in the United States.

The OIC retained Dr. Alan Berman to review and analyze state-of-mind evidence gathered by the OIC in the course of its investigation. Dr. Berman, as noted above, has extensive experience and expertise in the study of suicide. He examined the evidence and reported his findings to the OIC.

In his report, Dr. Berman first noted that "[d]escriptors used by interviewees with regard to Vincent Foster's basic personality were extraordinarily consistent in describing a controlled, private, perfectionistic character whose public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance."

Mr. Foster's life, after "arriving in Washington, was filled with long, intense and demanding hours of work." Dr. Berman noted that Mr. Foster's May 8 commencement address to the University of Arkansas School of Law was "replete with reflections upon and regret regarding the changes wrought by his experiences in Washington." Mr. Foster had "uncharacteristically . . . talked of quitting," but considered a return to Little Rock to be a "humiliation."

Dr. Berman reported that "[m]istakes, real or perceived, posed a profound threat to his self-esteem/self-worth and represented evidence for a lack of control over his environment. Feelings of unworthiness, inferiority, and guilt followed and were difficult for him to tolerate. There are signs of an intense and profound anguish, harsh self-evaluation, shame, and chronic fear. All these on top of an evident clinical depression and his separation from the comforts and security of Little Rock. He, furthermore, faced a feared humiliation should he resign and return to Little Rock." The torn note "highlights his preoccupation with themes of guilt, anger, and his need to protect others."

Dr. Berman noted that Mr. Foster's admission to his sister on the Friday before his death that he was depressed was a "profound expression of his depression." Dr. Berman also noted Mr. Foster's July 19 call to Dr. Larry Watkins in Little Rock, during which Mr. Foster referred to symptoms of a mild depression and to stress, criticism, and long hours.

Dr. Berman stated that Mr. Foster was "not a helpseeker" and was "reluctant to seek help" although he was "[a]ware he was in trouble

psychologically." Dr. Berman stated that "[t]his difficulty accepting the vulnerable position is common to successful executives." Dr. Berman stated that "[b]y the Friday before his death he was desperate; calling for names of psychiatrists was a clear . . . admission of his failure. He was ambivalent and fearful about this helpseeking." He ultimately "preferred the safety of his family physician . . . to the immediacy and presence of other, unknown professionals in the DC area."

Dr. Berman said that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability." Dr. Berman concluded, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, sub-clinically even before this." Dr. Berman noted that there was some history of depression in the family.

Dr. Berman explained that for certain executives facing difficult circumstances, "[i]n essence, death is preferred to preserve one's identity. The suicide has an inability to tolerate an altered view of himself; suicide maintains a selfview and escapes having to incorporate discordant implications about the self. These types of suicides are typically complete surprises to others in the available support system."

As to why Mr. Foster was overwhelmed at that particular time, Dr. Berman explained that Mr. Foster was "under an increasing burden of intense external stress, a loss of security, a painful scanning of his environment for negative judgments regarding his performance, a rigid hold of perfectionistic self-demands, a breakdown in and the absence of his usual ability to handle that stress primarily due to the impact of a mental disorder which was undertreated."

Mr. Foster apparently did not leave a note that specifically refers to or contemplates suicide. Dr. Berman indicated that the great majority of persons committing suicide do not leave a note. Dr. Berman also stated, with respect to the lack of a note in this case, that Mr. Foster was "intensely self-focused at this point; overwhelmed and out of control."

As to the Fort Marcy Park location, Dr. Berman stated that Mr. Foster "was ambivalent to the end" and may have driven for a while before going to Fort Marcy Park. He may have "simply and inadvertently happened upon the park or he may have purposely picked it off the area map found in his car." Dr. Berman stated that Mr. Foster's suicide in Fort Marcy Park is "[s]imilar to the typical

male physician who suicides by seeking the guaranteed privacy of a hotel room, and a 'do not disturb' sign"

In sum, Dr. Berman, based on his evaluation of the evidence, concluded: "In my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion"

B. Evidence

The OIC, like other investigations before, is not aware of a single, obvious triggering event that might have motivated Mr. Foster to commit suicide. Therefore, the following is simply a brief outline of some of the evidence relevant to the ultimate determination that Mr. Foster's state of mind was consistent with suicide. This outline is not designed to set forth or to suggest some particular reason or set of reasons why Mr. Foster committed suicide. Rather, the issue for purposes of the death investigation is whether Mr. Foster committed suicide, and this outline is designed to show that, as Dr. Berman concluded, compelling evidence exists that Mr. Foster was distressed or depressed in a manner consistent with suicide.

To begin with, in his six months in the White House, Mr. Foster was involved in work related to a number of important and difficult issues. The issues included, for example, the appointments and vetting of an Attorney General, a Supreme Court Justice, as well as many others (some of which developed into difficult situations abounding with unfavorable public comment); legal issues related to health care, such as medical malpractice reform; litigation related to the Health Care Task Force; the dismissal of White House Travel Office employees and the ensuing fallout from that incident; the Clintons' tax returns (which involved an issue regarding treatment of the Clintons' 1992 sale of their interest in Whitewater); the Clintons' blind trust; liaison with the White House Usher's Office over issues related to the White House Residence; and issues related to the Freedom of Information Act.

The work proved to be difficult and stressful. In a letter to a friend in Arkansas on March 4, 1993, for example, Mr. Foster wrote: "I have never worked so hard for so long in my life. The legal issues are mind boggling and the time pressures are immense. . . . The pressure, financial sacrifice and family disruption are the price of public service at this level. As they say, 'The wind blows hardest at the top of the mountain.'"

During that six-month period, certain other aspects of Mr. Foster's life also came under some scrutiny. For example, in May 1993, a controversy arose over membership of Administration officials in the Country Club of Little Rock, which had had no black members. Mr. Foster was a member of that club and resigned from it that month. On a copy of a May 11, 1993, newspaper article in Mr. Foster's office that mentioned the controversy, Mr. Foster wrote, "I wish I had done more."

At the same time, the White House staff generally was subject to media criticism during the first six months of the Administration. Some public criticism suggested incompetence, if not malfeasance, by staff members. Mr. Foster himself was mentioned in some of the critical editorial commentary. Numerous witnesses said that Mr. Foster was concerned and/or upset over the press criticism. According to Mr. Foster's brother-in-law, former Congressman Beryl Anthony, Mr. Foster said words to the effect that he had "spent a lifetime building [his] reputation" and was "in the process of having it tarnished."

As Dr. Berman noted, reputation was clearly important to Mr. Foster. Indeed, in the May 8, 1993, commencement address, Mr. Foster said that "[d]ents to the reputation in the legal profession are irreparable" and that "no victory, no advantage, no fee, no favor . . . is worth even a blemish on your reputation for intellect and integrity." He emphasized that the "reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy."

In that commencement address, Mr. Foster also noted that there will be "failures, and criticisms and bad press and lies, stormy days and cloudy days." He advised to "[t]ake time out for yourself. Have some fun, go fishing, every once in a while take a walk in the woods by yourself." He suggested that "[i]f you find yourself getting burned out or unfulfilled, unappreciated[,] . . . have the courage to make a change."

The Travel Office matter, in particular, was the subject of public controversy beginning in May 1993 and continuing through Mr. Foster's death. Criticism focused on the White House's handling of the matter before and after the May 19 firings. Legislation enacted on July 2, 1993, required the General Accounting Office (GAO) to investigate the Travel Office firings. There was a possibility of some form of congressional review, or perhaps special counsel investigation, as well as the GAO investigation. During the week of

July 12, Mr. Foster contacted private attorneys seeking advice in connection with the Travel Office incident.

At some point in the last weeks of his life, Mr. Foster wrote a note that he had "made mistakes from ignorance, inexperience and overwork" and that he "was not meant for the job or the spotlight of public life in Washington. Here ruining people is considered sport."

During that same period, according to Mr. Foster's immediate superior, Counsel Bernard Nussbaum, Mr. Foster's work effort decreased noticeably. According to William Kennedy, Sheila Anthony, and Lisa Foster, Mr. Foster said he was considering resigning.

Mr. Foster's sister Sheila Anthony said that Mr. Foster told her on Friday, July 16 that he was depressed. She furnished him the names of three psychiatrists. Mr. Foster did not speak to any of the three psychiatrists, although phone records show that Mr. Foster attempted to contact one of them on July 16. When Mr. Foster was found at Fort Marcy Park, a list of the three psychiatrists was in his wallet.

Lisa Foster said that her husband cried while talking to her on Friday night, July 16 and that Mr. Foster mentioned resigning during the weekend of July 16-18.

Meanwhile, Mr. Foster's mother, Alice Mae Foster, said that she talked to her son a day or two before his death and that he said he was unhappy because of his job and that it was "such a grind."

On Monday, July 19, Mr. Foster contacted Dr. Larry Watkins, his physician in Little Rock, and was prescribed an antidepressant. Watkins' typed notes of July 21 say the following:

I talked to Vince on 7/19/93, at which time he complained of anorexia and insomnia. He had no GI [gastrointestinal] symptoms. We discussed the possibility of taking Axid or Zantac to help with any ulcer symptoms as he was under a lot of stress. He was concerned about the criticism they were getting and the long hours he was working at the White House. He did feel that he had some mild depression. I started him on Desyrel, 50 mg. He was to start with one at bedtime and move up to three. . . . I received word at 10:20 p.m. on 7/20/93 that he had committed suicide.

Dr. Watkins said that it was unusual, even unprecedented, for Mr.

Foster to call him directly. Lisa Foster said that Mr. Foster took one tablet of the antidepressant medication on the night of the 19th.

In short, the OIC cannot set forth a particular reason or set of reasons why Mr. Foster committed suicide. The important issue, from the standpoint of the death investigation, is whether Mr. Foster committed suicide. On that issue, the state-of-mind evidence is compelling, and it demonstrates that Mr. Foster was, in fact, distressed or depressed in a manner consistent with suicide. Indeed, the evidence was sufficient for Dr. Berman to conclude that "to a 100% degree of medical certainty, the death of Vincent Foster was a suicide."

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X. SUMMARY OF CONCLUSIONS

To sum up, the OIC has investigated the cause and manner of Mr. Foster's death. To ensure that all relevant issues were fully considered, carefully analyzed, and properly assessed, the OIC retained a number of experienced experts and criminal investigators. The experts included Dr. Brian D. Blackbourne, Dr. Henry C. Lee, and Dr. Alan L. Berman. The investigators included an FBI agent detailed from the FBI-MPD Cold Case Homicide Squad in Washington, D.C.; an investigator who also had extensive homicide experience as a detective with the Metropolitan Police Department in Washington, D.C., for over 20 years; and two other OIC investigators who had experience as FBI agents investigating the murders of federal officials and other homicides. The OIC legal staff in Washington, D.C., and Little Rock, Arkansas, participated in assessing the evidence, examining the analyses and conclusions of the OIC experts and investigators, and preparing this report.

The autopsy report and the reports of the pathologists retained by the OIC and Mr. Fiske's Office demonstrate that the cause of death was a gunshot wound through the back of Mr. Foster's mouth and out the back of his head. The autopsy photographs depict the wound in the back of the head, and the photographs show the trajectory rod through the wound. The evidence, including the photographic evidence, reveals no other trauma or wounds on Mr. Foster's body.

The available evidence points clearly to suicide as the manner of death. That conclusion is based on the evidence gathered and the analyses performed during previous investigations, and the additional evidence gathered and analyses performed during the OIC investigation, including the evaluations of Dr. Lee, Dr. Blackbourne, Dr. Berman, and the various OIC investigators.

When police and rescue personnel arrived at the scene, they found

Mr. Foster dead with a gun in his right hand. That gun, the evidence tends to show, belonged to Mr. Foster. Gunshot residue-like material was observed on Mr. Foster's right hand in a manner consistent both with test firings of the gun and with the gun's cylinder gap. Gunshot residue was found in his mouth. DNA consistent with that of Mr. Foster was found on the gun. Blood was detected on the paper initially used to package the gun. Blood spatters were detected on the lifts from the gun. In addition, lead residue was found on the clothes worn by Mr. Foster when found at the scene. This evidence, taken together, leads to the conclusion that Mr. Foster fired this gun into his mouth. This evidence also leads to the conclusion that this shot was fired while he was wearing the clothes in which he was found. Mr. Foster's thumb was trapped in the trigger guard, and the trigger caused a noticeable indentation on the thumb, demonstrating that the gun remained in his hand after firing.

The police detected no signs of a struggle at the scene, and examination of Mr. Foster's clothes by Dr. Lee revealed no evidence of a struggle or of dragging. Nor does the evidence reveal that Mr. Foster was intoxicated or drugged.

Dr. Lee found gunshot residue in a sample of the soil from the place where Mr. Foster was found. He also found a bone chip containing DNA consistent with that of Mr. Foster in debris from the clothing. Dr. Lee observed blood-like spatter on vegetation in the photographs of the scene. Investigators found a quantity of blood under Mr. Foster's back and head when the body was turned, and Dr. Beyer, who performed the autopsy, found a large amount of blood in the body bag. In addition, the blood spatters on Mr. Foster's face had not been altered or smudged, contrary to what likely would have occurred had the body been moved and the head wrapped or cleaned. Fort Marcy Park is publicly accessible and traveled; Mr. Foster was discovered in that park in broad daylight; and no one saw Mr. Foster being carried into the park. All of this evidence, taken together, leads to the conclusion that the shot was fired by Mr. Foster where he was found in Fort Marcy Park.

The evidence with respect to state of mind points as well to suicide. Mr. Foster told his sister four days before his death that he was depressed; he cried at dinner with his wife four days before his death; he told his mother a day or two before his death that he was unhappy because work was "a grind"; he was consulting attorneys for legal advice the week before his death; he told several people he was considering resignation; he wrote a note that he "was not meant for

the job or the spotlight of public life in Washington. Here ruining people is considered sport." The day before his death, he contacted a physician and indicated that he was under stress. He was prescribed antidepressant medication and took one tablet that evening.

Dr. Berman concluded that Mr. Foster's "last 96 hours show clear signs of crisis and uncharacteristic vulnerability." Dr. Berman stated, furthermore, that "[t]here is little doubt that Foster was clinically depressed . . . in early 1993, and, perhaps, sub-clinically even before this." Dr. Berman concluded that "[i]n my opinion and to a 100% degree of medical certainty, the death of Vincent Foster was a suicide. No plausible evidence has been presented to support any other conclusion."

In sum, based on all of the available evidence, which is considerable, the OIC agrees with the conclusion reached by every official entity that has examined the issue: Mr. Foster committed suicide by gunshot in Fort Marcy Park on July 20, 1993.

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What the Editorial Page Had to Say about the Attacks on Independent Counsel Starr

Washington Post, October 20, 1999

- 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.
- 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.**

Washington Post, May 24, 2000

- Throughout the Monica Lewinsky scandal, **the White House tried to turn the tables on Kenneth Starr by making the prosecutor's conduct – rather than the president's – the issue.** In the White House version of events, a vindictive and ideologically motivated prosecutor seized on purely personal misconduct by the president and violated all manner of ethical rules to bring him down. The allegations of misconduct did, in fact, divert attention from Mr. Starr's investigation. So it is worth asking which, if either, of these men turns out to have a real problem under the rules of legal ethics. Conveniently, Mr. Starr and Mr. Clinton both faced reckonings on this score over the past week. **Last Thursday a federal judge threw out a series of ethical allegations against Mr. Starr. Four days later a disciplinary panel of the Arkansas Supreme Court decided that Mr. Clinton should be disbarred.**

Washington Post, November 11, 1999

- Mr. Clinton will surely not be remembered for any nobility or higher purpose. The president dragged the country through months of trauma to fight allegations that were, at least in the main, true. **His operatives smeared political and legal opponents.** To this day, he has never acknowledged the harm he did. At to this behavior, there was nothing "right about it.

Washington Post, September 15, 1999

- **Mr. Starr was attacked throughout the Lewinsky episode in a coordinated smear campaign that accused him publicly of a variety of types of misconduct. These accusations seriously undermined his investigation and distracted people from sober discussion either of the president's conduct or Mr. Starr's probe.**

The allegations took a great deal of time to investigate and sort out. Now, one by one, **they are proving meritless**, but only long after they have done their job of eroding confidence in his investigation. This is not to say that Mr. Starr has been a Boy Scout. There is much to criticize about his investigation. But there is a difference between criticism of Mr. Starr's judgment and allegations of illegalities or misconduct. **The readiness of many people to so confidently level grave allegations is a disturbing feature of the way our political culture responded to the Lewinsky scandal.**

Washington Post, June 5, 1998

- But the extra layers [of appellate review] **will grant the White House time: time in which to attack Mr. Starr's investigators and – even while extending the probe – complain about its duration and cost.** All this, naturally, without honoring the promise that President Clinton made at the outset of the Lewinsky matter that he would answer the legitimate questions at its heart.

Washington Post, March 5, 1998

- **The attacks on Mr. Starr are working, so there seems little reason to change anything. But Mr. Clinton owes an accounting that only he can give. The approach the White House has adopted instead – to keep mum, attack Mr. Starr, belittle the offense, shift the focus to anything you can think of but whether the president lied – is harmful, not just shifty.** The faster the country can get at the truth and decide what to do about it, the better. That's what matters, not the peripheral fireworks the White House would rather become the issue instead. That's why it's good news if Mr. Starr in fact is back at work.

Washington Post, February 25, 1998

- **The White House should remember that what is driving this story is not the conduct of Mr. Starr's staff, alleged leaks, supposed media bias or – in Mrs. Clinton's now famous words – a "vast right wing conspiracy."** Mr. Clinton is the only one who can make this matter go away, and he remains entirely free to do so at any time. The president should simply tell the real story now about what happened between him and Monica Lewinsky. If it causes him problems, he should take the hit and get it over with. Better that than prolonging a process that is doing no one any good – surely not him, and not the country either. **Whatever the truth, the longer he and his defenders spend attacking others for problems he alone can address, the harder a time his spin doctors will have persuading anyone to believe him when he finally is forced to talk.**

Washington Post, February 2, 1998

- **Our own sense, even so, is that step by step, each of the expansions of the investigation, including the current one, can be justified.** The bases have not been manufactured. They continue to derive, unfortunately, from the Clintons' own behavior. The questions raised have been serious ones and the kind that require independent investigation. That is what the defenders conveniently ignore.

Washington Post, September 27, 1996

- **We have seen no evidence of any impropriety in the conduct of the special prosecutor's office itself. Rather, Mr. Starr and his team seem to be following precisely the mandate they were set by a panel of federal judges at the request of Mr. Clinton's attorney general, Janet Reno.** That mandate ordered Mr. Starr to uncover whether "any individual" had committed a crime "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships" with Whitewater or the Madison Savings and Loan. If Mr. Clinton sees "a lot of evidence" that Mr. Starr is doing otherwise, he should share it.

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Wednesday, October 20, 1999

Editorial

Mr. Starr's Departure

AS LONG AS historians remain interested in American politics in the 1990s they are likely to debate the merits of **Kenneth Starr's** investigation. The parameters of the debate are already stark. Mr. Starr's defenders see him as a voice of principle who stood firm for the rule of law and courageously spoke unpopular truths about a president who had disgraced his office yet remained inexplicably popular. By contrast, Mr. Starr's detractors see him as a kind of demon who embodies everything puritanical and intrusive about contemporary American conservatism and whose zeal against a president from a different party led him on a crusade to bring him down, with whatever collateral consequences.

The reality is that neither of these narratives aptly describes Mr. Starr or the very mixed legacy that he left on resigning his post this week. Mr. Starr was given an almost impossible task. He was asked to address authoritatively a set of essentially unrelated public integrity questions of varying degrees of seriousness. The impossibility of his job was partly his own fault, since he made the mistake of accepting--and sometimes seeking--additional matters to review. But it is unclear whether anyone with such broad jurisdiction could have avoided being perceived as President Clinton's personal prosecutor.

Mr. Starr's own errors contributed greatly to this perception. At times in his investigation, he clearly lacked perspective--going full throttle after relatively marginal characters and pursuing imprudent litigation and investigative strategies. He also had a maddening tendency to ignore appearances--even at the expense of the public credibility of his investigation. This was particularly regrettable because the circumstances of his own appointment, which followed the dismissal of the widely admired Robert Fiske for inadequate reasons, begged suspicion. Rather than allaying this concern, Mr. Starr seemed to taunt his doubters by maintaining his law practice and his relationship with conservative causes.

Yet the sum of Mr. Starr's faults constituted a mere shadow of

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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.

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.

---- INDEX REFERENCES ----

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Wednesday, May 24, 2000

Editorial

Legal Ethics and Spin

THROUGHOUT THE Monica Lewinsky scandal, the White House tried to turn the tables on **Kenneth Starr** by making the prosecutor's conduct--rather than the president's--the issue. In the White House version of events, a vindictive and ideologically motivated prosecutor seized on purely personal misconduct by the president and violated all manner of ethical rules to bring him down. The allegations of prosecutorial misconduct did, in fact, divert attention from Mr. Clinton's own behavior and greatly weakened public confidence in Mr. Starr's investigation. So it is worth asking which, if either, of these men turns out to have a real problem under the rules of legal ethics. Conveniently, Mr. Starr and Mr. Clinton both faced reckonings on this score over the past week. Last Thursday a federal judge threw out a series of ethical allegations against Mr. Starr. Four days later a disciplinary panel of the Arkansas Supreme Court decided that Mr. Clinton should be disbarred.

The disbarment recommendation is hardly a surprise. The false testimony that just about everyone understands Mr. Clinton gave under oath in the Paula Jones case clearly conflicts with the obligation of candor that a lawyer owes to the judicial system. The recusal of eight of the 14 members of the disciplinary committee--those with ties to the president--will inevitably raise questions about whether Mr. Clinton is being judged by political foes. But the reality is that the committee's options are limited. The evidence that Mr. Clinton lied is overwhelming. Judge Susan Webber Wright held as much in finding him in contempt of court. To have ignored so public a flouting of the ethical rules would have made a joke of the disciplinary process--a joke the committee could not afford. The only real question is whether a reprimand or a suspension from the bar is an adequate alternative to disbarment. It's not a flattering question.

The contrast with the ruling on Mr. Starr's conduct is quite striking. In unusually strong language, Senior U.S. District Judge John Nangle dismissed a series of misconduct complaints brought against the former independent counsel by a Connecticut lawyer named Francis Mandanici. Judge Nangle found "no support for the allegation"

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that Mr. Starr or his colleagues had tried to get people to testify falsely. And he described the contention that Mr. Starr harbored a potential conflict of interest with respect to conservative philanthropist Richard Mellon Scaife as "the stuff that dreams are made of." He called other allegations "nonsense" and "ridiculous." Whatever one thinks of Mr. Starr's investigation, and we have expressed our own reservations, Judge Nangle's opinion offers powerful vindication on some of the leading ethical charges.

Charges involving leaks and other issues remain to be resolved against Mr. Starr's former office. And the disbarment recommendation against Mr. Clinton is still only a recommendation. But the week's events make pretty clear which of the lawyers in this battle, Mr. Starr and Mr. Clinton, was the one with the ethical problems.

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Thursday, November 11, 1999

Editorial

Mr. Clinton's Claim to History

HAVING WON the battle to remain in office, President Clinton has begun trying to rehabilitate his reputation. While contemporary commentators may regard his conduct in the Monica Lewinsky episode as deplorable, the president recently told ABC News that "I think history will view this much differently." Historians, he said, will understand that there really was a right-wing effort to get him: "I made a personal mistake, and they spent \$50 million trying to ferret it out and root it out, because they had nothing else to do, because all the other charges were totally false -- bogus, made up, and people were persecuted because they wouldn't commit perjury against me." In short, the president claimed, history "will say I made a bad personal mistake, I paid a serious price for it, but that I was right to stand and fight for my country and my Constitution and its principles, and that the American people were very good to stand with me."

President Clinton can perhaps be forgiven for wanting to shift the premises of the discussion of his impeachment. But no matter how mightily he strives, he cannot turn his fight for personal survival into a battle on behalf of the Constitution.

Following a habit that dates from his initial quasi-apologies for his conduct, the president describes his transgression as a "personal mistake" -- a phrase that seems to refer only to his sexual exploits rather than to his false testimony about them and his willingness to see others testify falsely to cover them up. His phrasing misses the point. Historians will surely recall that it was not any personal mistake but the question of whether the president had committed perjury and corrupted evidence in a federal proceeding that was the issue in his impeachment. They may also recall that it was not just independent counsel **Kenneth Starr** or the Republican House of Representatives but Judge Susan Webber Wright -- the same judge who threw out the Paula Jones lawsuit -- who described the president's testimony under oath unequivocally as "false, misleading and evasive answers that were designed to obstruct the judicial process."

Historians will have to cope with the troubling question of

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whether an effort to corrupt evidence of an affair in a civil lawsuit warrants impeachment. But the White House's effort to protect Mr. Clinton will surely not be remembered for any nobility or higher purpose. The president dragged the country through months of trauma to fight allegations that were, at least in the main, true. His operatives smeared political and legal opponents. To this day, he has never acknowledged the harm he did. As to his behavior, there was nothing "right" about it.

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Wednesday, September 15, 1999

Editorial

Mr. Starr and Leaks

WHEN THE New York Times published a story back in January suggesting that **Kenneth Starr** believed he had the authority to indict President Clinton before he left office, the reaction against Mr. Starr was strong and immediate. It was, critics were quick to allege, another violation of grand jury secrecy, and the White House asked Judge Norma Holloway Johnson to investigate. Never mind that the story included nothing that looked much like grand jury information but, rather, reported on Mr. Starr's conclusion that it was legally possible to indict a sitting president and on the feeling of some of his staff that doing so would be a good idea. Never mind as well that this information was not really even news at all. The incident was widely decried as yet another example of Mr. Starr's behaving unethically in a vendetta against the president, and Judge Johnson made an initial finding that the office had violated the law.

Mr. Starr did himself no favors in the matter by initially denying that the story had come from his office, something his own internal investigation later showed to be false. This led to the resignation of his spokesman, Charles Bakaly III, whom the internal probe fingered as a source. As Mr. Bakaly had denied in an affidavit commenting on what Mr. Starr and his office were considering, Mr. Starr also referred him to the Justice Department for possible criminal prosecution.

Whatever comes of the Bakaly matter, it is worth noting that the underlying charge of a grand jury leak has, like so many allegations against Mr. Starr and his people, evaporated on neutral inspection. A unanimous panel of the D.C. Circuit ruled recently that "internal deliberations of prosecutors that do not directly reveal grand jury proceedings are not" covered by grand jury secrecy. The ruling does not clear Mr. Starr on all allegations of grand jury leaks, as a much larger group of 24 instances of alleged leaks remains before the courts. But the current ruling does suggest that at least some of these instances may be found not to have involved grand jury material after all.

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It is another example of an ethical allegation that many assumed self-evident melting on closer examination. Mr. Starr was attacked throughout the Lewinsky episode in a coordinated smear campaign that accused him publicly of a variety of types of misconduct. These accusations seriously undermined his investigation and distracted people from sober discussion either of the president's conduct or of Mr. Starr's probe.

The allegations took a great deal of time to investigate and sort out. Now, one by one, they are proving meritless, but only long after they have done their job of eroding confidence in his investigation. This is not to say that Mr. Starr has been a Boy Scout. There is much to criticize about his investigation. But there is a difference between criticism of Mr. Starr's judgment and allegations of illegalities or misconduct. The readiness of many people to so confidently level grave allegations is a disturbing feature of the way our political culture responded to the Lewinsky scandal.

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Friday, June 5, 1998

Editorial

More Delay

IT IS understandable that the Supreme Court yesterday declined to review immediately two lower court decisions rejecting, in turn, the White House's assertion of attorney-client privilege and the Secret Service's claims of a fanciful "protective function" privilege. Once President Clinton backed off his executive privilege claims earlier this week, independent counsel **Kenneth Starr's** case that the Supreme Court should preempt review by the court of appeals grew weaker. There's a lot of reason to respect the normal appellate court hierarchy. And for the Supreme Court to jettison the tradition layers of appeal in the absence of an urgent constitutional controversy -- and the only controversy of constitutional dimensions was the discarded executive privilege claim -- may have been incautious.

The result -- more delay -- is nonetheless frustrating. The Secret Service's claimed privilege should not -- and, in all likelihood, will not -- be sustained. And the White House's vision of an expansive governmental attorney-client privilege was rejected decisively by the U.S. Court of Appeals for the 8th Circuit last year. Even Judge Norma Holloway Johnson's more generous vision of this controversial privilege would require that White House lawyer Bruce Lindsey give testimony before Mr. Starr's grand jury. So in the end, the additional layers of litigation seem unlikely to reverse Mr. Starr's victories.

But the extra layers will grant the White House time: time in which to attack Mr. Starr's investigators and -- even while extending the probe -- complain about its duration and cost. All this, naturally, without honoring the promise that President Clinton made at the outset of the Lewinsky matter that he would answer the legitimate questions at its heart. Those questions -- one strains to recall -- were not about the Secret Service, executive privilege, book purchases, talk-show lawyers or whether the president has an attorney-client relationship with the White House counsel. The questions were about whether President Clinton committed federal crimes by lying under oath about his relationship with a White House intern, suborning her perjury and obstructing justice by helping her

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find work in exchange for false testimony. The answers still have not been given.

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Thursday, March 5, 1998

Editorial

Diversionsary Flares

IN THE six weeks since the Monica Lewinsky scandal broke, the president's aides have been frantically launching diversionsary flares to shift the public's attention from Bill Clinton's conduct. Most of these flares have sought to illuminate the flaws -- real and imagined -- of independent counsel **Kenneth Starr**. As White House spokesmen have shrouded Mr. Clinton's own behavior in the most general -- and least-informative -- denials, they have issued shrill denunciations of everything from Mr. Starr's budget, to his party affiliation, to his other legal work. It is all an effort to portray the most powerful man in the world -- a man who refuses to tell his own side of the story -- as a victim, and it would be merely silly were it not working so well.

Of course, the independent counsel has, in part, himself to thank for its success. When the White House stuck out its foot last week, he seemed only too eager to trip over it -- hauling Sidney Blumenthal before his grand jury to answer questions about the White House's efforts to smear him and his staff. It was a move that lent credence to all the portrayals of Mr. Starr as an overzealous prosecutor with an ax to grind against the president. It was the kind of favor that only an enemy could have done for Mr. Clinton.

But after a spectacularly bad week in which he seemed to us, as to others, to have stumbled into the hands of his critics, Mr. Starr appears to be back on track. Instead of investigating who in the White House may or may not have been digging up and peddling stories meant to discredit him, his staff and their joint effort, he has returned to the basic question of whether President Clinton lied and, either directly or through aides and associates, encouraged others to lie in the Monica Lewinsky case.

In the midst of all this distraction, it is worth remembering what this investigation is supposedly about and why it remains important. The investigation is not about the president's private affairs, as his defenders constantly claim. It is, rather, about whether someone conspired to corrupt a civil suit in federal court in Arkansas. The allegations, if true, are important not because of some

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prurient interest in the president's sex life but because they address a fundamental issue of fairness in the administration of justice. One can believe or not believe Paula Jones, but she is surely entitled -- as are we all -- to have her case heard without having it marred by allegedly perjured testimony paid for with jobs. We continue to reserve judgment on the facts of the Lewinsky matter; but if the president did urge Ms. Lewinsky to lie under oath, this would be no insignificant matter that should be ignored because the underlying conduct is sexual in nature. It is critical, therefore, for Mr. Starr to stay focused on resolving the main issue authoritatively and quickly, rather than meandering off again into some examination of the White House's public relations strategy.

It is even more critical for the president to finally step up to the plate and face the questions that he has so embarrassingly dodged since the scandal began. This course is, needless to say, a tough sell at a time when Mr. Clinton is enjoying the highest approval ratings of his presidency. The attacks on Mr. Starr are working, so there seems little reason to change anything. But Mr. Clinton owes an accounting that only he can give. The approach the White House has adopted instead -- keep mum, attack Mr. Starr, belittle the offense, shift the focus to anything you can think of but whether the president lied -- is harmful, not just shifty. The faster the country can get at the truth and decide what to do about it, the better. That's what matters, not the peripheral fireworks the White House would rather become the issue instead. That's why it's good news if Mr. Starr in fact is back at work.

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Wednesday, February 25, 1998

Editorial

An Unruly Mess

THE WHITE HOUSE and **Kenneth Starr** are in a race to the bottom in the increasingly bizarre scandal surrounding Bill Clinton's relationship with Monica Lewinsky. The president's defenders have decided that smearing investigators -- rather than answering legitimate questions -- is the appropriate means of defending Mr. Clinton. Mr. Starr, meanwhile, appears to have come to the conclusion that this White House strategy itself may be an effort at intimidating prosecutors, and he absurdly issued a subpoena to presidential aide Sidney Blumenthal demanding that Mr. Blumenthal testify before the grand jury and apparently turn over documents that refer to Mr. Starr's office and staff.

On Sunday the White House denounced as "blatant lies" the suggestion that the president's troops authorized private snoopers to dig up dirt on those "investigators, prosecutors, or reporters" looking into the Lewinsky matter. Turns out, however, that Mr. Clinton's lawyers did retain the services of private eye Terry F. Lenzner (whom Mr. Starr has also subpoenaed). Mr. Lenzner, Mr. Clinton's lawyers said yesterday, has been working for them since 1994, "assist[ing] in the defense of matters related to the president"; their statement, however, reiterates that he is "not investigating the personal lives of" those investigating Mr. Clinton. The continuing and indignant denial by the White House that it would hire a private sleuth to look for disparaging tidbits on Mr. Starr seems doubly peculiar, since officials are entirely open about the fact that smearing Mr. Starr and his deputies is their primary strategy. The New York Times actually quoted a White House official describing "our continuing campaign to destroy **Ken Starr**." What's more, if the president's aides are refraining from investigating the press for now, it's certainly not because they are above attacking journalists. In 1996, First Lady Hillary Clinton ordered attorneys for the president to write a report critiquing the coverage of Whitewater by Susan Schmidt, The Post's main reporter on the subject. Mrs. Clinton actually wanted the report released publicly, Post staff writer Howard Kurtz recently wrote, although White House spokesman Michael McCurry and special counsel Mark Fabiani killed that idea.

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Looking for dirt on prosecutors and trying to discredit straightforward reporting of embarrassing facts about yourself is indeed a sleazy strategy, but it is far from criminal. And it would be an abuse of his power if Mr. Starr hauled Mr. Blumenthal before the grand jury simply because the latter had played a key role in such an effort. A grand jury investigation is supposed to focus on allegations of criminal conduct, and a subpoena is not meant to be used as a retaliatory gesture. There is, at this stage, no public evidence suggesting that Mr. Blumenthal's media campaign or his documents related to Mr. Starr are germane to any criminal allegations. Mr. Starr's explanation yesterday -- that the "misinformation" spread about prosecutors may be "intended to intimidate prosecutors and investigators, impede the work of the grand jury, or otherwise obstruct justice" -- seems pretty thin. Prosecutors get attacked every day by potential defendants, and having a thick skin is part of the job. If Mr. Starr's only basis for these subpoenas is the stated one, he should back down. Unless he possesses evidence suggesting that the White House is violating some law by attacking his people, his effort to investigate the defense is potentially an abuse -- and it certainly plays into the hands of those who regard his investigation as a reckless and partisan attack on the president.

This is a particular shame, because it is important that center stage in this drama be reserved for the main issue: the conduct of Bill Clinton. The White House spin-meisters have been able -- with Mr. Starr's help -- to create momentary distractions from the underlying scandal, but these distractions will only be momentary. The White House should remember that what is driving this story is not the conduct of Mr. Starr's staff, alleged leaks, supposed media bias or -- in Mrs. Clinton's now famous words -- a "vast right-wing conspiracy." Mr. Clinton is the only one who can make this matter go away, and he remains entirely free to do so at any time. The president should simply tell the real story now about what happened between him and Monica Lewinsky. If it causes him problems, he should take the hit and get it over with. Better that than prolonging a process that is doing no one any good -- surely not him, and not the country, either. Whatever the truth, the longer he and his defenders spend attacking others for problems he alone can address, the harder a time his spin doctors will have persuading anyone to believe him when finally he is forced to talk.

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Monday, February 2, 1998

Editorial**The Kenneth Starr Question**

LEAVE ASIDE the transparently demagogic political counterattack on **Kenneth Starr** by the Clinton White House. Others who are not working from anyone's talking points have come to wonder whether independent counsel **Kenneth Starr's** investigation has gotten out of hand. What began as a fairly conventional inquiry into the role, if any, of the Clintons in the draining and ultimate failure of an Arkansas savings and loan has become, as the daily soap opera attests, much more.

There are three main sources of unease with the way the investigation has been transformed. One has to do with the constant migration and broadening of Mr. Starr's jurisdiction. Whatever turns up ends up on Mr. Starr's platter, or so it seems. He has become less an independent counsel than a kind of standing inspector general for the Clinton White House. Second is the smarmy and personal zone into which the jurisdictional spread most recently has led him. This is now, at least in part, an inquiry into the president's sex life, based on surreptitious tape recordings by one woman of the supposed confidences of another much younger one. It is, in this sense, a slimy and intrusive business with which no one can be comfortable. Finally, Mr. Starr has been charged by Mrs. Clinton and others with either conducting or lending himself to a political vendetta against the president. He denies it, but a number of the ancillary characters in the drama have openly anti-Clinton agendas, and on occasion Mr. Starr's own careless behavior has seemed to support the charge.

Our own sense, even so, is that step by step, each of the expansions of the investigation, including the current one, can be justified. The bases have not been manufactured. They continue to derive, unfortunately, from the Clintons' own behavior. The questions raised have been serious ones and the kind that require independent investigation. That is what the defenders conveniently ignore.

Mr. Starr's original mandate was to determine whether the Clintons and other political figures in Arkansas used the failed savings-and-loan association as a piggy bank in violation of the law. The special court that names an independent counsel at the attorney

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general's request gave him extremely broad authority to do so. He has caught some considerable fish, including Mr. Clinton's successor as governor of Arkansas; Mr. Clinton's first choice to be associate attorney general in the administration, Webster Hubbell; and the owners of the S&L, who were also the Clintons' business partners in the failed real estate venture called Whitewater, which has given the whole affair its name. What Mr. Starr has not been able to do, despite efforts to extract more information from lesser figures in the case, including Mr. Hubbell, is show that the Clintons themselves violated the law. He continues to feel that some witnesses have not been forthcoming, is looking for possible reasons why and is trying to squeeze them. This Whitewater part of the inquiry seems to have come down to a familiar endgame.

There were, meanwhile, two relatively minor expansions of his mandate -- as ever, with the attorney general's approval -- having to do with the firing of White House travel office employees early in the first term and the still not fully explained gathering in the White House, also in the first term, of FBI files on some Republicans. Both these presented issues that needed vetting by an independent counsel, and Mr. Starr was at hand. He seems to have been assigned them mainly as a matter of convenience.

In the current case, the tape recordings containing charges against the president -- charges whose seriousness has to do much more with possible perjury than with sex -- were brought to Mr. Starr by the woman who had made them. She appears to have done so in such a way that they might have been inadmissible in court. Mr. Starr wired her with her consent to remake them, in part to validate her claims. The wiring was a repulsive thing to do, but not illegal and evidently a fairly common prosecutorial practice. He apparently acted quickly partly because there was a threat that news of the tapes would shortly appear in print, as in fact it did. He then presented the evidence to the attorney general, who without much apparent hesitation agreed with him that the court should include them in his mandate. If not Mr. Starr, another counsel would plainly have had to be named. If ever there were a case the Justice Department cannot itself credibly investigate, this is it. The tawdriness of the business -- the illicit and sneaky nature of the taping, to say nothing of the content of the tapes -- is not Mr. Starr's fault. He drew what seems to us a strained connection between the Whitewater case and this, in that Washington lawyer and Clinton confidant Vernon Jordan could be found in both helping possible witnesses against the president find jobs. But that's not why he has this case, nor do we quarrel with his decision to take the first step of creating a clean tape, if that word can be used for any aspect of this case, before going to the attorney general.

Mr. Starr has been casual in the past about flashing his own conservative politics while occupying the office of independent

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counsel. It's a huge mistake. The whole purpose of naming an independent counsel is, insofar as possible, to de-politicize an investigation such as this. He risks the undermining of his own role. There are problems with Mr. Starr, but the basic problem here is not with him.

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Friday, September 27, 1996

Editorial

'Isn't It Obvious?'

"ISN'T IT obvious?" So responded President Clinton on television the other night when PBS host Jim Lehrer asked him whether special prosecutor **Kenneth Starr** is just out to "get" Mr. Clinton and Hillary Clinton. Mr. Clinton leveled an extraordinary charge against the special prosecutor. He paraphrased his convicted old friend, Susan McDougal, as believing that Mr. Starr wants her to perjure herself if necessary to build a case against the Clintons. Then Mr. Clinton said: "There's a lot of evidence to support that."

Well, that doesn't seem so obvious to us. Certainly Mr. Starr is a Republican, and he or his law firm, in their other work, may have left themselves open to conflict-of-interest charges -- charges the White House has been only too happy to whip up. But Mr. Clinton's latest assault goes well beyond what is legitimate in the way of campaign spin and counterspin.

We have seen no evidence of any impropriety in the conduct of the special prosecutor's office itself. Rather, Mr. Starr and his team seem to be following precisely the mandate they were set by a panel of federal judges at the request of Mr. Clinton's attorney general, Janet Reno. That mandate ordered Mr. Starr to uncover whether "any individual" had committed a crime "relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships" with Whitewater or the Madison savings and loan. If Mr. Clinton sees "a lot of evidence" that Mr. Starr is doing otherwise, he should share it.

"Obvious" might better describe the questions that Mr. Starr has put to Susan McDougal and for which, to avoid answering, Mrs. McDougal has gone to jail in contempt of court. Mr. Starr wanted to know whether Mr. Clinton knew about illegal loans and whether he testified truthfully about them during the trial in which the McDougals themselves were convicted. Those, on their face, do not seem difficult questions to answer.

"Obvious," too, is Mr. Clinton's impropriety in dangling the

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possibility of a presidential pardon before Mrs. McDougal, who faces two years in prison for her four felony convictions. When Mr. Lehrer asked the president about a second-term pardon for her or other Whitewater-related figures, Mr. Clinton said he'd "given no consideration to that." Then he went on to describe the "regular process" for presidential pardons and to say that Whitewater-related cases "should be handled like others."

But these Whitewater cases are not like any other, because those seeking pardons may have information bearing on Mr. Clinton himself or on his wife. Before the election, Mr. Clinton should make clear that, if reelected, he will not subvert the judicial process through attacks on the special prosecutor or by abusing the president's pardon power. That much should be obvious.

---- INDEX REFERENCES ----

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- Ask for you? - Point ---?

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BY FACSIMILE AND MAIL

February 16, 2005

Miss Harriet Miers
Counsel to the President
The White House
Washington, D.C. 20502

Re: **Brett M. Kavanaugh**
United States Court of Appeals, District of Columbia

Dear Miss Miers:

The purpose of this letter is to confirm the recommendation of this Committee previously given as to the nomination of Brett M. Kavanaugh for appointment as Judge of the United States Court of Appeals for the District of Columbia.

A substantial majority of the Committee is of the opinion that Brett M. Kavanaugh is Well Qualified for appointment as Judge of the United States Court of Appeals for the District of Columbia. A minority of the Committee is of the opinion that Brett M. Kavanaugh is Qualified for appointment as Judge of the United States Court of Appeals for the District of Columbia.

Yours very truly,

Thomas Z. Hayward, Jr.
Chair

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cc: Daniel J. Bryant, Esq.
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BY FACSIMILE AND MAIL

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February 16, 2005

Miss Harriet Miers
Counsel to the President
The White House
Washington, D.C. 20502

Re: Thomas Beall Griffith
United States Court of Appeals, District of Columbia

Dear Miss Miers:

The purpose of this letter is to confirm the recommendation of this Committee previously given as to the nomination of Thomas Beall Griffith for appointment as Judge of the United States Court of Appeals for the District of Columbia.

A majority of the Committee is of the opinion that Thomas Beall Griffith is Qualified for appointment as Judge of the United States Court of Appeals for the District of Columbia. A minority of the Committee is of the opinion that Thomas Beall Griffith is Not Qualified for appointment as Judge of the United States Court of Appeals for the District of Columbia.

Yours very truly,

Thomas Z. Hayward, Jr.
Chair

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cc: Daniel J. Bryant, Esq.
ABA Standing Committee on Federal Judiciary

490480/C/1

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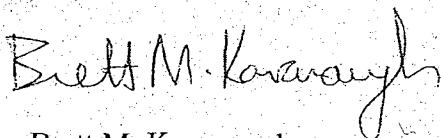
November 19, 2004

The Honorable Orrin G. Hatch
Chairman of the Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

Attached please find responses to written questions from Members of the Committee.

Sincerely yours,

A handwritten signature in cursive script that reads "Brett M. Kavanaugh". The signature is written in dark ink and is positioned above the printed name.

Brett M. Kavanaugh

**Responses of Brett M. Kavanaugh
to the Written Questions of Senator Leahy**

1. In your testimony before the Senate Judiciary Committee, you indicated that the work on judicial nominations was divided in the Office of White House Counsel among several Associate Counsels. You testified that you had “different areas of the country that we would work on and different nominations that we’d work on.” You mentioned that California and Illinois were among the states you worked on, and that you “worked on certain circuit court nominations.” A) Could you please list your particular geographic areas of responsibility, whether you covered just district or circuit court nominations or both within those areas, and the names of all of the circuit court nominees you worked on? B) What percentage of your time in the office would you say was devoted to judicial nominations? C) What other matters did you work on during your time in the Office of White House Counsel?

Response: I was one of eight associate counsels in the White House Counsel’s office who participated in the judicial selection process. At Judge Gonzales’ direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates’ records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel’s office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President’s judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

The time I devoted to the judicial nomination and confirmation process varied but probably was about half my time when I worked in the Counsel’s office. I also worked on a variety of ethics issues, legal policy matters such as victim compensation and liability issues, separation of powers issues, and records issues, among other matters.

2. A) Now that the ABA is no longer involved in the decision about whether or not to nominate someone for federal court vacancies, are there any other individuals or groups with whom the nominees are asked to meet as these choices are being made? B) In particular, have potential nominees been or are they now advised or sent to meet with or interview with individuals or groups outside of the government as part of the judicial selection process?

Response: No.

3. Did you or anyone else in the Office of White House Counsel seek advice or information or receive advice or information from any individuals or groups outside of the government when deciding on a judicial nominee? A) Were any White House officials from outside the Office of the White House Counsel involved in decisions on judicial selection? B) If so, who and from what offices? C) In particular, was Karl Rove involved in the judicial selection process, and if so, can you describe in detail his involvement?

Response: Outside groups and individuals – including Senators, Representatives, Governors, other state and local officials, local bar officials and lawyers, and members of interest groups – would often support or recommend candidates. That is traditional and appropriate. In addition, the Department of Justice conducts a thorough vetting process during which many individuals familiar with the candidate provide input regarding a candidate's qualifications and suitability for the federal bench. As Judge Gonzales previously has explained, judicial nomination recommendations are provided to the President by the judicial selection committee, which is chaired by Judge Gonzales and includes individuals from the White House and the Department of Justice. The President himself makes the decision in all cases to submit a particular judicial nomination to the Senate.

4. Did you work with others inside the government, including the Department of Justice and Senate Republicans and their staffs, to determine how to prepare the nominees or work to secure their confirmation?

Response: Yes, that is an important part of the work of the Counsel's office and the Department of Justice.

5. In your hearing testimony, you indicated that part of your responsibilities included “public liaison” work. That means working with groups from outside of the government. A) Did you have a regular meeting set up with outside groups or individuals? B) If so, please list the names of the outside groups or individuals with whom you regularly met, how often the meetings took place, and the nature of those meetings. C) If not, did you meet at any time with any outside groups or individuals about judicial nominations? D) Apart from groups or individuals involved in regular meetings, with which other outside groups or individuals have you met about judicial nominations? E) For each of these groups or individuals, please tell me how often you would meet with them and the nature of those meetings.

Response: We met with members of a wide variety of groups that were interested in the judicial nomination and confirmation process. That is traditional and appropriate. Beyond that, it would not be appropriate in this context for me to provide information regarding the Administration’s judicial nomination and confirmation strategy and meetings.

6. In your hearing testimony you indicated there was a “team” that worked in Senator Hatch’s office and Senator Frist’s office on nominations. A) Who was on that team during the time you worked in the Office of the White House Counsel? B) How often would that team meet? C) Where did that team meet? D) What specifically was the work of that team?

Response: The people who worked on issues relating to judicial confirmations included the White House Counsel’s office lawyers, staff of the White House Office of Legislative Affairs, other White House staff, Department of Justice lawyers and personnel, Members and staffs of the Senate Judiciary Committee, and Senate leadership Members and staffs, among others. As I understand it, previous Administrations of both parties operated in the same manner with respect to judicial nominations and confirmations. The White House and Department of Justice met often with Senate staffers in order to maintain communications regarding the status of individual judicial nominations and to discuss upcoming hearings, votes, or other issues. Meetings would occur in a variety of government rooms depending on convenience and availability.

7. At your hearing the subject of consulting on nominations to the D.C. Circuit came up. Did you or anyone involved in the judicial nominations process for President Bush ever discuss nominations to the D.C. District Court or the D.C. Circuit with any elected officials from the District of Columbia?

Response: I am aware that the Administration consults with Mayor Williams on a variety of issues affecting the District of Columbia, including local judges. I do not know whether he or other local elected officials have been consulted for vacancies on the D.C. Circuit Court of Appeals. I believe there has been consultation on certain D.C. District Court nominations.

8. President Clinton nominated several individuals to the circuit and district courts with no close ties to him or other Democrats but who were championed by Republican Senators because they were either registered Republicans or close friends of the Senator of the other party. For example, Judge Richard Tallman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator Slade Gordon; Judge Barry Silverman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator John Kyl, who struck the names of Democratic candidates; Judge William Traxler, who was put on the district court by President Reagan, was nominated to the Fourth Circuit and confirmed at the request of Republican Senator Strom Thurmond; Judge Stanley Marcus was nominated to the Eleventh Circuit and confirmed at the urging of Republican Senator Connie Mack. Please list the names of all of the circuit court nominations President Bush has made who were first recommended to you by a Democratic Senator.

Response: Recommendations for district and circuit nominees come to the Administration from many sources, and it is often difficult to identify the "first" recommendation of a particular candidate. I can say that there are numerous court of appeals nominees of President Bush who had the support of home-state Democratic Senators, including: Edith Brown Clement, Consuelo Callahan, Allyson Duncan, Dennis Shedd, Reena Raggi, Barrington Parker, Lavenski Smith, Steve Colloton, Michael Melloy, Carlos Bea, Richard Clifton, and Jay Bybee. We are proud of the strong support these court of appeals nominees received from the Democratic Senators in their home states.

9. I detailed the excellent credentials and experiences of Allen Snyder and Elena Kagan at your hearing. Why do you think you should be confirmed for a seat on the D.C. Circuit when Mr. Snyder and Ms. Kagan, about whom no objections of any substance were ever raised, were rejected by this Committee for that same position?

Response: I have met and think very highly of Mr. Snyder and Dean Kagan. The President has consistently stated that every judicial nominee deserves an up or down vote in the Senate, regardless of who is President. It is the Senate's decision whether to confirm or reject any individual nominee.

10. As you know there has been a lot of controversy surrounding the appointment of members to certain statutorily created bi-partisan boards and commissions. The White House gives a tortured interpretation to the statutes governing these bodies, claiming they permit the President to name not only the members of his political party, but also the members not of his political party, insisting that there is no requirement that the leadership of the political party opposite the President make these choices. Frankly, we find these contentions absurd and contrary to the letter and spirit of the law. A) Do you agree with the President's interpretation? B) What was your role in helping the President reach the conclusion that Democrats are not to pick nominees for Democratic seats?

Response: I am not familiar with any ongoing dispute of this sort.

11. Historian Richard Reeves said about Executive Order 13233 that, "[w]ith a stroke of the pen on November 1, President Bush stabbed history in the back and blocked Americans' right to know how Presidents [and Vice Presidents] have made decisions," and that the Order "ended more than 30 years of increasing openness in government." You testified at your hearing that you believed the "initial concern" by historians and archivists about Executive Order 13233 was "based on a misunderstanding." You indicated there were meetings with historians to discuss and explain the Order and that historians have found them useful. With which historians have you met and when did you meet with them?

Response: I do not have a full list of the individuals who attended such meetings. Professor Martha Kumar organized the groups that attended the meetings. They occurred about every six months while I was in the Counsel's office.

12. As you know, after Executive Order 13233 was promulgated, numbers of prominent historians and the major associations of historians, including the American Historical Association, and the Organization of American Historians, filed suit in federal court challenging the validity of the Order. Even after the meeting or meetings you held with them, they continued with the lawsuit. Indeed, one major plaintiff, the American Political Science Association, joined the suit after your meetings began. Their criticism continued as well. While the historians were complimentary of your personal demeanor in the initial meeting you had with them, they continued to be seriously concerned. For example, Robert Spitzer, president of the Presidency Research Group of the American Political Science Association said, "Kavanaugh's promise of openness reminds me that the promise is predicated not on law, but merely on good will . . . the situation continues to be deeply troubling." The late Hugh Graham, a Reagan historian and professor emeritus at Vanderbilt University, described the Executive Order as "a victory for secrecy in government" that is "so total that it would make Nixon jealous in his grave." Your testimony about the historians seemed calculated to brush off this sort of criticism. A) Do you deny that the Order continues to be unacceptable to most historians? B) How can you reconcile what you told us at your hearing with the very real concerns that America's historians continue to have?

Response: I know some historians are not satisfied with the rules that apply to Presidential records. I believe their concern stems from the Presidential Records Act and the Supreme Court decision authored by Justice Brennan in Nixon v. GSA. I know some of them have expressed and continue to express concerns about the Order, but we respectfully believe that any continuing concerns in fact stem from the Act itself and the Supreme Court decision, not from the Order.

13. At your hearing, you testified that the Bush Administration's Executive Order 13233 ("Bush Order"), which you authored, was nothing more than an order that set forth "procedures" for complying with the Presidential Records Act ("PRA"). In fact, according to many scholars, journalists, and others, the Bush Order goes far beyond mere "procedures" and in effect significantly impedes the release of presidential records intended to be released under the PRA and in effect eviscerates important parts of the PRA, increasing government secrecy. Specifically they are concerned about the "demonstrated, specific need" language, even after the end of the 12-year period, about Sections 3(a)-(d) of the Bush Order which effectively provide both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public, about Sections 3(d) and 4 of the Bush Order, which require the incumbent president to "concur in" and support in court an assertion of privilege by the former president, regardless of whether it is legally valid, unless there are compelling circumstances, about Section 3(d)(2) of the Bush Order which empowers the incumbent president to order the Archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national

security would be affected by public release, about Section 10 of the Executive Order which permits a former president (or his family) to designate a "representative" to assert constitutionally based executive privileges in the event of the former president's death or disability, about Section 11 of the Bush Order which allows a former vice president to assert constitutionally based privileges to bar release of records after the end of the 12-year restriction period applicable to records under the PRA, and about Section 2(a) of the Executive Order states that the former president's constitutional privileges include not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client privilege and attorney work product privileges, and the deliberative process privilege. In light of these specific concerns, can you explain in detail the basis for your claim that the Order is procedural in nature, and is merely complying with the PRA?

Response: The Order faithfully implements the Presidential Records Act and Supreme Court case law. It establishes procedures to govern release of records consistent with the statute and the Supreme Court precedent. The Order does not set forth the circumstances under which an assertion of privilege should be made or would be successful. The issues identified in this question are either procedural or stem from the Act itself or court decisions on executive privilege.

14. At your hearing, you also testified that there was a "need" for the Bush Order to "establish procedures" under the PRA because the end of the 12-year period of repose for former President Reagan's records was coming to an end, that both the current president and the former president could assert privilege with respect to the records under Nixon v. GSA, and that "[n]o one really had a good idea how this was going to work." But the Congress specifically delegated to the National Archives and Records Administration ("the Archivist") the authority to adopt regulations, and after notice and comment, to adopt all rules necessary to carry out the PRA's provisions, which the Archivist did. A) In light of the existing regulations under the PRA, why did you and others at the White House deem it necessary to adopt the Bush Order, which occurred without any opportunity for public notice and comment? B) During the period of more than 6 months when the Bush White House was notified about the Reagan records but before the Bush Order, please describe what if any consultation occurred with the Archivist concerning any alleged need for additional regulations.

Response: As you noted, the 12-year period was coming to an end as President Bush took office. This was the first time that the Act's 12-year period had expired for records subject to the Act. The Order itself provides that it was issued to establish procedures to govern review of the records. We consulted often with the National Archives and Records Administration (NARA) during the drafting process, and Archivist Carlin testified to the Congress that NARA had unprecedented access and opportunity to share their experiences and views.

15. In his introduction at your hearing, Senator Cornyn mentioned that the two of you had worked on a case together. A) What was the case? B) In what capacity were you involved in it? C) How did you come to be involved in the case? D) Why did you choose to be involved? E) Have you helped prepare others for Supreme Court argument? F) If so, who, and for what cases? G) For each one, please explain how you became involved and why.

Response: He was counsel in Santa Fe Independent School District v. Doe, and I participated in a moot court session when he prepared for oral argument. I also submitted an amicus brief on behalf of my clients, Congressmen Largent and Watts. It is very common for lawyers who will be appearing before the Supreme Court to participate in moot court sessions prior to their arguments. Often, attorneys who have submitted amicus briefs are especially knowledgeable about the issues and will therefore participate in such moots. While I have participated in dozens of moot courts over many years, I do not have a list.

16. In your hearing testimony you mentioned pro bono work you had done, and that it proved you would not be a partisan or ideological judge. Please list all of the pro bono legal work you did while you were in private practice and explain how each project demonstrates your ability to be fair to all litigants.

Response: I have worked in public service for 11 of the 14 years since I graduated from law school. During the years I was in private practice, I worked for several institutional clients of my law firm and also made time to do pro bono and reduced-fee work, including on the Elian Gonzales, Santa Fe, Good News Club, and Adat Shalom cases, as well as on a Florida school choice litigation matter. I believe the breadth of my experiences in public service and private practice, in the Judicial Branch and the Executive Branch, in criminal law and civil law, as an appellate litigator and a government advisor, as a law clerk on the Supreme Court and as a White House lawyer and advisor, has demonstrated my ability to be balanced and fair. The American Bar Association evaluates the fairness of judicial nominees, among other considerations, and rated me "well-qualified" to be a judge on the D.C. Circuit.

17. On September 20, 2001, did you and others in the Administration present a proposal to Congressional staff that called for liability protection for the airline carriers involved in the September 11, 2001 attacks, including limitations on punitive damages against the air carriers, attorney fee caps on victims' attorneys and offsets of victim awards in court for any emergency or disaster relief payments to these victims?

Response: In the aftermath of September the 11th, many of the lawyers in the Counsel's Office were assigned to the myriad legal issues that arose out of the attack. Among other matters, I worked on liability and compensation issues involving the airlines and the victims of the attack and their families. I was involved in presenting an Administration

proposal on the liability issues. I believe the Administration proposal in many respects resembled the final legislation with respect to liability issues.

18. Did this proposal from the Administration, presented on September 20, 2001, to provide liability protection for the airline carriers involved in the September 11, 2001, attacks also contain any compensation program for the victims of the September 11, 2001 attacks?

Response: I believe the issue of victim compensation was initially separate from the issues of airline solvency and liability. The two issues were both addressed in the final bill.

19. During subsequent negotiations on this proposal to provide liability protection for the airline carriers involved in the September 11, 2001, attacks, did you initially oppose providing any compensation program for the victims of the September 11, 2001 attacks?

Response: On behalf of the Administration, Director Daniels expressed support for the final bill in a meeting in the Speaker's office on the night of September 20. I was present for that meeting. The Administration (and I as a representative of the Administration) supported compensation for the victims and families of the victims of the September 11th attacks. The Administration's general position was and has been that victims of terrorism should receive equal compensation and that families of wealthy victims usually should not receive more money than families of poor victims. The Administration has wanted these programs to be consistent with other federal compensation programs and has sought to ensure that they can be administered in a fair and expeditious manner.

20. In your hearing testimony, you explained that one of the reasons you want to be a judge is because you have a "commitment to protecting rights and liberties of the people." What in your record demonstrates a commitment to protecting the rights and liberties of all people?

Response: I have a strong commitment to public service and have spent 11 of the 14 years since I graduated from law school in public service. During the years I was in private practice, I worked for several institutional clients of my law firm and also made time to do pro bono and reduced-fee work. I believe the breadth of my experiences in public service and private practice, in the Judicial Branch and the Executive Branch, in criminal law and civil law, as an appellate litigator and a government advisor, as a law clerk on the Supreme Court and as a White House lawyer and advisor, has demonstrated my ability to protect the rights and liberties of the people. The American Bar Association assesses the commitment to protecting the rights and liberties of all people when it evaluates judicial nominees, and the ABA concluded that I was "well-qualified" to be a judge on the D.C. Circuit. I have always tried to work hard and do my best for the public good, and I would continue to do so should I be confirmed to serve on the court of appeals.

21. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Charles Pickering. Pickering has called the fundamental "one-person one-vote" principle recognized by the Supreme Court under the Fourteenth Amendment "obtrusive." Fairley v. Forrest County, 814 F.Supp. 1327, 1330 (S.D. Miss. 1993). In order to redress serious problems of discrimination against African American voters in some cases, the courts (including the Supreme Court and the Fifth Circuit) have clearly recognized the propriety and importance of creating majority-black districts as a remedy under appropriate circumstances. Judge Pickering, however, has severely criticized this significant form of discrimination relief. In one opinion, he called it "affirmative segregation." Bryant v. Lawrence County, 814 F. Supp. 1346, 1351 (S.D. Miss. 1993). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? C) If so, did you express those concerns to your colleagues or to your superiors? D) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on voting rights. Was that your view? E) Why would you want to have someone with those views on the Fifth Circuit? F) Do you agree with Judge Pickering's views on voting rights as expressed above?

Response: It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I believe that Judge Pickering addressed these questions at his hearings. I know that Judge Pickering received a well-qualified rating from the American Bar Association and is supported by many prominent African-Americans and Democrats in Mississippi. He has the strong support of both home-state Senators.

22. In two cases dismissing claims of race discrimination in employment, Pickering used identical language striking a similar theme. He wrote in both that "this case has all the hallmarks of a case that is filed simply because an adverse employment decision was made in regard to a protected minority" and that the courts "are not super personnel managers charged with second guessing every employment decision made regarding minorities." See Seeley v. City of Hattiesburg, No.2:96-CV-327PG (S.D. Miss., Feb. 17, 1998) (slip op. at 12); Johnson v. South Mississippi Home Health, No. 2:95-CV-367PG (S.D. Miss., Sept. 4, 1996) (slip op. at 10). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Pickering, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit, where he would be in a strong position to affect the law on employment discrimination. Was that your view? D) Why would you want to have someone with those views on the Fifth

Circuit? E) Do you agree with Judge Pickering's views on employment discrimination cases as expressed above?

Response: See response to question 21.

23. In a 1994 case in his courtroom, U.S. v. Swann, Judge Pickering has admitted that he engaged in *ex parte* communication with the Department of Justice, including one high-ranking official who was a personal friend, in order to reduce the sentence of a convicted cross-burner. It has been argued that Judge Pickering was just trying to address the disparate sentences received by the three defendants in the case, and that he believed Mr. Swann, who says [he] was not the "ringleader" in the cross burning, was being unfairly punished. In fact, all three of the defendants were found guilty, and it was Mr. Swann's wood, gasoline, truck and lighter that were used to build, douse, transport and ignite the cross on the lawn of an interracial couple. Mr. Swann, the only competent adult of the trio of perpetrators, was also the only defendant who rejected the plea offered by the government. He was convicted by a jury of his peers of all three counts brought by the Department of Justice, including one that required a five-year mandatory minimum sentence. This sentence was legislated by Congress and the judge had no discretion to depart from it. A) Were you or anyone else involved in his selection, nomination or hearing preparation aware of Judge Pickering's conduct in this case before he was nominated? B) If so, did you still recommend his nomination? If not, when did you become aware of it, and once you became aware of it did you recommend that he withdraw his nomination? C) Do you think it is in the public interest to have a judge on the bench who engaged in what several legal ethics experts have agreed was unethical behavior?

Response: See response to question 21.

24. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Priscilla Owen. She was the target of criticism from her conservative Republican colleagues. In FM Properties v. City of Austin, the majority calls her dissent "nothing more than inflammatory rhetoric." In Montgomery Independent School District v. Davis, the majority (which included your former boss, then-Justice Alberto Gonzales and two other Bush appointees) is quite explicit about its view that Owen's position disregards the law, saying that "nothing in the statute requires" what she says it does, and that, "the dissenting opinion's misconception . . . stems from its disregard of the procedural elements the Legislature established," and that the "dissenting opinion not only disregards the procedural limitations in the statute but takes a position even more extreme than that argued for by the board. . ." In In re Jane Doe, the majority includes an extremely unusual section explaining its view of the proper role of judges, admonishing the dissent joined by Justice Owen for going beyond its duty to interpret the law in an attempt to fashion policy, and in a separate concurrence, Justice Gonzales says that to construe law as the dissent did "would be an unconscionable act of judicial activism." A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone who had been criticized by her own colleagues for misconstruing the law and engaging in judicial activism to

the Fifth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Owen, and I include you in that group, must have considered it in the public interest to have someone with those views on the Fifth Circuit. Was that your view? D) Why would you want to have such an activist judge on the Fifth Circuit?

Response: It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I believe that Justice Owen addressed these questions at her hearing. I know that Justice Owen received a unanimous well-qualified rating from the American Bar Association and is supported by three former Democrat Justices on the Texas Supreme Court, as well as more than a dozen past Presidents of the Texas State Bar. She has the strong support of both home-state Senators.

25. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Janice Rogers Brown. According to her questionnaire, her contact with the office began in the spring of 2001. Among the views that have made her nomination controversial was her statement that the Supreme Court's decisions 65 years ago to uphold humanitarian New Deal reforms – what she calls the “Revolution of 1937” – constituted a “disaster of epic proportions.” Those 1937 decisions included rulings that upheld minimum wage laws, unemployment compensation laws, federal guarantees for collective bargaining, and the federal social security program. [Minimum wage laws – West Coast Hotel v. Parrish, 300 U.S. 379 (1937); federal unemployment compensation laws – Steward Machine Company v. Davis, 301 U.S. 548 (1937); collective bargaining guarantees – Jones and Laughlin Steel v. NLRB, 301 U.S. 1 (1937); federal social security system – Helvering v. Davis, 301 U.S. 619 (1937)] A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Justice Brown, and I include you in that group, must have considered it in the public interest to have someone with those views on the D.C. Circuit, where she would be in a strong position to affect all of those programs. Was that your view? D) Why would you want to have someone with those views on the D.C. Circuit? E) Do you view the Supreme Court decisions she discussed as “disasters?”

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. Justice Brown and I were nominated at the same time for the same court. I also believe that Justice Brown addressed these questions at her hearing.

26. Justice Brown ruled in a dissenting opinion that any regulation constitutes a regulatory “taking” – hence requiring compensation – if it “benefit[s] one class of citizens [in that case, low income tenants] at the expense of another [in that case, landlords].” San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 126 (2002). Under that standard, virtually any law to protect certain citizens, such as environmental, health and safety, consumer protection, nursing home reform, or antidiscrimination standards, could be challenged. This of course was not just a

speech by Justice Brown; it was a dissenting opinion and a purported interpretation of the law. A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the DC Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

Response: See response to question 25.

27. Justice Brown has made some very radical statements in her opinions, dissents and speeches. For each of the statements below, please answer the following questions: A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the D.C. Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) Did you think it was in the public interest to put someone with such views on the D.C. Circuit? D) Why would you want to have someone with those views on the D.C. Circuit? E) What is your own view of the issue?

“Today’s senior citizens blithely cannibalize their grandchildren because they have a right to get as much ‘free’ stuff as the political system permits them to extract...Big government is...[t]he drug of choice for multinational corporations and single moms, for regulated industries and rugged Midwestern farmers, and militant senior citizens.”

“Some things are apparent. Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.” “A Whiter Shade of Pale,” Speech to Federalist Society (April 20, 2000) (“Federalist speech”).

“[W]e no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is the opiate. The drug of choice for multinational corporations and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens.” “Fifty Ways to Lose Your Freedom,” Speech to Institute of Justice (Aug. 12, 2000) (“IFJ speech”).

“[P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco...I would find the HCO [San Francisco Residential Hotel Unit Conversion and Demolition Ordinance] preempted by the Ellis Act and facially unconstitutional....Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the

legitimacy of the government.... The right to express one's individuality and essential human dignity through the free use of property is just as important as the right to do so through speech, the press, or the free exercise of religion." [Dissenting opinion in San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 120, 128-9 (Cal. 2002).]

Response: See response to question 25.

28. One of the nominees submitted during your tenure, recently given a recess appointment after his nomination failed on the Senate floor, is William Pryor. Among many other remarkable statements, Mr. Pryor praised as "sublime" and "brilliant" a 2001 Federal District Court decision, West Side Mothers v. Havemann, later reversed on appeal, that would deny patients a day in court to enforce their right to treatment in accord with Federal Medicaid standards – a right that has clearly existed dating back to the earliest days of the Medicaid program. That would include, for example, a large proportion of all Americans who must now reside in nursing homes. A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on this program. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you view the district court decision in West Side Mothers to be "sublime" or "brilliant?"

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. I believe that Judge Pryor addressed these questions at his hearing. I know that Judge Pryor received a qualified rating from the American Bar Association, has been elected and respected as Attorney General in Alabama, and is strongly supported by many Democrats in Alabama. He also has the strong support of both home-state Senators.

29. In a July 2000 speech Pryor stated: "I will end with my prayer for the next administration: Please God, no more Souters." Bill Pryor, "The Supreme Court as Guardian of Federalism," before the Federalist Society and Heritage Foundation (July 11, 2000). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit. Was that your view? D) Why would you want to have someone with those views on the Eleventh Circuit? E) Do you agree with Mr. Pryor that no more Supreme Court Justices like David Souter should be appointed? If not, why not?

Response: See response to question 28.

30. Mr. Pryor has criticized the Supreme Court's 7-1 ruling that the denial of admission to women by the Virginia Military Institute, a state-supported public university, violated the Equal Protection Clause. He said "[t]he Court ruled that the people of Virginia were somehow prohibited by the fourteenth amendment from maintaining an all male military academy. Even the Chief Justice concurred. Never mind that for more than a century after the fourteenth amendment was enacted both the federal government and many state governments maintained all male military academies. Never mind that the people of the United States did not ratify the Equal Rights Amendment. We now have new rules of political correctness for decisionmaking in the equal protection area." Alabama Attorney General Bill Pryor, "Federalism and the Court: Do Not Uncork the Champagne Yet," Remarks Before the National Federalist Society (Oct. 16, 1997). A) Were you or anyone else involved in his selection and nomination aware of these views before he was nominated? B) Were you concerned at all about nominating someone with these views to the Eleventh Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Mr. Pryor, and I include you in that group, must have considered it in the public interest to have someone with those views on the Eleventh Circuit, where he would be in a strong position to affect the law on equal protection. Was that your view? D) Why would you want to have someone with those views on equal protection and equal treatment of women on the Eleventh Circuit? E) Do you agree with Mr. Pryor that the Supreme Court's decision in the VMI case represented the triumph of political correction over Constitutional principles?

Response: See response to question 28.

31. One of the nominees reviewed and sent to the Senate during your tenure in the White House Counsel's office was Carolyn Kuhl. An *amicus curiae* brief that Kuhl co-authored when she served as Deputy Assistant Attorney General urged the Supreme Court to overturn Roe v. Wade, stating that: "the textual, historical and doctrinal basis of that decision is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided." Brief for the United States as *Amicus Curiae* in Support of Appellants, Thornburgh v. American College of Obstetricians and Gynecologists, at 10 (July 15, 1985) (LEXIS pagination). The brief also asserted that the important principle of stare decisis should not stop the Court from overturning Roe. The brief claimed that "[s]tare decisis is a principle of stability. A decision as flawed as we believe Roe v. Wade to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment." Id. at 10 (emphasis added). A) Were you or anyone else involved in her selection and nomination aware of these views before she was nominated? B) Were you concerned at all about nominating someone with these views to the Ninth Circuit? If so, did you express those concerns to your colleagues or to your superiors? C) The people who decided to nominate Judge Kuhl, and I

include you in that group, must have considered it in the public interest to have someone with those views on the Ninth Circuit, where she would be in a strong position to affect the law on privacy and reproductive rights. Was that your view? D) Why would you want to have someone with those views on the Ninth Circuit? E) Do you agree with the views Judge Kuhl expressed in that brief? F) Do you believe Roe v. Wade is so flawed that it ought to be overturned?

Response: It would not be appropriate in this context for me to comment on the records of other nominees and on internal Executive Branch communications. I believe that Judge Kuhl addressed these questions at her hearing. I know that Judge Kuhl received a well-qualified rating from the American Bar Association and is supported by many prominent Democrats in California, such as Vilma Martinez. She also has the strong support of a very large number of prominent women judges and women lawyers in California, many of whom are Democrats.

32. Mr. Kavanaugh, in your work on judicial nominations in the White House Counsel's Office, I am sure you recall the February 2003 letter from the White House asserting that there was no "persuasive support in the history and precedent of judicial appointments" for our request for memos written by Mr. Estrada at the Justice Department. I found that letter to be completely inconsistent with the level of cooperation shown by other administrations toward such requests of Members of this co-equal branch. I also put into the Congressional Record excerpts of correspondence between President Reagan's Justice Department and the Senate Judiciary Committee demonstrating that the administration agreed to share legal memos written by and to Robert Bork and William Rehnquist during their judicial nominations—even though they had served for years as judges--and I also noted other examples in which legal memos were shared during nominations for lifetime or short-term posts, such as Brad Reynolds's nomination. A) Did you ever look at the correspondence between the Department of Justice and the Senate in the Bork, Rehnquist, Reynolds or other nominations? B) If you did examine that correspondence, then you must be aware that past administrations provided the Senate with numerous legal memos of nominees while your administration provided not a single one by Mr. Estrada. Even your administration provided the Senate EPW Committee with legal memoranda of Jeffrey Olmstead in connection with his short-term appointment. Please explain why the legal memos of an attorney in the White House Counsel's Office could be shared with the Senate but your administration refused to provide any legal memos by Mr. Estrada. C) We know that legal memos written by Carolyn Kuhl, when she was a legal advisor to the Attorney General and recommended that Bob Jones University be given tax exempt status despite its express policy of racial discrimination, were provided to Congress in the aftermath of that failed initiative. Please explain why her legal memos and those of her colleagues at the Justice Department could be shared with Congress but not any of the memos of Mr. Estrada. D) I am sure you will cite the letter from former Solicitors General. As you know, their policy preference to provide absolute protection to deliberations in their former office is not embodied in any statute or in the Constitution and, in fact, the disclosure to the Senate of numerous memos

written to Robert Bork and by him in the Solicitor General's Office (as well as other past disclosures) did not chill deliberations. As the Supreme Court noted in the Nixon tapes case, it is quite *unlikely* "that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure." U.S. v. Nixon, 418 U.S. 683 at 712 (1974); see also Clark v. United States, 289 U.S. 1, 16 (1933); McGrain v. Daugherty, 273 U.S. 135 (1927). The interest in candid deliberation does not create an absolute privilege against disclosure in response to a request of Members of a co-equal branch. What can you say to assure the Senate that you would give due respect to the prerogatives of the Senate and not just continue to favor maximizing this Administration's penchant for secrecy if you were confirmed?

Response: I believe that the Administration has addressed this issue in many letters to the Committee. Beyond that, it would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications. I know that Miguel Estrada received a unanimous well-qualified rating from the American Bar Association and was supported by many prominent Democrats and Hispanic organizations. I would faithfully follow the relevant Supreme Court precedent on the separation of powers and the prerogatives of the Executive Branch and the Senate.

33. Mr. Kavanaugh, you had significant responsibilities on judicial nominations in the White House Counsel's Office during much of the same period that Manuel Miranda worked for Senate Majority Leader Bill Frist's lead attorney on nominations and when Mr. Miranda worked as counsel to Senator Hatch on the Senate Judiciary Committee. You testified that during the years you worked on judicial nominations you met with Mr. Miranda and others on the Republican team "to discuss upcoming hearings or upcoming votes, issues related to press interest in nominations or public liaison activities that outside groups were interested in." Mr. Miranda has asserted publicly that he took Democratic memos in part to find "information about when confirmation hearings would be held." A) From December 2001 through December 2002, did Mr. Miranda ever tell you when he thought Democrats would schedule hearings on the President's judicial nominees in advance of the public notice of hearings? B) Did he ever tell members of the White House team when he thought hearings would be scheduled or the likely timing of hearings throughout the year? C) Did other Republican Senate staffers provide you or your colleagues with such information or speculation? D) Did you ever inquire about the source of such speculation? How accurate was the speculation?

Response: See the response to questions 33-58 after question 58 below.

34. A) How often did you speak with Mr. Miranda from the time Senator Frist became the Majority Leader in late 2002 through May 2003, when you became staff secretary to the President? B) How often did you receive e-mail communications from him during this period? C) How often did you see him at meetings, either on the Hill or at the White House? Please provide the same information for the period December 2001 through December 2002.

35. You testified that Mr. Miranda did not ever share, reference, or provide you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee or any information that you believed or were led to believe was obtained or derived from Democratic files. A) Did Mr. Miranda ever discuss with you what the Democratic strategy on nominations was during the spring of 2003? B) Did he suggest to you or to others on your team that Democrats would filibuster any of the President's judicial nominees? C) Did you or your team have confidence that his speculations were accurate? D) Did you find, perhaps even in retrospect, that his intelligence was untoward or dubious?

36. One of Mr. Miranda's responsibilities during the period when your responsibilities overlapped was managing the Republican strategy during the floor fight on the nomination of Miguel Estrada to the court to which you are now nominated. A) Were you in daily contact with Mr. Miranda during this period? B) If you were not, which members of your team were responsible for or assisted with communications with him about the strategy for winning the confirmation of Mr. Estrada?

37. A) Did Mr. Miranda ever convey to you or any member of the White House staff the allegation that Mr. Estrada was being opposed because he was Latino, or similar words? B) Did you ever discuss this issue or allegation with Mr. Miranda or any other Senate staffer, including Senator McConnell's aide John Abegg, who was mentioned in the SAA report as providing at least one of the stolen computer files to Senator Hatch's chief nominations counsel, Rena Comisac, according to her statement? C) Did you ever discuss this issue or allegation with any Republican senate staffer or Senator?

38. A) Prior to the Bob Novak column published on February 9, 2003, did you hear that Democratic Senators had met in January regarding the decision to filibuster the nomination of Miguel Estrada? Mr. Novak has admitted writing a column published that day based on computer files that were stolen by others. B) Did you ever discuss the issue of Mr. Estrada's nomination or the filibuster with Mr. Novak? C) Did he ever indicate to you that he had a source or had seen a purported Democratic strategy memo on the Estrada filibuster? D) Did Mr. Novak ever speak with you or any of your colleagues in advance of the date that column was published about the decision to filibuster the Estrada nomination?

39. A) At any time from January 30th until November 14, 2003, did you ever hear that such a meeting occurred? B) Prior to November 14, 2003, did you hear that there was a computer file about any such meeting? According to reports, Senator Kyl's counsel Joe Matal received copies of some of the Democratic computer files from the Wall Street Journal on November 14, 2003. C) Were you or anyone at the

White House given copies of the purported Democratic computer files on November 14 or November 13 by staff of the Wall Street Journal or any other person?

40. A) Did you or anyone at the White House receive copies of any purported Democratic computer file, electronically or in hard copy, prior to November 14, 2003 or at any time since then? B) If your answer is "no," how do you know that no one on the White House staff saw such a memo? Mr. Gonzales wrote a letter in response to a letter of inquiry from Senator Leahy stating that the White House would not conduct an internal investigation to determine whether any of the stolen computer files were given to White House aides. C) Did you personally conduct any inquiry into whether any attorney or staff member of the White House received any of the stolen memos?

41. A) Please provide a list of the names of every staff member who worked on judicial nominations at the White House from December 2001 through December 2003, during the period that Mr. Miranda worked at the Senate and was stealing and reading Democratic computer files. Also, please indicate who from the Justice Department worked with you on nominations during this period.

42. According to the SAA report, Mr. Miranda directed that Jason Lundell provide computer files to the Executive Director of the Committee for Justice, Sean Rushton. You testified that you thought you "met him where the people from the administration and from the Senate would speak to outside groups who were supporting the President's nominees, and he is a member of a group that supports the President's nominees." A) Please describe how you first met Mr. Rushton, how often you have met with him or spoken with him about nominations, and how often you have received e-mail communications from him about judicial nominations.

43. A) How often did you speak or meet with, or receive e-mail communications from, the leader of Committee for Justice, C. Boyden Gray, about judicial nominations issues? B) How often did you or members of the White House nominations team meet with or speak with either Mr. Rushton or Mr. Gray during 2003? The Committee for Justice has been a strong defender of Mr. Miranda's role in taking Democratic computer files, which is understandable I suppose since they received computer files at Mr. Miranda's direction according to Mr. Lundell. C) Please describe for the Committee any contacts you had with Mr. Gray, Mr. Rushton, or Mr. Lundell by phone, by e-mail, or in person during your work on judicial nominations.

44. A) Did you keep a telephone log, appointment-book or any other document that makes any reference to Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Kay Daly (whose organization published some of the purported stolen computer files)?

45. Mr. Gray and Mr. Rushton's group, Committee for Justice, has held fundraisers with White House insiders like Karl Rove as well as members of the

Bush family, including the President's nephew. You testified that you had attended one of their fundraisers but you were not sure if you made a donation. A) Which fundraiser or fundraisers of theirs did you attend? B) Did you ever donate any money to this organization? C) Have you ever attended any other event sponsored or co-sponsored by this organization? Please be specific.

46. During the spring of 2003, the Committee for Justice began an attack ad campaign basically accusing Senate Democrats of opposing Mr. Estrada because he is Latino, an accusation that seems to be premised on Mr. Miranda's claims. A) Were you involved in any way in the creation of that ad or in any discussion about the benefits of any such ad campaign? B) Did you preview that ad before it was first aired? C) Did you ever discuss that ad, orally or in writing, with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? Did you ever discuss that ad with any other Republican Senate staffer or Senator?

47. During the spring of 2003 did you ever discuss the nomination of Priscilla Owen of Texas with Mr. Miranda? B) Did you ever discuss the Democratic or likely Democratic strategy with him on this nomination that was so important to the President, because she's from Texas, and to Mr. Rove, who was her state judicial election campaign strategist and fundraiser in the 1990s? C) Did you have any meetings with Mr. Miranda about this nomination? D) Did you have any e-mail communication about this nomination with him? E) Did you have any telephone conversations with him? F) Who on the White House staff was involved in the Owen nomination and floor strategy? G) Did you ever discuss, orally or in writing, Senator Kennedy's views on Justice Owen with Mr. Gray? With Mr. Rushton? With Mr. Miranda? With Mr. Abegg? With Mr. Dahl? With Ms. Comisac? With Mr. Novak? With Mr. Rove? Did you ever discuss this issue with any Republican in the Senate?

48. A) In April 2003, did you ever speak with any Republican in the Senate or any outside group or press about the issue of Democratic filibusters based on "substance as opposed to process?" B) Did you hear that or any similar phrase used by Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Rushton, Mr. Gray, or Ms. Daly?

49. A) Did you work with Mr. Miranda in his role in getting Majority Leader Frist to schedule a day of "constitutional debate" on the filibuster in March of 2003, when Vice President Cheney presided as President of the Senate? B) Did you discuss with Mr. Miranda, Mr. Abegg or any other Republican staffer strategies for overcoming the Democratic filibuster last spring? C) Were any outside organizations present at or involved in those discussions? D) Did you or any of your colleagues discuss that issue, orally or in writing, with Ms. Comisac or Mr. Dahl?

50. A) Were you involved in any way in the decision of Mr. Frist to hire Mr. Miranda as his chief aide on judicial nominations? B) Were you asked about

whether you thought he would do a good job by anyone on his staff? C) Did you recommend him? D) Did Mr. Gray, Ms. Daly or any other leader of conservative groups commend Mr. Miranda's work on judicial nominations to you?

51. A) In the year 2002, when Mr. Miranda worked on the Judiciary Committee, did you have any communication with Mr. Miranda in 2002 about the nomination of Judge Dennis Shedd to the Fourth Circuit? B) Who on the White House staff was involved in the Shedd nomination, during the Committee consideration and the floor consideration? C) Which Senate staffers did you or White House staff work with on this nomination? D) Who worked on this nomination at the Justice Department? E) Did Mr. Miranda ever mention to you his views on the pace of consideration of the Shedd nomination? F) Did you ever have any communication, orally or in writing, about this matter with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly? G) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? H) Did you ever see any proposed questions for Judge Shedd that might be asked by Senate Democrats in advance of that hearing? I) Were you aware prior to Judge Shedd's hearing that there were concerns about Judge Shedd's civil rights record? How so?

52. A) From December 2001 through November 14, 2003, did you ever hear or learn that any Republican staffer claimed to have a Democratic mole or source or a "conscience stricken" Democrat who was providing Mr. Miranda or any other staffer with information about the hearing schedule or Democratic strategy? B) During this period did you ever hear a claim that there was a supposed computer glitch or security weakness that allowed Democratic computer files to be spied upon, read, stolen, printed or downloaded, prior to November 14, 2003?

53. A) Did you attend the nomination hearing for Miguel Estrada? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Who in the White House and at Justice worked on that nomination at that stage? E) Did any of them get that information? How do you know? F) Did you ever see or hear about any possible questions from Senate Democrats for Mr. Estrada that might be asked, in advance of that hearing?

54. A) Did you attend the first nomination hearing for Priscilla Owen? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Justice Owen that Senate Democrats might ask her in advance of that hearing?

55. A) Did you attend the nomination hearing for D. Brooks Smith? B) Did you speak with Mr. Miranda, Mr. Lundell, Mr. Abegg, Mr. Dahl, Ms. Comisac, Mr. Lundell, Mr. Rushton, Mr. Gray, Mr. Novak, or Ms. Daly at that hearing or about that hearing? C) Did you get any information about when that hearing might be scheduled in advance of the official notice of that hearing? D) Did you ever see or hear about any proposed questions for Judge Smith that Senate Democrats might ask him in advance of that hearing?

56. During the winter of 2001 through the spring of 2002, did it come to your attention that Judge Charles Pickering's nomination was facing difficulty due to his legislative voting record on civil rights matters or his connection to the Mississippi Sovereignty Commission or his partner Carroll Gartin's ties to that Commission?

57. Mr. Miranda told the Los Angeles Times in a March 4 story that he believed that there was nothing wrong with him accessing the computer files of his opposing counsels on nominations and using them to help win what he calls the "judicial nominations war." In that story, he also noted that that trove of Democratic computer files he and Mr. Lundell located "was valuable information." In a March 5, 2004 Washington Times story, Mr. Miranda noted that he spied on and read the stolen computer files because he "had an obligation to learn everything [he] could possibly learn to defend [his] clients." He himself or through one of his proxies shared some of this valuable information with Mr. Novak and other columnists, as one of his primary responsibilities in Frist's office was dealing with the media and outreach to conservative groups and working with the White House, yet you are prepared to state unequivocally that you never saw or heard that Mr. Miranda had obtained Democratic computer files prior to his public admissions that he had done so?

58. Have you spoken with Mr. Miranda or received any written communication from him directly or through a third party about judicial nominations or the improper access of Democratic computer files between November 14, 2003 and today? B) Has the White House been approached or lobbied to hire him, as the Senate has?

Response to questions 33-58:

Before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files. I was informed that I am not a target or subject of the investigation into this matter.

I knew Mr. Miranda, as he and many other Senate staffers were part of regular meetings, telephone calls, and emails about the judicial confirmation process. These meetings, calls, and emails were typical of how judicial confirmations have been handled in past Administrations. I never knew or suspected that he or others had obtained information from Democratic computer files. I know of no one in the Administration or elsewhere who had any such knowledge or suspicions. I assumed that he, like many staffers and

legislative affairs personnel in the Administration and on the Committee, talked often to the staffs of Democratic members to appropriately obtain as much information as possible about hearings, questions, concerns, individual nominees, and the like. Such inquiries and conversations are standard and appropriate on both sides, and they tend to generate and reveal a great deal of relevant information that is shared by both sides of the Committee with the other side and with the Administration. In my experience, the Senators on the Committee and their staffs have been open about likely questions and general concerns, and many Senators and staffers on both sides have provided helpful information with respect to timing of hearings, specific concerns about nominees, and overall plans and strategy. Usually, for example, Senators on both sides would explain any areas of concern to the Administration and often directly to the nominees well before any individual hearings. As I explained to Senator Durbin at my hearing, I cannot be sure which of the information imparted orally or in writing by Senate staffers or others may have been derived in whole or in part from information obtained from Democratic computer files. To reiterate, before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files.

Beyond this, it would not be appropriate in this context to provide further information about Executive Branch communications relating to judicial nominations and confirmations.

**Responses of Brett M. Kavanaugh
to the Written Questions of Senator Kennedy**

I. FOLLOW-UP ON QUESTIONS AT THE HEARING

A. THE DEMOCRATIC COMPUTER FILES

As you know, the questions surrounding the improper access to and dissemination of the Senate Democratic computer files have been referred for investigation by a special prosecutor. Since your office worked directly with both a key perpetrator and with other individuals and groups who appear to have received materials from the files, on the very subject of most of the files known to have been downloaded, it is to be expected that you and your office will be subjects of this investigation. We therefore need to be as sure as we can, before processing your nomination, that we have all of the information regarding your possible involvement in or knowledge of the matters under investigation.

You were asked a number of questions regarding this matter by Senators from both parties (see, e.g., pages 35-37, 97-100, 112-114 of the Transcript of the Hearing on the Nomination of Brett M. Kavanaugh, "hearing transcript"). In some cases the questions as asked were framed, or your answers were framed, in ways that restricted or limited them in some way, either by time frame (e.g., past, present, at, before or after a certain time), particular person (e.g., Rushton, Gray, Daly), a qualifier (e.g., "usually," "documents" vs. "information") or an ambiguous description (e.g., "that matter"), or otherwise. In some cases your answers were unresponsive even to the questions as asked.

Would you kindly review all of your testimony on this subject, and amplify each of your answers to provide and make clear that you are providing all of the information you have on the entire subject without regard to any restrictions or limitations or qualifiers in the original questions or your answers. In addition, where, on review you see that your answers were not fully responsive or were misleading in any way in view of your entire knowledge of the subject at any point in time, please provide fully responsive answers.

For example, when you were asked about the circumstances of your meetings with Manuel Miranda, you responded with what they "usually" were. In such a case, you should provide what the circumstances were in all instances, whether usual or unusual.

Similarly, you were asked two questions about whether you received documents or information that "appeared" to come from or that "you believed or were led to believe" came from Democratic files. Both answers were in the negative but were explained by almost identical statements, not responsive to the questions, that you were "not aware of that matter until I learned of it in the media." For present

purposes you should consider that you were asked: “Did Mr. Miranda (or anyone else) ever share, reference or provide you with any documents (or other facts, schedules, positions, plans or other information) that appeared to you (then or at any subsequent time, especially after you had become aware of the Republican access to Democratic files and had seen the files posted on the web or provided to the media and to groups or persons with whom you were in touch) to have been drafted or prepared by (or obtained or derived from the files, emails or other communications of) Democratic staff members of the Senate Judiciary Committee?”

Similarly, you should re-frame your answer to the second question on page 37 of the hearing transcript to read its reference to “Associate White House Counsels” as including any interested White House staff, such as those in the Public Liaison or Legislative Affairs offices, to remove your own limitation to whether they were “aware” of the source of the materials and instead respond to the question asked, i.e., did they have access to the materials (or information), whether or not they were “aware” of the source.

As another example, you should review your answers to the questions regarding Boyden Gray on pages 113-114 of the hearing transcript, and remove your repeated limitation to “since I have been staff secretary,” providing detailed information on your relationship to Mr. Gray throughout your White House employment.

In short, whether or not you believe the questions as asked should have elicited this information at the hearing, please fully disclose now, without standing on semantic limitations in the original questions or in this submission, everything you know, or in retrospect now realize or believe, about the circumstances surrounding the access to the Democratic files, the use and dissemination of the content or information derived from these files, and the availability of that content or information to you or anyone else in the White House, the Justice Department, the groups supporting the President’s nominations, or anyone else outside the Democratic offices of the Judiciary Committee.

If this request is any way unclear, or leaves open any basis on which you might think that you need not provide everything you know on the entire subject, please let us know promptly, and we will clarify the request.

Response: Before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate’s judicial confirmations process had been obtained from Democratic computer files. Also, to clarify one statement in your questions, I was informed that I am not a target or subject of the investigation into this matter.

I knew Mr. Miranda, as he and many other Senate staffers were part of regular meetings, telephone calls, and emails about the judicial confirmation process. These meetings, calls, and emails were typical of how judicial confirmations have been handled in past

Administrations. I never knew or suspected that he or others had obtained information from Democratic computer files. I know of no one in the Administration or elsewhere who had any such knowledge or suspicions. I assumed that he, like many staffers and legislative affairs personnel in the Administration and on the Committee, talked often to the staffs of Democratic members to appropriately obtain as much information as possible about hearings, questions, concerns, individual nominees, and the like. Such inquiries and conversations are standard and appropriate on both sides, and they tend to generate and reveal a great deal of relevant information that is shared by both sides of the Committee with the other side and with the Administration. In my experience, the Senators on the Committee and their staffs have been open about likely questions and general concerns, and many Senators and staffers on both sides have provided helpful information with respect to timing of hearings, specific concerns about nominees, and overall plans and strategy. Usually, for example, Senators on both sides would explain any areas of concern to the Administration and often directly to the nominees well before any individual hearings. As I explained to Senator Durbin at my hearing, I cannot be sure which of the information imparted orally or in writing by Senate staffers or others may have been derived in whole or in part from information obtained from Democratic computer files. To reiterate, before there was a public revelation of the matter in late 2003, I was not aware nor did I suspect that information related to the Senate's judicial confirmations process had been obtained from Democratic computer files.

Beyond this, it would not be appropriate in this context to provide further information about Executive Branch communications relating to judicial nominations and confirmations.

In addition to the above:

- 1. Please provide your own conclusions as to the validity of Mr. Miranda's public statements as to his justification for his actions, their compliance with his ethical obligations, and the fact that he was operating in the interests of those who supported the nominations.**

Response: I am not familiar with all of Mr. Miranda's public statements regarding this issue, and it would not be appropriate in this context to comment on a matter under investigation.

2. **Since Boyden Gray has been publicly identified as a supporter of and spokesman for the White House on subjects relating to judicial nominations, please state whether you agree with his public defenses of Mr. Miranda, whether you or anyone at the White House have indicated to him that since he is so identified with the White House, he should desist from defending Mr. Miranda.**

Response: Mr. Gray is not an employee of the White House and does not speak on behalf of the White House. I am not familiar with particular public statements Mr. Gray may have made relating to Mr. Miranda.

3. **In view of Mr. Gonzales' refusal to investigate the subject, please state whether your (expanded) answer to the question on page 37 about whether "any other Associate White House Counsels had access" to the materials at issue is based on your own affirmative knowledge of what other White House staff knew or on your lack of knowledge of what other staff knew.**

Response: See my response to IA.

4. **Please state whether Mr. Miranda was ever involved in any of the moot courts or other meetings, conference calls, or conversations to prepare nominees for their hearings. If so, which ones?**
 - a. **Did you ever meet with a nominee together with Mr. Miranda to prepare the nominee to testify before the Senate Judiciary Committee? If so, please describe that preparation and Mr. Miranda's role in it.**
 - b. **Did Mr. Miranda ever directly or indirectly convey to any nominee, or to anyone involved in preparing any nominee, whether orally or in writing, any questions or areas of questioning that he suggested the nominee might be asked by any member of the Senate Judiciary Committee? If so, please describe the circumstances in which this occurred, and identify each nominee as to whose nomination Mr. Miranda's suggestion was made.**

Response: See my response to IA.

5. **Please describe any efforts you made, before or after your hearing, to review the materials and information you received from Mr. Miranda, other White House staff, the Justice Department, Mr. Gray, Mr. Rushton, Ms. Daly, or anyone else involved in judicial nominations, to determine whether anything they provided may have derived from the accessed Democratic files.**

Response: See my response to IA.

6. **Did Mr. Miranda ever tell you, suggest, or hint in any manner that he had a “source” or “mole” or other means of obtaining non-public information from the Democratic side? Did you ever hear that there was a disaffected Democratic staffer member or similar source providing such information?**

Response: See my response to IA.

B. FEDERALIST SOCIETY

In response to questions about the heavy tilt toward Federalist Society members on the Administration’s judicial nominations, you characterized the Society as “a group that brings together lawyers for conferences and legal panels. The Federalist Society does not take a position on issues. It does not have a platform.” You said you were a member because it puts on “conferences and panels” where you can learn about issues and meet colleagues.

No reasonable person could think the Society is just a meeting place for lawyers. The Society’s own website is much more candid than you were, describing it as “a group of conservatives and libertarians interested in the current state of the legal order.” The Society decries, without attributing it to anyone in particular, the “orthodox liberal ideology which advocates a centralized and uniform society” and in pursuit of its goals has “created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

If, as a judge, your opinions merely followed and implemented the goals of the Society, would you still assert that you would not be “taking a position on issues” and not pursuing “a platform”?

Response: A judge should never attempt to follow or implement the goals of any organization. If confirmed as a judge, I would fairly and impartially interpret and apply the law.

C. PRYOR NOMINATION

Since responding to the questions on the Republican Attorneys General Association issue, have you reviewed your records and refreshed your recollections as to your role in preparing the nominee for questions on that subject? Please describe your role in more detail.

1. You did not answer the questions I asked you on pages 134-135 of the hearing transcript, as to what if anything was done after the revelations in the media about the RAGA issue. Please do so in full now. Did you or anyone else in the White House or Justice Department check the issue out in more detail, have it investigated further, question the nominee about it, or otherwise follow up on the issue? Did any of you check with the RNC to determine who had the records that the nominee said they had? Please provide details on what was done, the results of any inquiry, and who received those results.

Response: I believe Judge Pryor addressed these questions at his hearing. It would not be appropriate in this context for me to comment on the records of other nominees or on internal Executive Branch communications.

2. At any time before February 20, 2004, were you aware that Mr. Pryor was being considered for a recess appointment to the 11th Circuit? Were you aware that the recess which was going to be used was an intra-session recess of five business days surrounding a three-day holiday weekend? Were you aware that the appointment was to be made on the afternoon of the last business day of the recess? Were you aware that the shortest prior recess used for appointment of an Article III judge during an intra-session recess was a recess of 35 days? Did you express an opinion to anyone at the White House as to the validity or advisability of making such an unprecedented appointment? If so, without asking what your advice was, is there any reason we cannot assume that your advice had to have been either (a) that the appointment should be attempted, or (b) not followed.

Response: It would not be appropriate in this context for me to discuss any internal Executive Branch communications on this matter. The United States Court of Appeals for the Eleventh Circuit has upheld the appointment of Judge Pryor.

3. **At your nomination hearing, I asked whether you assisted in preparing William Pryor to testify before the Senate Judiciary Committee. At that time, you indicated that you may have participated in a “moot court” session to prepare Mr. Pryor, but that you could not recall. Now that you have had additional time to review your work on nominations matters, please clarify whether you did in fact participate in a moot court preparation of Mr. Pryor.**

Response: I participated in moot court preparation for Judge Pryor.

4. **As you know, after William Pryor was nominated to the U.S. Court of Appeals for the Eleventh Circuit, several members of the Senate and the public expressed concern about extreme statements that Mr. Pryor had made, including his description of Roe v. Wade as “the worst abomination of constitutional law in our history.” Do you agree with Mr. Pryor that Roe v. Wade is an “abomination of constitutional law”?**

Response: It would not be appropriate in this context for me to comment on the records of other nominees. Roe v. Wade is binding Supreme Court precedent. If confirmed, I would fairly and faithfully follow and apply all binding Supreme Court precedent, including Roe v. Wade.

5. **The Constitution gave the Senate a co-equal role in appointing federal judges to guarantee that the judiciary is independent, and does not simply reflect the political views of a particular President. The idea that federal judges should be independent of the other two branches of government is one of the most important aspects of our democracy. As I mentioned during your confirmation hearing, after the Supreme Court’s 5 to 4 decision in Bush v. Gore, William Pryor stated that he had wanted the decision to be decided 5 to 4, so that President Bush “would have a full appreciation of the judiciary and judicial selection, so we can have no more appointments like Justice Souter.” If all judges followed Mr. Pryor’s view, the courts would be little more than an arm of the Executive Branch. Do you believe this is an appropriate view for a nominee to a federal court? Do you agree with Mr. Pryor’s view about the role of federal judges?**

Response: I understand, respect, and fully appreciate the need for an independent Judiciary. I know how important an independent Judiciary is to our system of government, to the rule of law, and to the American people. It would not be appropriate in this context for me to comment on the records or statements of other nominees.

D. LEGAL EXPERIENCE AND ROLE IN JUDICIAL NOMINATIONS

- 1. During your April 27, 2004, nomination hearing, you testified about your role in judicial nominations during the current Bush Administration and stated that you focused on "certain circuit court nominations" and on nominees from particular parts of the country.**
 - a. Please note the month and year when you first began working on matters related to judicial nominations and, if you no longer have any role in matters related to nominations, the date on which your involvement in such matters ceased.**
 - b. Which nominees did you work on, in any capacity?**
 - c. With respect to each of the nominees listed in response, above, please describe your role in selecting, vetting, or recommending them for nomination to the federal courts of appeals, and please describe the role you played in their preparation for testimony or responses to written questions.**

Response: I began working in the White House Counsel's Office in January 2001 and became Staff Secretary in July 2003. I began working on judicial nominations in January 2001. When I became Staff Secretary, I usually did not work on judicial nominations except to handle certain paperwork for the President.

I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

On occasion, I would review the drafts of written answers by nominees, although the Department of Justice had the primary role in reviewing nominees' written answers, as has been the case in prior Administrations as well.

2. **During the hearing on your nomination, I asked what experience if any you have in labor law matters. Your answer noted that you have held several government positions, but did not identify whether you have any experience in labor law. Please clarify whether you worked on any cases or legal matters involving labor law claims, and if so, please identify the case and describe the nature of your work.**

Response: As I stated at my hearing, I have spent the majority of my professional career in public service. My primary experience in labor law has been with respect to cases I worked on as a law clerk, including for Justice Kennedy, and as a lawyer in the Solicitor General's office.

3. **Please describe any legal experience you have involving the Americans with Disabilities Act. Please also describe any legal experience you may have involving the Endangered Species Act, the Clean Air Act, the Safe Drinking Water Act or any aspect of environmental law. In responding to this question, please identify the cases or legal matters on which you worked, and any role you played in drafting submissions or presenting oral argument to a court on these issues.**

Response: As I stated at my hearing, I have spent the majority of my professional career in public service. My primary experience in disability and environmental law has been in cases I worked on as a law clerk, including for Justice Kennedy, and as a lawyer in the Solicitor General's office.

4. **In response to a question from Senator Schumer during the hearing on your nomination, you stated that you believed that you had attended a fundraiser for the Committee for Justice on at least one occasion. You could not recall whether you made a donation at that event, but indicated that you would check to confirm this fact.**
- a. **Please indicate whether you have ever attended a fundraiser for the Committee for Justice, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.**
 - b. **Please state whether you have attended a fundraiser for the Coalition for a Fair Judiciary, and if so, when. In addition, please list any contributions you have made to that organization and when they were made.**

Response: I attended one Friday happy hour hosted by the Committee for Justice in Washington, D.C. in the summer of 2003. Several hundred people attended. I believe I may have spent about \$20 at the happy hour. Other than that, I have not attended any events for the Coalition for a Fair Judiciary or the Committee for Justice or contributed to them.

5. **You have testified that, as part of your work on judicial nominations, you coordinated with the White House Press Office and with outside organizations regarding nominees. As you know, Democrats who raised concerns about some of the Administration's most controversial nominees have been called anti-Black, anti-Latino, anti-Southern and anti-Catholic by some of these outside organizations.**
- a. **Did you play any role in encouraging conservative organizations and conservative media in these characterizations of Senators who opposed judicial nominees?**
 - b. **Do you agree that such characterizations are unacceptable and mislead the public about the judicial nominations process?**
 - c. **What if anything did you do to stop these White House supported organizations and surrogates from continuing to make these changes?**

Response: I spoke to and met with members of outside organizations who were interested in the judicial nomination and confirmation process. I have never encouraged anyone to portray Senators in the ways described in this question. No one in the Administration to my knowledge has ever made, suggested, or countenanced such charges.

II. OTHER ISSUES

The Office of the Counsel to the President plays a major role in decision-making with respect to access to Executive Branch materials and inquiries into allegations of improper activities by White House staff. Please provide a detailed description of your role in those activities, and specific responses to the questions below, answering any "yes" or "no" questions with a "yes" or "no" before providing any explanations. If any of your answers are classified, please separate the classified portions to the maximum extent possible, and provide a classified and unclassified version of such answers.

A. CIA LEAK INVESTIGATION

1. **Did you have any role in any activity relating in any way to the leak of information regarding Valerie Plame? If so, please detail your role.**

Response: No

2. **Did you personally question staff members or receive, review, or become familiar with evidence relating in any way to this matter? If so, please provide the details of what you did.**

Response: No

3. **Have you been questioned by the Special Prosecutor, the FBI, or anyone else about this matter?**

Response: No

4. **Were you involved in any internal investigation within the Executive Branch as to this matter? If so, please provide the details of what you did.**

Response: No

5. **As a result of anything you did, saw, read or heard, do you know who the person(s) was (were) who communicated information about Ms. Plame to the media? If so please provide the details of what you know.**

Response: No

6. **To the best of your knowledge, what efforts were made by your office or any other office in the White House to determine who disclosed the Plame information? Were you satisfied that all possible efforts were made to discover the facts? What other steps could have been taken that were not taken? Did you attempt to take those steps?**

Response: I do not have knowledge of this matter and these issues.

7. **Did you participate in the screening process conducted by the Counsel's office before materials on this subject requested by the Department of Justice were provided to the Department? Please describe that process and your role in detail.**

Response: No. I assumed my position as Staff Secretary in July 2003.

8. **What steps do you believe should have been or should be taken against anyone involved in disclosing the Plame information? Do you know whether such steps have been taken? If so, please provide the details of what steps have been taken and what other steps you believe should be taken.**

Response: I am not familiar with the facts relating to this matter and did not work on this matter.

B. BARRIERS TO ACCESS TO 9/11 INFORMATION

1. **Did you or anyone else in your office or, to the best of your knowledge, elsewhere in the White House, have any contact in 2001 or 2002 with (a) any member or staff of the Senate Judiciary Committee, or (b) any other Senator or Senate staff, with respect to the Committee's desire to investigate issues relating to the 9/11 attacks? If so, please provide details of what you did and what you know. What do you know about the efforts to deny authorization or funding for that investigation? What was your role and that of your office? If your office had nothing to do with that matter, who handled it for the White House?**

Response: I did not work on this matter.

2. **Did you or anyone else in your office or, to your knowledge, elsewhere in the White House have any role in the denial, delay or limitation of access to the materials and information requested by the Joint Intelligence Committees for their inquiry into 9/11 as described in the Appendix to their Report? In particular, did you or your office participate in any way in the decision to classify the fact that the President had received the PDB dated August 6, 2001? If either answer is yes, please provide details of what you know and what you did.**

Response: I did not work on this matter.

3. **Did you or your office have a role (a) in formulating or implementing the White House opposition to the establishment of the 9/11 Commission before September 2002, (b) in negotiating the details of the legislation establishing the Commission's mandate and structure once the White House agreed to its establishment, or (c) in considering, determining, and negotiating with regard to the White House responses to requests from the Commission for materials, interviews, and information? Please describe your own role in detail.**

Response: I did not work on this matter.

4. **Were you in any way responsible for the White House statements that it was impermissible for Ms. Rice to testify and for the White House to release the August 6th 2001 PDB? If so, please describe your role in detail.**

Response: I did not work on this matter.

5. **Do you see any meaningful distinctions between President Ford's public testimony before a House subcommittee in 1974 and President Bush's appearance before the 9/11 Commission which justify his refusal to testify in public?**

Response: I did not work on this matter.

**Responses of Brett M. Kavanaugh
to the Written Questions of Senator Feingold**

1. According to your Judiciary Committee questionnaire, while working in the White House Counsel's office, you "worked on the nomination and confirmation of federal judges." You state that you also worked on "various ethics issues." As part of your responsibilities in that office, did you review the records of potential nominees for their compliance with standards of legal and judicial ethics?

Response: The responsibility for reviewing background investigation files was performed by the Counsel and Deputy Counsel to the President, as well as attorneys in the Department of Justice. I therefore was rarely involved in that particular aspect of the judicial selection process.

2. Do you believe that adherence to strict ethical standards is an important qualification for being a federal judge?

Response: Yes.

3. During the Senate's consideration of Judge Charles Pickering's nomination to the Fifth Circuit, the Judiciary Committee learned that he solicited and collected letters of support from lawyers who had appeared in his courtroom and practiced in his district. It later became apparent that some of these lawyers had cases pending before him when they wrote the letters that Judge Pickering requested. Prof. Stephen Gillers of NYU Law School has written: "Judge Pickering's solicitation creates the appearance of impropriety in violation of Canon 2 of the Code of Conduct for U.S. Judges. . . . The impropriety becomes particularly acute if lawyers or litigants with matters currently pending before the Judge were solicited."

Did you know that Judge Pickering planned to solicit letters of support in this manner before he did so? When did you become aware that Judge Pickering had solicited these letters of support?

Do you believe that Judge Pickering's conduct in this instance is consistent with the ethical obligations of a federal judge?

Do you believe it is appropriate for federal judges to solicit letters of support from lawyers who practice before them and ask that those letters be sent directly to him to be forwarded to the Senate Judiciary Committee?

Response: I believe Judge Pickering addressed inquiries about this matter in his confirmation hearings. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

4. During the Senate's consideration of Judge D. Brook Smith's nomination to the Third Circuit, the Judiciary Committee learned that Judge Smith had not resigned from the Spruce Creek Rod and Gun Club until 1999, even though he had promised during a

confirmation hearing in 1988 that he would do so if he was unable to bring about a change in the club's discriminatory membership policies.

When Judge Smith was nominated did you know that he had made this promise to the Judiciary Committee in 1988 and that he remained a member until 1999? If not, when did you become aware of these facts?

Did you work with Judge Smith in preparing his discussion of his membership in the Spruce Creek Rod and Gun Club in this Judiciary Committee questionnaire and his answers to questions about that membership in the club? Did you review his answers to questions on this matter before they were submitted?

Do you believe Judge Smith's continued membership in the Spruce Creek Rod and Gun Club from 1992 to 1999 was consistent with the Code of Conduct for United States Judges?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

5. Also in connection with Judge Smith's nomination, the Committee considered allegations that he violated the judicial disqualification statute, 28 U.S.C. section 455, by not recusing himself earlier in *SEC v. Black*, and by not recusing himself immediately upon being assigned the criminal matter in *United States v. Black*. Prof. Monroe Freedman of the University of Hofstra University Law School called his violations "among the most serious I have seen."

Were you aware of the controversy over Judge Smith's handling of the *SEC v. Black* and *United States v. Black* cases when he was being considered for nomination to the Third Circuit?

Do you believe that Judge Smith's actions in these cases were consistent with his obligations under the judicial disqualification statute and the Code of Conduct?

Response: I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

6. As you may know, I have questioned a number of judicial nominees about their acceptance of what some have termed "junkets for judges" -- free trips to education seminars sponsored by ideological organizations such as Montana-based Foundation for Research on Economics and the Environment ("FREE"). In answer to a written question, Judge Smith stated that under Advisory Committee Opinion No. 67, which sets out the ethical obligations of judges who wish to go on such trips, he did not need to inquire about the sources of funding of seminars put on by the Law and Economics Center at George Mason University.

Do you agree with Judge Smith's interpretation of Advisory Committee Opinion No. 67?

If you are confirmed, will you accept free trips from organizations such as FREE and the Law and Economics Center?

Response: On these kinds of ethics issues, I would faithfully follow all applicable statutes, court decisions, and policies. I believe Judge Smith addressed inquiries about this matter in his confirmation hearing. It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

7. After Judge Ron Clark was confirmed by the Senate to a district judgeship in Texas, he told the New York Times that, despite his confirmation, "right now, I'm running for state representative." Indeed, he admits that he was actively campaigning for office, stating "I go to functions, go block walking, that sort of thing." The Code of Conduct prohibits a candidate for judicial office from engaging in partisan political activity.

Were you involved in discussions about the timing of Judge Clark's commission or whether Judge Clark should continue to campaign for office after he was confirmed by the Senate?

Do you believe that Judge Clark complied with his ethical obligations in campaigning for the Texas legislature while he was awaiting his commission from President Bush? If not, did you ever recommend to the President or your supervisors that Judge Clark's commission not be signed?

Response: It would not be appropriate in this context for me to comment on the record of another nominee or on internal Executive Branch communications.

**Responses of Brett M. Kavanaugh
to the Written Questions of Senator Schumer**

1. When the Supreme Court issues non-unanimous opinions, Justice Scalia and Justice Ginsburg frequently find themselves in disagreement with each other. Do you more frequently agree with Justice Scalia's position or Justice Ginsburg's?

Response: As an appeals court judge, I would faithfully apply the Supreme Court's decisions regardless of who authored any particular decision. I have great respect for all of the Justices on the current Court; eight of them were serving on the Court when I was a law clerk for Justice Kennedy. All of the Supreme Court Justices disagree with one another at times, and that is expected and understandable since the Supreme Court decides only the most difficult and complex cases.

A judicial nominee should not comment on his or her agreement or disagreement with the positions of particular Justices. A judicial nominee similarly should not provide his or her personal views on the correctness of Supreme Court decisions. At her hearing, Justice Ginsburg explained these principles, which have been followed by almost every judicial nominee in our history. In response to one question about her views on a particular case, for example, she said: "I sense that I am in the position of a skier at the top of the hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case." Hearing at 494. She made this and related points several times in her hearing. Hearing at 474 ("I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that's about all I can say."); Hearing at 542 ("I have tried religiously to refrain from commenting on a number of Court decisions"). Justice Ginsburg specifically refused to comment on whether a particular decision was an example of judicial activism. Hearing at 558. Justice Ginsburg explained that the principle she was applying in declining to answer these questions was the "best interests of the Supreme Court."

2. At your confirmation hearing, you testified that you "don't know in the vast, vast majority of cases" what nominees' positions are on choice "unless there has been a public record before." As you know, with numerous nominees there has been "a public record before." They have run or been active in anti-choice organizations, have sponsored anti-choice legislation, have worked for anti-choice causes, and in the instance of Justice Priscilla Owen as described by White House Counsel and then-Texas Supreme Court Justice Alberto Gonzales, engaged in "unconscionable judicial activism" on the anti-choice side of a case that came before her as a judge.

The record of Democratic Senators makes it patently clear that none of us has a litmus test when we vote on judges. We have voted for dozens who are

demonstrably anti-choice. Many, however, believe that this Administration has a litmus test when it comes to choosing judicial nominees.

- a. Do you agree that based on the records of numerous judicial nominees, the White House had substantial reason to be confident that they are anti-choice?**
- b. Do you agree that based on Democratic Senators' records of voting for a substantial majority of the nominees whose records show them to be anti-choice, it is clear we do not have a litmus test?**
- c. At your hearing, you testified that you are "sure there are many" of President Bush's judicial nominees who are pro-choice. Please identify those judicial nominees of this Administration whose records provide substantial reason to believe they are pro-choice.**

Response: I do not agree that "numerous nominees" have had a public record on abortion. I am aware of only a handful out of more than 200 judicial nominees who had any kind of record that would indicate what their personal views on abortion are. I cannot identify which of the more than 200 judicial nominees are pro-life or pro-choice (with the few exceptions of nominees who had taken public positions on the issue) because the President does not have a litmus test on this issue and the Administration does not ask judicial candidates their views on this issue.

3. If you are confirmed and, as a judge, you find yourself in the identical circumstances that Justice Scalia found himself in for Cheney v. U.S. District Court, will you recuse yourself?

Response: On recusal issues, I would faithfully follow all applicable statutes, court decisions, and policies, including 28 U.S.C. 455.

4. Over the last few years, progressive groups have been excoriated by the right wing for their role in the confirmation of federal judges. My view is that outside groups on both sides, representing the interests of millions of Americans, have an appropriate place in the nomination and confirmation process. But there seems to be a certain degree of denial on the Right when it comes to recognizing that outside groups on both sides are involved in the process. We all know that organizations such as the Committee for Justice, Coalition for a Fair Judiciary, and individuals such as C. Boyden Gray and Kay Daly have been active in the efforts to confirm President Bush's judicial nominees.

I want to be clear in asking this question, that I have no objection to the involvement of activist groups on the Right. My objection is to the hypocrisy of the criticism when the Right is engaged in conduct identical to what progressives are doing.

To set the record straight on the extent of their involvement, please describe the interaction, during your time in the White House Counsel's Office, between the

Administration and the below-listed outside groups and non-government employees regarding judicial nominations, including but not limited to their roles in identifying individuals for judicial nominations, advocating for or against their nominations, evaluating and vetting them, and developing strategies around their nominations and confirmations.

- a. **Committee for Justice (and officers and employees thereof)**
- b. **C. Boyden Gray**
- c. **Coalition for a Fair Judiciary (and officers and employees thereof)**
- d. **Kay Daly**
- e. **Sean Rushton**
- f. **The Federalist Society (and officers and employees thereof)**

Response: I agree that outside groups have a perfectly legitimate and appropriate role in expressing their views on the judicial nomination and confirmation process. Members of the Administration met with outside groups that were interested in the judicial nomination and confirmation process. That is traditional and appropriate. Beyond that, it would not be appropriate in this context for me to provide information regarding the Administration's judicial nomination and confirmation strategy and meetings.

5. You took over as White House staff secretary in May of 2003, just weeks before Administration officials leaked the identity of then-covert CIA operative Valerie Plame to retaliate for her husband's authoring an op-ed that criticized the Administration. As staff secretary, you control the flow of most paper to the President. Ms. Plame's name was leaked on or about July 13, 2003.

I want to be absolutely clear that I have no reason to believe you had anything to do with the leaking of Ms. Plame's name or that you know anything about who committed that crime. However, given that you have been nominated for such a high post and given the positions you have held in the White House, both in the counsel's office and as staff secretary, I believe we have a duty to get your responses to the following questions on the record.

- a. **What, if anything, do you know about the identity of the person or people who made Ms. Plame's name public?**

Response: See the response to this series of questions after question g below.

- b. **Have you spoken with investigators and/or prosecutors working on the Plame case, regarding the Plame case?**
- c. **Have you testified in the Grand Jury in the Plame case?**
- d. **Have you been told that you are either a target or a subject of the investigation into the criminal leaking of Ms. Plame's identity.**

- e. **Before July 14, 2003, did you see any paper or electronic document submitted to the President (or otherwise) bearing Ms. Plame's name, identity, or otherwise referencing the wife of Ambassador Joe Wilson?**
 - i. **If so, please describe in detail what you saw.**
 - ii. **If so, have you informed the federal prosecutors investigating the case of what you saw?**
 - f. **Were you aware that anyone was discussing or considering making Ms. Plame's name (or the identity of a covert CIA operative) public before such occurred?**
 - g. **Were you aware of any other discussion or consideration of any other actions directed toward Ambassador Joe Wilson after publication of his op-ed that criticized the Administration?**

Response: I began my service as Staff Secretary in early July 2003. I am not familiar with the facts relating to this matter, and the answer to these questions is no.

**Responses of Brett M. Kavanaugh to the
Written Questions of Senator Durbin**

1. At your nomination hearing, you discussed your involvement in the judicial nomination process when you worked in the White House Counsel's office. You indicated that you were involved in both the selection side and the confirmation side, but you described only the confirmation side. Please provide details about your role in the selection side. What was the nature of your role in selecting judicial nominees for President Bush?

Response: I was one of eight associate counsels in the White House Counsel's office who participated in the judicial selection process. At Judge Gonzales' direction, we divided up states for district court nominations, and we divided up appeals court nominations as vacancies arose. Our roles included discussions with staffs of home-State Senators and other state and local officials, review of candidates' records, participation in candidate interviews (usually with Judge Gonzales and/or his deputy and Department of Justice lawyers), and participation in meetings of the judicial selection committee chaired by Judge Gonzales. That committee would make recommendations and provide advice to the President. Throughout this process, we worked collaboratively with Department of Justice attorneys. It is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations.

At the district court level, I assisted with nominations from Illinois, Idaho, Arizona, Maryland, California, and Pennsylvania, among other states. In assisting with Illinois district court nominations, I worked with members of your staff, as well as staff who worked for Senator Fitzgerald. I assisted several court of appeals nominees on the confirmation side of the process, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

2. For the following judicial nominees, please indicate: (A) whether you recommended the nominee for the position to which he or she was nominated, and (B) the nature of your involvement in their selection and confirmation: Miguel Estrada, Charles Pickering, Priscilla Owen, William Pryor, Carolyn Kuhl, Janice Rogers Brown, William Myers III, Claude Allen, Terrence Boyle, D. Brooks Smith, Dennis Shedd, Michael McConnell, Jeffrey Sutton, John Roberts, Jay Bybee, Timothy Tymkovich, William Haynes, J. Leon Holmes, and Paul Cassell.

Response: It would not be appropriate in this context for me to disclose advice and recommendations that were provided to the President or Judge Gonzales. As I noted in response to Question 1, I participated in the meetings of a judicial selection committee that was responsible for making recommendations to the President. During my time, each of the nominees listed in your question was evaluated and discussed. As with prior Administrations, the White House Counsel's Office and Department of Justice attorneys

assist judicial nominees in the confirmation process, which included reviewing nomination paperwork and preparing for hearings. As part of my responsibilities, I assisted several judicial nominees in this manner, including Judge Consuelo Callahan, Judge Steve Colloton, Judge Carlos Bea, Justice Priscilla Owen, Miguel Estrada, and Judge Carolyn Kuhl, among others.

3. When you were helping select judicial nominees for President Bush, did you give preference to individuals who were members of the Federalist Society? Did you consider membership in the Federalist Society to be a positive factor for a potential nominee? Why?

Response: The President has selected judicial nominees based on their qualifications, including their intellect, integrity, and temperament, and whether they will fairly and strictly interpret the law. As far as I am aware, the majority of President Bush's judicial nominees have not been members of the Federalist Society.

4. In your capacity as Staff Secretary and Assistant to the President, have you worked on judicial nominations issues either formally or informally? If so, were you involved in the decision to give recess appointments to Charles Pickering and William Pryor? If you were, please describe the nature of your involvement and recommendations. If you no longer work on judicial nominations, please indicate the month you stopped working on this issue.

Response: I became Staff Secretary in early July 2003. As Staff Secretary, I perform traditional tasks assigned to that position, such as assisting with the President's signing of commissions, orders, and other documents, reviewing and clearing memoranda for the President, coordinating drafts of Presidential speeches, and helping to prepare the President's briefing books. In that office, I usually do not work on judicial nominations except with respect to coordinating paperwork. If asked by the President, Counsel, or other members of the staff for my opinion or advice, I provide it as appropriate. As I noted in response to Question 2, it would not be appropriate in this context for me to disclose recommendations or advice that were provided to the President or Judge Gonzales.

5. You and Justice Janice Rogers Brown were nominated together to the 11th and 12th seats on the D.C. Circuit. During the Clinton Administration, some Senate Republicans argued that there was no need for these seats to be filled because the workload did not warrant it. President Clinton nominated individuals to the 11th and 12th seats but those nominees were never given a hearing and vote. There is no evidence that the workload of the D.C. Circuit has increased since that time. In fact, since 1997 the number of appeals is down 27%, the number of pending cases is down 28%, and the number of written decisions per judge is down 14%. In this light, do you believe that it is advisable to fill these seats today? Was any consideration given by the Bush White House to not filling these seats? Please explain.

Response: Congress decides the appropriate number of seats on the federal courts of appeals. Congress historically has done this in consultation with the Judicial Conference of the United States. My understanding is that Congress established in the early 1980's that the D.C. Circuit should have 12 seats.

6. What role did you play in helping judicial nominees answer written questions submitted by Senators on the Judiciary Committee? Please provide examples.

Response: On occasion, I would review the drafts of written answers by nominees, although the Department of Justice had the primary role in reviewing nominees' written answers, as has been the case in prior Administrations as well.

7. You served as a law clerk to Supreme Court Justice Anthony Kennedy. In a December 2003 *Vanity Fair* article, a fellow law clerk of yours at the Supreme Court discussed your attitude about death penalty appeals. He said: "You'd kind of know instinctively how he'd come out, no matter what the petition was." What is your response to this statement? Without naming specific cases, were there any capital punishment cases you worked on in which you recommended that the death penalty not be administered?

Response: The statement is unattributed and inaccurate. I cannot respond to the remainder of the question because law clerks maintain the confidentiality of their work as Supreme Court clerks in perpetuity. It therefore would not be appropriate for me to disclose recommendations or advice I provided to Justice Kennedy on particular cases or matters.

8. At your hearing, Senator Kennedy asked whether you agreed with the statement from the Federalist Society's mission statement that "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Please provide a more direct and complete answer to the question than the one you gave Senator Kennedy at your hearing.

Response: I did not find political affiliation or ideology to correlate to whether one was a good law school professor. It is my impression and widely believed that most law school faculties are composed primarily of Democrats; for example, most of my professors at Yale Law School were Democrats, and many likely would describe themselves as liberal. I liked my law school professors and learned a lot from them and consider them mentors and in many cases friends.

9. One of the stated goals of the Federalist Society is “reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law.” Which priorities do you believe need to be reordered within the legal system of America?

Response: At the federal level, Congress and the President determine what laws to pass based on their assessment of priorities and values. The courts must fairly interpret that law and not assume the role of legislators. As an appeals court judge, I would carefully follow the precedents of the Supreme Court and fairly interpret and apply the statutes passed by Congress.

10. During the 2000 presidential campaign, President Bush pledged that he would appoint “strict constructionists” to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

- A. As someone who had significant responsibility at the White House for carrying out this mandate, do you believe that President Bush has been successful in fulfilling this pledge?**
- B. How would you describe the judicial philosophy of Justices Scalia and Thomas?**
- C. How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?**
- D. Do you consider yourself to be a strict constructionist? Why or why not?**
- E. Do you think that the Supreme Court’s landmark decisions in *Brown v. Board of Education*, *Miranda v. Arizona*, and *Roe v. Wade* are consistent with strict constructionism? Why or why not?**

Response: President Bush has stated that he seeks judicial nominees who will apply the law as written and not legislate from the bench. He seeks nominees who have demonstrated that they know the difference between personal opinion and the strict interpretation of the law. Almost all of President Bush’s judicial nominees have been rated “Well Qualified” or “Qualified” by the American Bar Association and have been confirmed by the Senate.

If confirmed, I would fairly interpret and apply the law, carefully and strictly adhere to the text of the Constitution and of the statutes passed by Congress, and faithfully follow the binding precedents of the Supreme Court and D.C. Circuit. Beyond that, I would not attach any particular overarching label to my likely judicial approach.

A judicial nominee should not comment on his or her agreement or disagreement with the positions of particular Justices. A judicial nominee similarly should not provide his or her personal views on the correctness of Supreme Court decisions. At her hearing, Justice Ginsburg explained these principles, which have been followed by almost every judicial nominee in our history. In response to one question about her views on a particular case, for example, she said: "I sense that I am in the position of a skier at the top of [the] hill, because you are asking me how I would have voted in Rust v. Sullivan (1991). Another member of this committee would like to know how I might vote in that case or another one. I have resisted descending that slope, because once you ask me about this case, then you will ask me about another case that is over and done, and another case." Hearing at 494. She made this and related points several times in her hearing. See Hearing at 474 ("I agree that those cases are the Supreme Court's precedent. I have no agenda to displace them, and that is about all I can say."); Hearing at 542 ("I have tried religiously to refrain from commenting on a number of Court decisions"). Justice Ginsburg also specifically refused to comment on whether a particular decision was an example of judicial activism. Hearing at 558. Justice Ginsburg explained that the principle she was applying in declining to answer these questions was the "best interests of the Supreme Court."

11. In the case *Rice v. Cayetano*, you were the counsel of record in an amicus brief arguing that the state of Hawaii violated the Constitution by permitting only Native Hawaiians to vote in elections for the Office of Hawaiian Affairs. In a 1999 *Wall Street Journal* op-ed you wrote about *Rice v. Cayetano* entitled "Are Hawaiians Indians? The Justice Department Thinks So," you expressed considerable cynicism about the Clinton Administration's justification for filing a brief on behalf of the state of Hawaii. You wrote: "As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency."

- A. Do you stand by your statement that the Clinton Administration filed a brief on behalf of Hawaii because "Hawaii is a strongly Democratic state," and that the Clinton Administration took "the politically correct position" in order to "support the state's system of racial separatism"?**
- B. Do you believe there are any instances in which the Ashcroft Justice Department has failed – in your words – "to put law and principle above politics and expediency"? If so, please provide specific examples.**

Response: I wrote that op-ed in conjunction with my representation of a client and did so to advance the position of my client. As the article states, my client argued that Hawaiians could not be analogized to Native Americans for the purposes of justifying a racial voting qualification. The Department of Justice took the opposite view. The

Supreme Court agreed 7-2 with the position of my client. It would not be appropriate for me to state my agreement or disagreement with what I wrote as a lawyer for a client. That said, I usually do not think it appropriate or necessary to ascribe negative motives to decisions of government officials. The statement in this article could have been phrased differently; had it been phrased differently, it would have more effectively represented my client's interests. With respect to sub-part B of the question, the answer is no.

12. In your *Wall Street Journal* op-ed, you wrote that the position of the Clinton Administration was “to allow political correctness to trump the Constitution.” You also wrote: “The Supreme Court ought not be fooled by the Justice Department’s simplistic and far-reaching effort to convert an ethnic group into an Indian tribe.” Justices Ginsburg and Stevens were apparently “fooled” by the Justice Department because they dissented in this case and largely adopted the Justice Department’s position. At your nomination hearing, however, you described Justice Ginsburg as “an excellent Justice.” Do you believe that your *Wall Street Journal* op-ed was excessively harsh in its condemnation of the Clinton Administration and Supreme Court Justices who voted for that Administration’s position?

Response: As I noted in response to Question 11, I believe the passage you quote would have more effectively supported my client's position had it been phrased differently.

13. One of your clients in the *Rice v. Cayetano* case was the Center for Equal Opportunity, an organization that opposes the use of affirmative action. The organization’s mission statement refers to affirmative action as “racial preferences” and states: “CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in employment, education, and voting.”

A. Do you believe that affirmative action constitutes a “racial preference”?

B. Do you share the desire of your former client to prevent the use of affirmative action in the contexts of employment, education, and voting?

Response: The Supreme Court has decided many cases on affirmative action programs and, if confirmed, I would faithfully follow those precedents. The Court has established detailed tests to assess whether affirmative action programs are race-based or race-neutral – and also whether they pass constitutional muster. My personal views or the views of my former clients on these or other issues would not affect how I would approach decisions as an appeals court judge. I would carefully and faithfully follow all precedent of the Supreme Court.

14. In the case *Santa Fe Independent School District v. Doe*, you wrote an amicus brief on behalf of Representatives J.C. Watts and Steve Largent in which you argued that the use of loudspeakers for student-led prayers at high school football games did not constitute an Establishment Clause violation of the First Amendment. The Supreme Court rejected your argument by a vote of 6-3, ruling that the prayer involved both perceived and actual endorsement of religion. Do you believe that the Supreme Court was wrong in reaching that decision?

Response: As a judicial nominee, it would not be appropriate for me to comment on whether a particular Supreme Court decision was correct, for the reasons set forth by Justice Ginsburg in her hearing, for example. See also response to question 10 above. As an appeals court judge, I would faithfully apply the Supreme Court's decision in the Santa Fe case, which resolved a question that had previously divided lower courts after the question had been left open in Lee v. Weisman (1992).

15. Other than the work you performed on behalf of J.C. Watts and Steve Largent in *Santa Fe Independent School District v. Doe*; in defense of a local ordinance that granted religious entities an exemption from the county's zoning restrictions; and on behalf of the American relatives of Elian Gonzalez, please describe all other pro bono legal work that you have performed as an attorney.

Response: I have worked in public service as a government lawyer for 11 of the 14 years since I graduated from law school. In private practice, I spent a significant amount of time doing pro bono and reduced-fee work. In addition to the cases you cited, for example, I worked on a religious freedom case in the Supreme Court known as Good News Club v. Milford Central School District. I also worked on school choice litigation in Florida for a reduced fee.

16. You indicate on your Senate questionnaire that you "went to Deland, Florida, in November 2000 to participate in legal activities related to the recount." Please describe these activities in more detail.

Response: Republican and Democratic lawyers observed the recount activities in Florida in 2000. I was part of a group of Republican lawyers that provided observers for the recount in Volusia County. The recount activities in Volusia County were relatively quick and uncontroversial.

17. You indicate on your Senate questionnaire that you were the Regional Coordinator for Pennsylvania, Maryland, Delaware, and the District of Columbia for a group called "Lawyers for Bush Cheney 2000." Please describe your activities

as Regional Coordinator.

Response: Among other activities, I would participate in weekly conference calls, communicate with the state directors for the states I was assigned about their efforts to recruit members for Lawyers for Bush-Cheney, and attend events held for Governor Bush.

18. On your Senate questionnaire, you stated: "In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit." Please provide more information about the meaning of that statement. Why were you not selected for the Fourth Circuit? Was the opposition of the Maryland Senators a factor in your not being selected?

Response: I met at length with Senator Sarbanes, and he indicated that my record made me a better nominee for the D.C. Circuit than for the Fourth Circuit since I had practiced primarily in Washington and as a government lawyer. He made it clear that he would not support a nominee for that seat on the Fourth Circuit unless the nominee was a Maryland lawyer, maintained an office in Maryland, and practiced regularly in the Maryland courts. He said that Senator Mikulski agreed with him about this.