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CADC (Court of Appeals DC Circuit) Kavanaugh [2]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Draft	[Edits on the Myth/Fact Sheet - page 4-6]	3	N.D.	P5;
002	Chart	[Ages]	1	N.D.	P6/b6;
003	Email	Confirm Stats - To: Jonathan Ganter - From: Kyle Sampson	1	07/29/2003	P6/b6;
004	Email	RE: Judge Bio Info - To: Jonathan Ganter - From: Sheila Joy	1	07/29/2003	P6/b6;
005	Report	Candidate Report: Brett M. Kavanaugh	19	07/14/2003	P5; P6/b6;
006	List	[List of Questions]	1	N.D.	P5;
007	Draft	Brett Kavanaugh - Judicial Nominees	1	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Rao, Neomi

FOLDER TITLE:
CADC (Court of Appeals DC Circuit) Kavanaugh [2]

FRC ID:
10167

RESTRICTION CODES

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

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

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

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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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008	Report	Candidate Report: Brett M. Kavanaugh	19	07/14/2003	P5; P6/b6;

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Written Questions for Brett Kavanaugh from Sen. 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?

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

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."

(a) 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?

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

(c) 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?

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.

(a) 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?

(b) 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?

(c) 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?

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."

(a) 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?

(b) 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?

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.

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

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

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.

(a) 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?

(b) 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?

Questions for Brett Kavanaugh from Senator Charles E. 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?
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 are pro-choice. Please identify those judicial nominees of this Administration whose records provide substantial reason to believe they are pro-choice.
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?
 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)

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?
- 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?

Questions for Brett Kavanaugh from Senator Patrick 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?
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?
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?
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?
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.
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?

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?
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.
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?
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 to 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?
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 13223 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?
12. As you know, after Executive Order 13223 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?

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?
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.

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.
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.
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?
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?
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?
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?
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?

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?
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 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 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?

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 the 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 Fifth Circuit?
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 statements 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?"

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?
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 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?
- ▶ “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).]

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?”
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?
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?

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?

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?

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?
34. A) How often did you speak with Mr. Miranda from the 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 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. A) 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, 2003 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 he 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. A) 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?

**Written Questions from Sen. Richard Durbin
Nomination of Brett Kavanaugh to the
U.S. Court of Appeals for the D.C. Circuit
Senate Judiciary Committee
May 4, 2004**

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?
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.
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?
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 your recommendations. If you no longer work on judicial nominations, please indicate the month you stopped working on this issue.
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.

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

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?

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.

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?

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*, *Roe v. Wade* are consistent with strict constructionism? Why or why not?

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.

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?

13. One of your clients in *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?

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?

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.

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

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.

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?

Written Questions of Senator Edward Kennedy
to Brett Kavanaugh
Nominee to the U.S. Court of Appeals for the D.C. Circuit

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 113-14 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.

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.
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 discussed Mr. Gray's position on this subject with Mr. Gray, and 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.

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.
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.
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.
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?

B. FEDERALIST SOCIETY

In response to questions about the heavy tilt towards 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"?

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 134-35 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 on the matter, talk to those involved, or ask to see 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.
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 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.

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.
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"?
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 reflecting 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?

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 in matters related to judicial nominations and, if it 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 to 3.a. 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.
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.
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.
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 fund raiser 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.

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

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.
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?
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.
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.

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?
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.

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.
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 6, 2001 PDB? If so, please describe your role in detail.
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?



Federal Register

Monday,
November 5, 2001

Part IV

The President

Executive Order 13233—Further
Implementation of the Presidential
Records Act

Presidential Documents

Title 3—

Executive Order 13233 of November 1, 2001

The President

Further Implementation of the Presidential Records Act

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges, including those that apply to Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors, and to do so in a manner consistent with the Supreme Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and other cases, it is hereby ordered as follows:

Section 1. Definitions.

For purposes of this order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "Presidential records" refers to those documentary materials maintained by the National Archives and Records Administration pursuant to the Presidential Records Act, 44 U.S.C. 2201-2207.

(c) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

Sec. 2. Constitutional and Legal Background.

(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).

(b) In *Nixon v. Administrator of General Services*, the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. The Court cited the precedent of the Constitutional Convention, the records of which were "sealed for more than 30 years after the Convention." *Id.* at 447 n.11. Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure." *Id.* at 449. The Court also held that a former President, although no longer

a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records, and expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." *Id.* at 448.

(c) The Supreme Court has held that a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a "demonstrated, specific need" for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding. See *United States v. Nixon*, 418 U.S. 683, 713 (1974). Notwithstanding the constitutionally based privileges that apply to Presidential records, many former Presidents have authorized access, after what they considered an appropriate period of repose, to those records or categories of records (including otherwise privileged records) to which the former Presidents or their representatives in their discretion decided to authorize access. See *Nixon v. Administrator of General Services*, 433 U.S. at 450-51.

Sec. 3. Procedure for Administering Privileged Presidential Records.

Consistent with the requirements of the Constitution and the Presidential Records Act, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner:

(a) At an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent President and, as soon as practicable, shall provide the former President and the incumbent President copies of any records that the former President and the incumbent President request to review.

(b) After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. The Archivist shall not permit access to the records by a requester during this period of review or when requested by the former President to extend the time for review.

(c) After review of the records in question, or of any other potentially privileged records reviewed by the former President, the former President shall indicate to the Archivist whether the former President requests withholding of or authorizes access to any privileged records.

(d) Concurrent with or after the former President's review of the records, the incumbent President or his designee may also review the records in question, or may utilize whatever other procedures the incumbent President deems appropriate to decide whether to concur in the former President's decision to request withholding of or authorize access to the records.

(1) When the former President has requested withholding of the records:

- (i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the former President and the Archivist. The Archivist shall not permit access to those records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

- (ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.
- (2) When the former President has authorized access to the records:
- (i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.
 - (ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. Concurrence by Incumbent President.

Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204(c)(1). When the incumbent President concurs in the decision of the former President to request withholding of records within the scope of a constitutionally based privilege, the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged.

Sec. 5. Incumbent President's Right to Obtain Access.

This order does not expand or limit the incumbent President's right to obtain access to the records of a former President pursuant to section 2205(2)(B).

Sec. 6. Right of Congress and Courts to Obtain Access.

This order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain access to the records of a former President pursuant to section 2205(2)(A) or section 2205(2)(C). With respect to such requests, the former President shall review the records in question and, within 21 days of receiving notice from the Archivist, indicate to the Archivist his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 21 days after the former President has indicated his decision. Those periods may be extended by the former President or the incumbent President for requests that are burdensome. The Archivist shall not permit access to the records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 7. No Effect on Right to Withhold Records.

This order does not limit the former President's or the incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.

Sec. 8. Withholding of Privileged Records During 12-Year Period.

In the period not to exceed 12 years after the conclusion of a Presidency during which section 2204(a) and section 2204(b) of title 44 apply, a former President or the incumbent President may request withholding of any privileged records not already protected from disclosure under section 2204. If the former President or the incumbent President so requests, the Archivist shall not permit access to any such privileged records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 9. *Establishment of Procedures.*

This order is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege. The order is intended to establish procedures for former and incumbent Presidents to make privilege determinations.

Sec. 10. *Designation of Representative.*

The former President may designate a representative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the Presidential Records Act and this order. Upon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges. In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discretion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Sec. 11. *Vice Presidential Records.*

(a) Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.

(b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President.

(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Sec. 12. *Judicial Review.*

This order is intended to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party, other than a former President or his designated representative, against the United States, its agencies, its officers, or any person.

Sec. 13. Revocation.

Executive Order 12667 of January 18, 1989, is revoked.

A handwritten signature in black ink, appearing to be "George W. Bush", written in a cursive style.

THE WHITE HOUSE,
November 1, 2001.

[FR Doc. 01-27917
Filed 11-2-01; 11:23 am]
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THE WHITE HOUSE
WASHINGTON

OFFICE OF THE COUNSEL TO THE PRESIDENT

FACSIMILE COVER SHEET

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From: Charles Duggan

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Just a few light edit/suggestions on the myth/fact sheet.

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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

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

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.

	DOB	Date of Nomination	Age @ Nomination
Anthony Kennedy	(b)(6)	3/3/1975	38 yrs. 7 months
Harry Edwards		12/6/1979	39 yrs. 1 month
Stephanie Seymour		8/28/1979	38 yrs 11 months
Mary Schroeder		5/3/1979	38 yrs. 6 months
Alex Kozinski		6/5/1985	34 yrs. 11 months
Frank Easterbrook		2/25/1985	36 yrs. 5 months
Deanell Tacha		10/31/1985	39 yrs. 10 months
J. Harvie Wilkinson		1/30/1984	39 yrs. 4 months
Michael Luttig		4/23/1991	36 yrs. 10 months
Samuel Alito		2/20/1990	39 yrs. 10 months
Walter Stapleton		9/22/1970	36 yrs. 3 months

Ganter, Jonathan F.

From: Sampson, Kyle
Sent: Tuesday, July 29, 2003 8:52 AM
To: Ganter, Jonathan F.
Subject: cofirm stats

Could you -- ASAP -- check the ages of the various judges listed below; the key, obviously, is their age at the time they were nominated, not at the time they were appointed. Thanks.

Allegation: Kavanaugh is only 38 and has no judicial experience.

Response:

Six of the nine judges currently on the D.C. Circuit had no prior judicial experience when they were appointed to that court. Indeed, several modern Supreme Court appointees, such as Byron White, William Rehnquist, and Lewis Powell, had no prior judicial experience when they were appointed to the Supreme Court.

A number of America's best appeals court judges were nominated in their late 30s. They include:

- o Anthony Kennedy (38), who was nominated by President Ford; (b)(6)
- o Harry Edwards (39), Stephanie Seymour (39), and Mary Schroeder (38), who were nominated by President Carter;
- o Alex Kozinski (34), Frank Easterbrook (36), Deanell Tacha (39), and J. Harvie Wilkinson (39), who were nominated by President Reagan; and
- o Michael Luttig (36) and Samuel Alito (39), who were nominated by President Bush.

Indeed, Kavanaugh is as old or older than were all three of the judges for whom he clerked when they were first nominated to the federal bench: Anthony Kennedy (38), Alex Kozinski (35), and Walter Stapleton (35). 36

Kavanaugh has a broad range of experience that well qualifies him for the court of appeals. His substantial experience includes working as:

- o A law clerk for three appeals court judges, including for Justice Kennedy on the Supreme Court.
- o An appellate lawyer in the Solicitor General's office at the Department of Justice.
- o An associate counsel in a high-profile and difficult independent counsel investigation and earned the respect of opposing counsel for his integrity and intellect.
- o A partner at a major national law firm representing significant firm clients on critical litigation matters. He has argued important and closely watched cases before the Supreme Court and the D.C. Circuit.
- o A senior associate counsel for President Bush.
- o A senior White House staffer for President Bush in the position of Staff Secretary, where he is responsible for staffing, clearing, and presenting all paper for the President.

Ganter, Jonathan F.

From: Sheila.Joy@usdoj.gov
Sent: Tuesday, July 29, 2003 11:57 AM
To: Ganter, Jonathan F.
Subject: RE: Judge Bio Info

Seymour (b)(6) Tacha (b)(6) Wilkinson (b)(6) (Stapleton (b)(6))

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

From: Jonathan_F._Ganter@who.eop.gov [mailto:Jonathan_F._Ganter@who.eop.gov]
Sent: Tuesday, July 29, 2003 10:03 AM
To: Joy, Sheila
Subject: Judge Bio Info

Sheila,
I am looking for the birthdates for a couple appeals court judges. The FJC website only gives years, not months and days. I have also run google searches on these judges but haven't come across precise birthdates. Do you have this anywhere?

Stephanie Seymour

Deanell Tacha

J. Harvie Wilkinson

Walter Stapleton

Thanks,

Jon

Stapleton, Walter King

Born 1934 in Cuthbert, GA

Federal Judicial Service:

U. S. District Court, District of Delaware

Nominated by Richard M. Nixon on September 22, 1970, to a seat vacated by Edwin D. Steel, Jr.;

Confirmed by the Senate on October 8, 1970, and received commission on October 14, 1970.

Served as chief judge, 1983-1985. Service terminated on May 8, 1985, due to appointment to another judicial position.

U. S. Court of Appeals for the Third Circuit

Nominated by Ronald Reagan on March 27, 1985, to a new seat created by 98 Stat. 333;

Confirmed by the Senate on April 3, 1985, and received commission on April 4, 1985. Assumed senior status on June 2, 1999.

Education:

Princeton University, A.B., 1956

Harvard Law School, LL.B., 1959

University of Virginia School of Law, LL.M., 1984

Professional Career:

Private practice, Wilmington, Delaware, 1959-1970

Deputy attorney general of Delaware, 1963-1964

Race or Ethnicity: White

Gender: Male

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FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Report	Candidate Report: Brett M. Kavanaugh	19	07/14/2003	P5; P6/b6;

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FRC ID:

10167

FOIA IDs and Segments:

2018-0009-P

OA Num.:

6324

NARA Num.:

6125

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Brett M. Kavanaugh

Birth: February 12, 1965 Washington, D.C.

Legal Residence: District of Columbia

Marital Status: Single

Education: 1983 - 1987 Yale College
B.A. degree, *cum laude*

1987 - 1990 Yale Law School
J.D. degree

Bar: 1990 Maryland
1992 District of Columbia

Experience: 1990 Williams & Connolly
Summer Associate

1990 - 1991 Law Clerk to the Honorable Walter K. Stapleton
United States Court of Appeals for the Third Circuit

1991 - 1992 Law Clerk to the Honorable Alex Kozinski
United States Court of Appeals for the Ninth Circuit

1992 Munger Tolles & Olson
Summer Associate

1992 - 1993 United States Department of Justice
Office of the Solicitor General
Attorney

1993 - 1994 Law Clerk to the Honorable Anthony M. Kennedy
Supreme Court of the United States

1994 - 1997 Office of Independent Counsel Kenneth W. Starr
1998 Associate Counsel

1997 - 1998 Kirkland & Ellis
1999 - 2001 Partner

2001 - present President George W. Bush
Associate Counsel to the President, 2001 -2003
Senior Associate Counsel to the President, 2003
Staff Secretary, 2003-present

Office: Eisenhower Executive Office Building

Washington, D.C. 20502
202-456-2702

To be United States Circuit Judge for the District of Columbia Circuit

Home: 3633 M Street
Washington, D.C. 20007
301-951-8956

Ethnic Group: Caucasian

Salary: \$164,000

Circuit Judges Appointed Before or at the Age of 40

Name	Circuit	Age
Judge Harry Edwards	DC	39
Judge Douglas Ginsburg	DC	40
Judge Kenneth Starr	DC	37
Judge Samuel Alito	3 rd	40
Judge J. Michael Luttig	4 th	37
Judge Karen Williams	4 th	40
Judge J. Harvie Wilkinson	4 th	39
Judge Edith Jones	5 th	35
Judge Frank Easterbrook	7 th	36
Judge Donald Lay	8 th	40
Judge Steven Colloton	8 th	40
Judge Mary Schroeder	9 th	38
Judge Alex Kozinski	9 th	35
Judge Deanell Tacha	10 th	39
Judge Stephanie Seymour	10 th	39
Judge J.L. Edmondson	11 th	39

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FRC ID:

10167

OA Num.:

6324

NARA Num.:

6125

FOIA IDs and Segments:

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WASHINGTON

OFFICE OF THE COUNSEL TO THE PRESIDENT

FACSIMILE COVER SHEET

Date April 21, 2004

To: Kristi Remington

Fax: (202) 514-5715

From: Charles Duggan

Phone: (202) 456-2318 Fax: (202) 456-5813

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Some thoughts on the Judicial Nominees page, for you to consider; feel absolutely free to

Disregard them if they don't strike you as worthwhile.

Confidentiality Notice

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FRC ID:

10167

OA Num.:

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NARA Num.:

6125

FOIA IDs and Segments:

2018-0009-P

RESTRICTION CODES

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Brett Kavanaugh – Judicial Nominees

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

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.
- Prior to the President's final decision, the judicial selection process is a collaborative one.
 - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.
- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."
- One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.
- Miguel Estrada and Priscilla Owen would have been confirmed if given an up-or-down vote by the full Senate.

Brett Kavanaugh – Experience

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

Facts:

- **Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials and significant legal experience in the federal courts.**
- **The ABA, the Democrat’s “Gold Standard,” has rated him “Well Qualified” to serve as a judge on the DC Circuit.**
 - ✓ He has practiced law in the private and public sectors for 14 years. He was a partner at the law firm of Kirkland & Ellis, specializing in appellate litigation, and has an outstanding reputation in the legal community.
- **Mr. Kavanaugh has argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.**
 - ✓ Mr. Kavanaugh served as an Associate Counsel in the Office of Independent Counsel, where he handled a number of the novel constitutional and legal issues presented during that investigation.
- **Mr. Kavanaugh has extensive experience in the appellate courts, both as a clerk and as counsel.**
 - ✓ Mr. Kavanaugh served as a law clerk to Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit.
 - ✓ He clerked on the Ninth Circuit for Judge Alex Kozinsky of the U.S. Court of Appeals.
 - ✓ Mr. Kavanaugh was a law clerk to U.S. Supreme Court Justice Anthony Kennedy.
 - ✓ Prior to his Supreme Court clerkship, Mr. Kavanaugh earned a prestigious fellowship in the Office of the Solicitor General of the United States. The Solicitor General’s office represents the United States before the Supreme Court.
- **Only 3 of the 18 judges confirmed to the D.C. Circuit since President Carter’s term began in 1977 previously had served as judges.**

- ✓ Democrat-appointed D.C. Circuit judges with no prior judicial experience include: **Harry Edwards, Merrick Garland, Ruth Bader Ginsburg, Abner Mikva, David Tatel, and Patricia Wald.**

- In his 2001 *Year-End Report on the Federal Judiciary*, Chief Justice Rehnquist argued that “we must not drastically shrink the number of judicial nominees who have substantial experience in private practice.” The Chief Justice also noted in his Report that “the federal Judiciary has traditionally drawn from a wide diversity of professional backgrounds, with many of our most well-respected judges coming from private practice.”
 - ✓ Supreme Court Justice **Louis Brandeis** spent his whole career in private practice before he was named to the Supreme Court in 1916.
 - ✓ Supreme Court Justice **Byron White** spent fourteen years in private practice and two years at the Justice Department before his appointment to the Court by President Kennedy in 1962.
 - ✓ Supreme Court Justice **Thurgood Marshall** had no judicial experience when President Kennedy recess appointed him to the Second Circuit in 1961. Marshall had served in private practice and as Special Counsel and Director of the NAACP prior to his appointment.

- **President Clinton nominated, and the Senate confirmed, a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the DC Circuit.**

Confirmed Clinton Appeals Court Judges Without Prior Judicial Experience

Name	Circuit	Confirmed
M. Blane Michael	Fourth	September 30, 1993
Robert Henry	Tenth	May 6, 1994
Guido Calabresi	Second	July 18, 1994
Michael Hawkins	Ninth	September 14, 1994
William Bryson	Federal	September 28, 1994
David Tatel	DC	October 6, 1994
Sandra Lynch	First	March 17, 1995
Karen Moore	Sixth	March 24, 1995
Carlos Lucero	Tenth	June 30, 1995
Diane Wood	Seventh	June 30, 1995
Sidney Thomas	Ninth	January 2, 1996
Merrick Garland	DC	March 19, 1997
Eric Clay	Sixth	July 31, 1997

Arthur Gajarsa	Federal	July 31, 1997
Ronald Gilman	Sixth	November 6, 1997
Margaret McKeown	Ninth	March 27, 1998
Chester Straub	Second	June 1, 1998
Robert Sack	Second	June 15, 1998
John Kelly	Eighth	July 31, 1998
William Fletcher	Ninth	October 8, 1998
Robert King	Fourth	October 9, 1998
Robert Katzmann	Second	July 14, 1999
Raymond Fisher	Ninth	October 5, 1999
Ronald Gould	Ninth	November 17, 1999
Richard Linn	Federal	November 19, 1999
Thomas Ambro	Third	February 10, 2000
Kermit Bye	Eighth	February 24, 2000
Marsha Berzon	Ninth	March 9, 2000
Timothy Dyk	Federal	May 24, 2000
Robert Tallman	Ninth	May 24, 2000
Johnnie Rawlinson	Ninth	July 21, 2000
Roger Gregory	Fourth	May 9, 2001

Brett Kavanaugh

1. Independent Counsel
 - a. Vince Foster investigation
 - b. Privilege arguments v. work in Bush White House (E.O. 13233 PRA)
 - c. IC referral/impeachment (his role, release of salacious details)
 - d. Law review article on IC Law
 - e. Op-eds on Starr/general defense of Starr
2. Elian Gonzales
3. First Amendment Religion Cases (check out McConnell tps)
 - a. Good News Club v. Milford (exclusion of relig. orgs. from use of facilities)
 - b. Santa Fe Indep. School Dist. v. Doe (prayer at h.s. football game)
 - c. Bush v. Holmes (Florida school vouchers)
4. Affirmative Action/Race – Rice v. Cayetano (representation & op-ed)
5. Anti-Consumer
 - a. Lewis v. Brunswick (product liab)
 - b. Geier v. Honda (product liab)
 - c. Green v. GM (product liab)
 - d. Broussard v. Meineke (class action) (might not be important)
6. Bush White House activities
 - a. Document production in Enron, (may cross over w/ 1b above)
 - b. Work on judicial nominations
 - c. Tort reform
7. Experience
8. General Right Wing Affiliations (Fed Soc; Starr; Bush White House, etc...)



U.S. Department of Justice

Office of Legal Policy

950 Pennsylvania Avenue, NW
Washington, DC 20530

DATE: April 21, 2004

TO: ~~Dabney Friedrich~~ *Charles Duggan*

FAX: 456-7528-5813

PAGES: 19 (excluding cover)

FROM: Kristi L. Remington

VOICE: 202/ 514- 8356

FAX: 202/ 514-5715

MESSAGE: Brett's vet.

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The George W. Bush Library

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

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

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