

CONFORMATION HEARING ON THE NOMINATION  
OF BRETT M. KAVANAUGH TO BE CIRCUIT  
JUDGE FOR THE DISTRICT OF COLUMBIA CIR-  
CUIT

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HEARING  
BEFORE THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

APRIL 27, 2004

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**NOMINATION OF BRETT M. KAVANAUGH, OF  
THE DISTRICT OF COLUMBIA, TO BE CIR-  
CUIT JUDGE FOR THE DISTRICT OF COLUM-  
BIA CIRCUIT**

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**TUESDAY, APRIL 27, 2004**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Kyl, Sessions, Cornyn, Leahy, Kennedy, Feinstein, Schumer, and Durbin.

**OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S.  
SENATOR FROM THE STATE OF UTAH**

Chairman HATCH. Good morning. I am pleased to welcome to the Committee today members, guests, and our nominee, Mr. Brett Kavanaugh, who has been nominated by President Bush to be United States Circuit Judge for the District of Columbia Circuit. We also welcome members of his family. I would note his father, Mr. Ed Kavanaugh, a long-time president of CTFA. We all know Ed. We know what a fine person he is and what a great individual he is, and we all respect him. So we want to welcome you, Judge, Ed's wife, the mother of Brett, who is a renowned judge, and we appreciate having both of you here.

Before we turn to the nomination, I want to tell members of the Committee that I remain hopeful that we can continue to complete the work of the Committee on both legislation and nominees. I was disappointed that we were not able to accomplish more at the markup last week. Earlier this month, we did report five district judges and two circuit judges. So I do appreciate the Committee's efforts in that regard.

Now, I remain concerned about the executive calendar and floor action. I remain hopeful that an accommodation on nominees can be reached and that floor action can be scheduled for those judges. The Senate has confirmed only four judges this year—all district court judges. By comparison, in the last Presidential election of 2000, with a Democratic President and a Republican Senate, seven judges had been confirmed by this point in the year, including five circuit court judges. Furthermore, we are way behind the pace of that election year, which saw a total of 39 judges confirmed. And

we remain well behind President Clinton's first-term confirmation total of 203.

So while we have made some progress in reporting nominees to the full Senate, the work of confirming judges remains. We presently have 29 judges on the executive calendar. Five circuit court nominees remain from last year on the executive calendar in addition to the six reported this year. Eighteen district nominees are available for Senate confirmation, including two holdovers from the last session. But we are making progress, and I thank all members for their support and ask for their continued cooperation.

Now, today we will consider the nomination of Mr. Brett M. Kavanaugh. He is an outstanding nominee who has been nominated to the Circuit Court of Appeals for the District of Columbia. He comes to us with a sterling resume and a record of distinguished public service. Mr. Kavanaugh currently serves as Assistant to the President of the United States and Staff Secretary, having been appointed to the position by President George W. Bush in 2003. He previously served in the Office of Counsel to the President as an Associate Counsel and a Senior Associate Counsel.

After graduating from Yale Law School in 1990, Mr. Kavanaugh served as a law clerk for three appellate judges, so he has extensive judicial experience as well: Justice Anthony M. Kennedy of the Supreme Court, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, and Judge Walter K. Stapleton of the United States Circuit Court of Appeals for the Third Circuit. He served for 1 year as an attorney in the Office of the Solicitor General, where he prepared briefs and oral arguments.

Mr. Kavanaugh served in the Office of Independent Counsel under Judge Starr, where he conducted the office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. He also was responsible for briefs and arguments regarding privilege and other legal matters that arose during investigations conducted by the office. Mr. Kavanaugh was part of the team that prepared the 1998 report to Congress regarding possible grounds for impeachment of the President of the United States.

In addition to this extensive public service, Mr. Kavanaugh was also in private practice. As a partner at the distinguished firm of Kirkland and Ellis, one of the great firms in this country, he worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation.

Mr. Kavanaugh, as I have said, received his law degree from Yale Law School, where he was notes editor for the Yale Law Journal. He is a cum laude graduate of Yale College, where he received his B.A. degree.

The American Bar Association has rated Mr. Kavanaugh as "Well Qualified," its highest rating. Let me remind everyone what that rating means. According to guidelines published by the American Bar Association Standing Committee on Federal Judiciary, "To merit a rating of 'Well Qualified,' the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

I want to turn now to a few of the arguments which I have heard raised by a number of Mr. Kavanaugh's opponents and address some of the concerns I expect to hear today.

First, is that Mr. Kavanaugh is too young and inexperienced to be given a lifetime appointment to the Federal bench, particularly to the important Circuit Court of Appeals for the District of Columbia. Now, there are many examples of judges who were appointed to the bench at an age similar to Mr. Kavanaugh, who is 39 years old, and have had illustrious careers. For example, all three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39, and all have been recognized as distinguished jurists. Justice Kennedy was appointed to the Ninth Circuit when he was 38 years old; Judge Kozinski was appointed to the Ninth Circuit when he was 35 years old; and Judge Stapleton was appointed to the district court at 35 and later elevated to the Third Circuit Court of Appeals.

I think many of my colleagues would agree that age is not a factor in public service, other than the constitutional requirements. I would note that many in this body began their service in their 30s, if not barely age 30. Through successful re-elections, we have been benefited from a lifetime of service from such members of this body and members of the judiciary as well.

With regard to judicial experience, I would reiterate that Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials with extensive experience in the appellate courts themselves, both as a clerk and as counsel, having argued both civil and criminal matters before the Supreme Court and appellate courts throughout this country.

As I have pointed out with previous nominees, a number of highly successful judges have come to the Federal appellate bench without prior judicial experience. On this particular court, the D.C. Circuit, only three of the 19 judges confirmed since President Carter's term began in 1977 previously had served as judges. Furthermore, President Clinton nominated and the Senate confirmed a total of 32 lawyers without any prior judicial experience to the U.S. Court of Appeals, including Judges David Tatel and Merrick Garland to the D.C. Circuit.

I would mention that I think the work in the Supreme Court and the Circuit Courts of Appeals that Mr. Kavanaugh has had, do qualify him highly, in addition to all the other qualifications that he has.

Opponents will attempt to portray Mr. Kavanaugh as a right-wing ideologue who pursues a partisan agenda. I have to tell you this allegation is totally without merit, and a careful scrutiny of his record will demonstrate otherwise. He is an individual who has devoted the majority of his legal career to public service, not private ideological causes. Within his public career, he has dedicated his work to legal issues, always working carefully and thoroughly in a professional manner.

In short, Mr. Kavanaugh is a person of high integrity, of skilled professional competence, and outstanding character. He will be a great addition to the Federal bench, and he has the highest rating

that the American Bar Association can give. And all of that stands him in good stead.

So I look forward to hearing your testimony and any responses that you might make to questions from the esteemed members of this Committee.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Now I will turn to our acting Ranking Member at this time, Senator Schumer, for any remarks that he would care to make, and then we will turn to Senator Cornyn, who will introduce Mr. Kavanaugh. But first I would like to introduce your fiancée. I will have you do that for us. Why don't you do it right now?

Mr. KAVANAUGH. My fiancée, Ashley Estes, from Abilene, Texas, is here, as well as my parents, Ed and Martha Kavanaugh.

Chairman HATCH. Ashley, Ed, and Martha, we are so grateful to have all of you here. Ashley, don't let this affect you, this meat grinder that we go through around here. Just understand, okay?

We will turn to Senator Schumer.

Senator SCHUMER. Mr. Chairman, I will defer to Mr. Cornyn first to introduce him, and then I will speak.

Chairman HATCH. That will be fine.

**PRESENTATION OF BRETT M. KAVANAUGH, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT,  
BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE  
OF TEXAS**

Senator CORNYN. I appreciate that very much, Mr. Chairman and Senator Schumer, that courtesy. I do just have some brief comments I want to make by way of introduction.

It is my honor to introduce to the Committee, to supplement those remarks already made by the Chairman, about a distinguished attorney and devoted public servant, Brett Kavanaugh. I have known Brett for several years and had the privilege of working with him on a case that I argued to the United States Supreme Court, so I have had the chance to observe his legal skills from up close. And I have every confidence that he would be an exceptional jurist on the United States District Court of Appeals for the D.C. Circuit.

His distinguished academic and professional record confirms beyond all doubt that he possesses the intellectual ability to be a Federal judge. His temperament and character demonstrate that he is well suited to that office. Indeed, I can think of no better evidence of his sound judgment than the fact he has chosen to marry a good woman from the great State of Texas, who has just been introduced to the Committee. Brett deserves the support of this Committee and the support of the United States Senate.

As you know, Mr. Chairman, one-fourth of the active D.C. Circuit Court is currently vacant, and as you know, Mr. Chairman, the D.C. Circuit is unique among the Federal courts of appeals. Of course, it is an appellate court, not a trial court, and appellate judges do not try cases or adjudicate factual disputes. Instead, they hear arguments about legal issues. But unlike the docket of other courts of appeals, the docket of the D.C. Circuit is uniquely focused on the operations of the Federal Government. Accordingly, attor-

neys who have experience working with and within the Federal Government are uniquely qualified to serve on that distinguished court.

Brett Kavanaugh is an ideal candidate for the D.C. Circuit. He has an extensive record of public service. For over a decade, he has held the most prestigious positions an attorney can hold in our Federal Government. He is, as you pointed out, a graduate of Yale College and Yale Law School. He served as law clerk to three distinguished Federal judges, including United States Supreme Court Justice Anthony Kennedy.

Brett has also served in the Office of the Solicitor General representing the U.S. Government in cases before the United States Supreme Court. He served as a Federal prosecutor in the Office of Independent Counsel under Hon. Kenneth Starr. And as you pointed out, he personally has argued civil and criminal cases in the United States Supreme Court and courts of appeals throughout the country.

And he has been called upon for his wisdom and counsel by the President of the United States, first, by his service as Associate Counsel and Senior Associate Counsel to the President, and now as Staff Secretary, one of the President's most trusted senior advisers.

Mr. Chairman, I can think of few attorneys at any age who can boast this level of experience with the inner workings of the Federal Government. It is no wonder then that the American Bar Association has raised him "Well Qualified" to serve on the D.C. Circuit, the gold standard, as you observed.

Ordinarily, a nominee possessing such credentials and experience would have little difficulty receiving swift confirmation by the United States Senate. Unfortunately, observers of this Committee will know that we are not living under ordinary circumstances today.

I hope that this distinguished nominee will receive fair treatment. His exceptional record of public service in the Federal Government will serve him well on the D.C. Circuit bench. His wisdom and counsel have been trusted at the highest levels of Government. Yet I fear that it is precisely Brett's distinguished record of experience that will be used against him. I sincerely hope that will not happen. After all, it would be truly a shame to use one's record of service against a nominee, especially with respect to a court that is so much in need of jurists who are knowledgeable about the inner workings of the Federal Government.

Indeed, many successful judicial nominees have brought to the bench extensive records of service in partisan political environments. I have often said that when you place your hand on the Bible and take an oath to serve as a judge, you change. You learn that your role is no longer partisan, if it once was, and that your duty is no longer to advocate on behalf of a party or a client but, rather, to serve as a neutral arbiter of the law.

The American people understand that when your job changes, you change, and that people are fully capable of putting aside their personal beliefs in order to fulfill their professional duty. That is why this body has traditionally confirmed nominees with clear records of service in one particular party or of a particular philosophy.

For example, Ruth Bader Ginsburg served as general counsel of the ACLU. Of course, it is difficult for me to imagine a more ideological job than general counsel of the ACLU, yet she was confirmed by an overwhelming majority of the U.S. Senate, first by unanimous consent to the D.C. Circuit and then by a vote of 96–3 to the United States Supreme Court.

Stephen Breyer was the Democrats' chief counsel on the Senate Judiciary Committee before he, too, was easily confirmed to the First Circuit and then to the United States Supreme Court.

Byron White was the second most powerful political appointee at the Justice Department under President Kennedy when the Senate confirmed him to the Supreme Court by a voice vote.

Abner Mikva was a Democrat Member of Congress when he was confirmed to the D.C. Circuit by a majority of the Senate.

Indeed, as many as 42 of the 54 judges who have served on the D.C. Circuit came to the bench with political backgrounds, including service in appointed or elected political office. All received the respect that they deserved and the courtesy of an up-or-down vote on the floor of the U.S. Senate, and all received the support of at least a majority of Senators, as our Constitution demands.

So, historically, this body and this Committee have exercised the advise and consent function seriously and appropriately by emphasizing legal excellence and experience and not by punishing nominees simply for serving their political party. It would be tragic for the Federal judiciary and ultimately harmful to the American people who depend on it to establish a new standard today and declare that any lawyer who takes on a political client is somehow disqualified for confirmation, no matter how talented, how devoted, or how fit for the Federal bench they may truly be.

Brett Kavanaugh is a skilled attorney who has demonstrated his commitment to public service throughout his life and career. He happens to be a Republican, and he happens to be close to the President. This is a Presidential election year, but the rigorous fight for the White House should not spill over to the judicial confirmation process any more than it already has. Last year, it was wrong for close friends of the President, like Texas Supreme Court Justice Priscilla Owen, to be denied the basic courtesy and Senate tradition of an up-or-down vote simply to score political points against the President. And this year, it would be terribly wrong for Brett to be denied confirmation or at least an up-or-down vote simply because he has ably and consistently served his President, his party, and his country.

And, with that, I thank you, Mr. Chairman.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman HATCH. Thank you, Senator. Normally we would defer to the Democrat leader on the Committee, Senator Leahy, but he has asked that I first go to Senator Schumer, and then the last statement will be made by Senator Leahy, and then we will turn to you for any statement you would care to make, Mr. Kavanaugh.  
Senator Schumer?

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR  
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman. And, first, I want to welcome Brett Kavanaugh, his parents, and his fiancée to today's hearing. Something tells me this won't be the easiest or the most enjoyable hearing for them or for us. But I know that Brett appreciates what an important position he has been nominated to and how important this process is, and I know how proud his family is of him.

Now, Mr. Chairman, it is really unfortunate we have to be here again on another controversial nomination. It is unfortunate because it is so unnecessary. We have offered time and time and time again to work with the administration to identify well-qualified, mainstream conservatives for these judgeships, especially on the D.C. Circuit. Instead, the White House insists on giving us extreme ideological picks.

In this instance, the nomination seems to be as much about politics as it is about ideology, and I am sometimes a little incredulous. The President makes the most political of picks, and then my colleagues tell us not to be political. Tell the President, and maybe we could come to some agreement here together. While the nominations of William Pryor and Janice Rogers Brown and Priscilla Owen may be among the most ideological we have seen, the nomination of Brett Kavanaugh is among the most political in history.

Mr. Kavanaugh is a tremendously successful young lawyer. His academic credentials are first-rate. He clerked for two prestigious circuit court judges and a Supreme Court Justice. And he has been quickly promoted through the ranks of Republican lawyers. Some might call Mr. Kavanaugh the Zelig of young Republican lawyers, as he has managed to find himself at the center of so many high-profile, controversial issues in his short career, from the notorious Starr Report to the Florida recount, to this President's secrecy and privilege claims, to post-9/11 legislative battles, including the victims compensation fund, to controversial judicial nominations. If there has been a partisan political fight that needed a good lawyer in the last decade, Brett Kavanaugh was probably there. And if he was there, there is no question what side he was on.

In fact, Mr. Kavanaugh would probably win first prize as the hard-right's political lawyer. Where there is a tough job that needs a bright, hard-nosed political lawyer, Brett Kavanaugh has been there.

Judgeships should be above politics. Brett Kavanaugh's nomination seems to be all about politics. If President Bush truly wanted to unite us, does anyone believe he would have nominated Brett Kavanaugh? If President Bush wanted to truly unite us, not divide us, this would be the last nomination he would send to the Senate. Anyone who has any illusion that President Bush wants to change the tone in Washington ought to look at this nomination. You could not think of another nomination, given Mr. Kavanaugh's record, more designed to divide us.

Brett Kavanaugh's nomination to the D.C. Circuit is not just a drop of salt in the partisan wounds, it is the whole shaker.

The bottom line seems simple: This nomination appears to be judicial payment for political services rendered. There is much that

many of us find troubling about this nomination. I look forward to hearing the nominee address our myriad concerns. I would just like to take a moment to lay out two areas that will be central to this discussion.

First, for the first 2 years of the administration, when the administration was developing and implementing its strategy to put ideologues on the bench, Mr. Kavanaugh quarterbacked President Bush's judicial nominations. He spoke frequently at public events defending the President's decision to nominate such controversial jurists as Charles Pickering, Carolyn Kuhl, Priscilla Owen, and William Pryor.

As you all know, many of us have been shocked and appalled by the extreme and out-of-mainstream ideologies adhered to by these and other nominees. I speak for myself, many of my colleagues, and a sizable majority of the American people when I say we do not want ideologues on the bench, whether too far right or too far left. Judges who bring their own agendas to the judiciary are inclined to make law, not interpret law, as the Founding Fathers intended. We want fair and balanced judges in the real sense of those words.

Nonetheless, this administration has repeatedly bent over backwards to choose nominees who defend indefensible ideas and whose records are rife and replete with extreme activism.

During his time in the White House Counsel's Office, Brett Kavanaugh played a major role in selecting these judges, preparing them for hearings, and defending their nominations at public events. In the course of defending the administration's record on judicial nominations, Mr. Kavanaugh routinely cited the five criteria used by President Bush in selecting judges. The five criteria he cites are: one, extraordinary intellect; two, experience; three, integrity; four, respect in the legal community and the nominee's home State community; and, five, commitment to interpreting law, not making law.

I don't think I am stepping out on a limb when I say that every one of us up here sees those five criteria as outstanding factors to consider when choosing judges. But in the same public discussions of the President's judicial nominees where he cited these five criteria, Mr. Kavanaugh has routinely denied that the President considers a nominee's ideology. The record before us starkly belies that claim. It just does not hold water. If ideology did not matter, we would see nominations scattered across the political spectrum. There would be a roughly equal number of Democrats and Republicans, with a healthy dose of independents thrown in. We would see some nominees edge left of center while others tip right, while a few outliers would be at each extreme.

Even a President who wanted to have only some ideological impact on the bench would have some balance. That is not the case with the nominations Brett Kavanaugh has shepherded.

If you were to map the circuit court nominees on an ideological scale of 1 to 10, with 10 being very liberal and 1 being very conservative, there is a huge number of 1s and 2s, some 3s, and only a smattering of 4s and 5s. Of course, ideology played a role in this process. Suggesting otherwise insults our intelligence and the intelligence of the American people.

For the last 3 years, I have been trying to get us to talk honestly about our differences over judicial nominees. We have pretty much stopped citing minor personal peccadilloes in the nominees' histories as pretext for stopping nominations that we really oppose on ideological grounds. The process is better for the honesty we have brought to it.

Now, I hope we can have an honest dialogue today. Toward that end, I look forward to hearing Mr. Kavanaugh explain how it is possible that the President who has made some of the most extreme ideological nominations in history does not consider ideology when he makes those picks.

A second area I expect we will get into is closely related to the first. As I noted at the outset, there is no question that Brett Kavanaugh is a bright and talented young lawyer. There is no question that for someone of his age he has an extraordinary resume and that he has achieved in every job he has held. But there are serious questions—and it is not the age; it is that he has never tried a case; he has a record of service after he clerked almost exclusively to highly partisan political matters—why he is being nominated to a seat on the second most important court in America.

Why is the D.C. Circuit Court so important? The Supreme Court currently takes fewer than 100 cases a year. That means that the lower courts resolve the tens of thousands of cases a year brought by Americans seeking to vindicate their rights. All other Federal appellate courts handle just those cases arising from within its boundaries. So the Second Circuit, where Senator Leahy and I are from, takes cases coming out of New York and Connecticut and Vermont. But the D.C. Circuit doesn't just take cases brought by residents of Washington, D.C. Congress has decided there is a value in vesting one court with the power to review certain decisions of administrative agencies. We have given plaintiffs the power to choose the D.C. Circuit. In some cases, we force them to go to the D.C. Circuit because we have decided, for better or for worse, when it comes to these administrative decisions, one court should decide what the law is for the whole Nation.

So when it comes to regulations adopted under the Clean Air Act by EPA or labor decisions by the NLRB, rules propounded by OSHA, gas prices regulated by FERC, and many other administrative agencies, the decisions are usually made by the judges on the D.C. Circuit. To most, it seems like this is the alphabet soup court since virtually every case involves an agency with an unintelligible acronym—EPA, NLRA, FCC, SEC, FTC, FERC, and so on and so forth. The letters, though, that comprise this alphabet soup are what makes our Government tick. They are the agencies that write and enforce the rules that determine how much reform there will be in campaign finance reform. They determine how clean clean water has to be for it to be safe for families to drink. They establish the rights that workers have when negotiating with corporations.

The D.C. Circuit is important because its decisions determine how these Federal agencies go about doing their jobs. And in doing so, it directly impacts the daily lives of all Americans more than any other court in the country with the exception of the Supreme Court.

So there is a lot at stake when considering nominees to the circuit and how their ideological predilections will impact the decisions coming out of the court and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

Perhaps more than any other court aside from the Supreme Court, the D.C. Circuit votes, when you study them, break down on ideological lines with amazing frequency. People who went to same law schools and clerked for the same courts somehow vote almost dramatically differently depending on who appointed them. I wonder why. Ideology. And this divide happens in cases with massive national impact.

It is not good enough just to cite that someone went to a great law school and clerked for some very distinguished judges. We have an obligation to weigh how the ideological and political predispositions of those who are nominated are going to affect America. So we have a real duty to scrutinize the nominees who come before us seeking lifetime appointment to this court. And it is no insult to Mr. Kavanaugh to say that there is probably not a single person in this room, except perhaps Mr. Kavanaugh and his family, who doesn't recognize that there are scores of lawyers in Washington and around the country who have equally high intellectual ability but who have more significant judicial, legal, and academic experience to recommend them for this post.

It is an honor and a compliment that, despite his relative lack of experience, this administration wants Brett Kavanaugh to have this job. But when a lifetime appointment to the second highest court in the land is at stake, the administration's desire to honor Mr. Kavanaugh must come into question.

When the President picked Brett Kavanaugh, he was not answering the question of who has the broadest and widest experience for this job or who can be the most balanced and the most fair. He was rewarding a committed aide who has proven himself in some tough political fights.

Would we have welcomed the renomination of Alan Snyder or Elena Kagan, now dean of Harvard Law School, two extremely well-qualified Clinton nominees who never received consideration from this Committee? Of course we would have. But we also would have welcomed the nomination of a mainstream conservative who has a record of independence from partisan politics, who has demonstrated a history of non-partisan service, who has a proven record of commitment to the rule of law, and who we can reasonably trust will serve justice, not just political ideology and political patrons, if confirmed to this lifetime post.

Brett Kavanaugh is the youngest person nominated to the D.C. Circuit since his mentor, Ken Starr. If you go through the prejudicial appointment accomplishments of the nine judges who sit on the D.C. Circuit, you will see that Mr. Kavanaugh's accomplishments pale by comparison.

Chief Judge Ginsburg held several high-level executive branch posts, including heading the Antitrust Division of DOJ, and was a professor at Harvard Law School.

Judge Edwards taught at Michigan and Harvard law schools and was Chairman of Amtrak's Board of Directors and published numerous books and articles.

Judge Sentelle had extensive practice as a prosecutor and trial lawyer, and experience as a State judge and a Federal district court judge.

Judge Henderson had a decade in private practice, a decade of public service, and 5 years as a Federal district court judge.

Judge Randolph spent 22 years with Federal and State Attorneys General offices, including service as Deputy Solicitor General of the United States, and a law firm partnership.

Judge Rogers had roughly 30 years of service in both Federal and State governments, including a stint as corporation counsel for D.C. and several years on D.C.'s equivalent of a State Supreme Court.

Judge Tatel divided his nearly 30 years of experience between the public and private sectors, including a partnership at a prestigious law firm and service as general counsel of Legal Services.

Judge Garland practiced for 20 years, held a law firm partnership, and supervised both the Oklahoma City bombing and the Unabomber trial while in a senior position at the Justice Department.

And Judge Roberts spent nearly 25 years going back and forth between his law firm partnership where he ran his law firm's appellate practice and significant service in the Department of Justice.

Like Mr. Kavanaugh, many of the nine current judges on this court held prestigious clerkships, including clerkships on the Supreme Court. But they all had significant additional experience, non-partisan experience, to help persuade us that they merited confirmation. And, of course, they are of widely different ideologies.

If Mr. Kavanaugh had spent the last several years on a lower court or in a non-political position, providing his independence from politics, we might be approaching this nomination from a different posture. But he has not. Instead, his resume is almost unambiguously political. Perhaps with more time and different experience we would have greater comfort imagining Mr. Kavanaugh on this court. Suffice it to say, on the record before us Mr. Kavanaugh faces a serious uphill battle.

I look forward to hearing his answers to the difficult questions we will pose.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Chairman HATCH. Senator Leahy, we will now call on you, and then we will turn to Mr. Kavanaugh.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR  
FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman.

I listened with interest to the Chairman's comments at the beginning about moving judges quickly or not. I would point out that we have confirmed more judges for President Bush so far in his term than all of President Reagan's first term, and President Reagan, of course, had a Republican majority throughout that.

Now, I know that sometimes there have been some differences. During the 17 months the Democrats controlled the Senate, we did confirm 100 of President Bush's nominees. During the 22 months that the Republicans were in control of the Senate, I believe they confirmed about 73 or 74.

One could say, if we just wanted to go by statistics, that the Democrats have been a lot better to President Bush on his judicial nominees than the Republicans have.

I would like to pick up on something that Senator Schumer said, and it refers to another statement made about whether everybody should get votes. We have differing opinions. The Democrats have blocked a handful of judges from votes. The Republicans, when they were in charge during President Clinton's time, blocked 61 judges from having votes. And I will mention a couple of them, and Senator Schumer has, too: Alan Snyder and Elena Kagan.

Alan Snyder was 54 years old when he was nominated to the D.C. Circuit. He had 26 years of experience as an appellate specialist at the firm of Hogan and Hartson. He was a graduate of the Harvard Law School. He held the prestigious post of president of the Harvard Law Review. He clerked with two Justices of the Supreme Court. But he was not allowed to have a vote by the Republican-controlled Senate, and the reason for that, he had represented Bruce Lindsey, who was an aide of President Clinton. And so I would tell my friend from Texas, he was told that because of his representation of a client he had had, he could not have a vote. And it was determined that he would not be allowed to have a vote by the U.S. Senate, even though I suspect he would have been confirmed had there been a vote.

Elena Kagan was another one. She, too, went to Harvard Law School. She served as a Law Review supervising editor. She supervised 70 student editors, including Miguel Estrada. She went on to clerk for a Justice of the Supreme Court, Justice Marshall, and extraordinarily qualified. But she was told, I guess, because she had had some association working, I think, a job similar to yours at the White House that she should not be allowed to have a vote, and this Committee determined she would not be allowed to come to a vote. One or two Republicans opposed her, so she was never allowed to even be given a vote. Of course, to point out her qualifications, she now has what is arguably the most prestigious post in legal academia. She is dean of the Harvard Law School.

I have made a suggestion to the White House—I realize that they may be disappointed that during Republican control of the Senate they have not moved as many of the President's nominees as the Democrats did during their control of the Senate, but I have made a suggestion to them of a way to move forward. As you know, Mr. Kavanaugh, because you worked in that area, we have the so-called Strom Thurmond rule, which has been followed by this Committee for years, which limits the number of nominees that you get within a few months of the nomination of Presidential candidates during a Presidential election year.

I have suggested that the White House do what all six Presidents have done since I have been here, and that is to work out, as we always have, a list of those who may well be confirmed. Every President can determine how they want it. That is what President

Ford did, that is what President Reagan did, what the former President Bush did, what President Carter did, and what President Clinton did. Maybe President Bush will decide to do the same. That is a decision he has to make, not this Committee.

Senator Hatch and I worked with a number of these other Presidents in doing that. I would hope that we might be able to do it again. As we have demonstrated, in the 17 months that the Democrats were in charge of the Senate, we moved 100, both district court judges and circuit court judges, President Bush's nominees. During the 22 months that the Republicans were in charge, they moved another 70 or 73. I forget what the exact number is. So we have demonstrated our good faith. We have done this notwithstanding the 61 of President Clinton's nominees that were blocked—61 of them were blocked by the Republicans.

Mr. Chairman, I appreciate you and Senator Schumer holding this hearing. I appreciate your courtesy, which I might say is typical of the courtesy you always show in having me make a statement. I will hold my time for questions.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman HATCH. Well, thank you, Senator.

Mr. Kavanaugh, if you will stand and be sworn. Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KAVANAUGH. I do.

Chairman HATCH. Thank you. Mr. Kavanaugh, we will be happy to take any statement you would care to make at this time.

**STATEMENT OF BRETT M. KAVANAUGH, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Mr. KAVANAUGH. Mr. Chairman, I don't have an opening statement. I am prepared to answer the Committee's questions. And Senator Schumer raised a number of important points. I look forward to answering his questions and the questions of the Committee today.

I do thank, again, my parents and Ashley for being here and look forward to the hearing.

[The biographical information follows:]

**I. BIOGRAPHICAL INFORMATION (PUBLIC)**

1. **Full name (include any former names used.)**  
Brett Michael Kavanaugh.
2. **Address: List current place of residence and office addresses.**  
Residence: Washington, DC 20007.  
Office: Staff Secretary's Office, White House West Wing, Washington, DC 20502.
3. **Date and place of birth.**  
February 12, 1965. Washington, DC.
4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**  
Single. I have never been married.
5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**  
Yale Law School, 1987-90. J.D. 1990.  
Yale College, 1983-87. B.A. 1987.
6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**  
  
President George W. Bush.  
Assistant to the President and Staff Secretary, 2003-present.  
  
President George W. Bush.  
Senior Associate Counsel to the President, 2003.  
Associate Counsel to the President, 2001-2003.  
  
Kirkland & Ellis, Washington, DC.  
Partner, 1997-98, 1999-2001.  
  
Office of Independent Counsel Kenneth W. Starr.  
Associate Counsel, 1994-97, 1998.

Justice Anthony M. Kennedy, Supreme Court of the United States.  
Law Clerk, 1993-94.

Office of the Solicitor General, U.S. Department of Justice.  
Attorney, 1992-93.

Munger Tolles & Olson, Los Angeles, CA.  
Summer Associate, Summer 1992.

Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit.  
Law Clerk, 1991-92.

Judge Walter K. Stapleton, U.S. Court of Appeals for the Third Circuit.  
Law Clerk, 1990-91.

Williams & Connolly, Washington, DC.  
Summer Associate, Summer 1990.

Covington & Burling, Washington, DC.  
Summer Associate, Summer 1989.

Miller Cassidy Larocca & Lewin, Washington, DC.  
Summer Associate, Summer 1989.

Pillsbury Madison & Sutro, Washington, DC.  
Summer Associate, Summer 1988.

Other:

Commission on the Future of Maryland Courts.  
Research Associate to the Chairman, 1996.

Georgetown Prep Alumni Association (since 1990's).

Federalist Society.  
Co-Chair of School Choice Subcommittee of Religious Liberties Practice Group, 1999-2001.

Class Secretary for Yale Law School Class of 1990 in 2000-01.

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Cum laude graduate of Yale College.  
Notes Editor, Yale Law Journal, 1989-90.

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Maryland State Bar Association.  
Montgomery County Bar Association.  
District of Columbia Bar Association.  
American Bar Association.  
Federalist Society. Co-Chair of School Choice Subcommittee of Religious Liberties Practice Group, 1999-2001.  
Commission on the Future of Maryland Courts. Research Associate to the Chairman, 1996.

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Lobbying Organizations: None.  
Other Organizations:  
Congressional Country Club.  
Holy Trinity Roman Catholic Church.  
Georgetown Prep Alumni Association.  
Delta Kappa Epsilon (when at Yale College).  
Truth and Courage Society (when at Yale College).  
I have been a member of the American Bar Association and the Federalist Society at various times since law school.

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States, 1994.  
Maryland, 1990.  
District of Columbia, 1992. (Lapsed for brief period in 2002 when renewal form was sent to incorrect home address.)

I also have been admitted at various times to several lower federal courts, including the United States Court of Appeals for the D.C. Circuit and the United States District Court for the District of Columbia.

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

**Articles:**

The President and the Independent Counsel, 86 Georgetown Law Journal 2133 (1998).

Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings, 99 Yale Law Journal 187 (1989).

**Op-eds:**

Washington Post, November 15, 1999 (joint op-ed responding to Richard Cohen's column criticizing Judge Starr).

Wall Street Journal, September 27, 1999 (op-ed about Supreme Court case in which I represented an amicus curiae as a client; the Supreme Court agreed 7-2 with the position in the amicus brief).

American Spectator, April 1999 (brief submission describing lessons from independent counsel investigations).

Washington Post, February 26, 1999 (op-ed criticizing the operation of the independent counsel statute in relation to impeachment and the House of Representatives for its "immediate and unscreened release of the referral").

**Letters to Editor:**

Washington Post, August 31, 1999.

New York Times, August 1, 1999.

Washington Post, July 1, 1999.

**Speeches:**

I have given remarks on occasion in official and personal capacities. These remarks have most often occurred at legal conferences and on panels. I also have guest-taught classes at various law schools. In the White House Counsel's office, I also spoke to visitors to the White House and on Capitol Hill. I generally have spoken with short written points, which I have not ordinarily retained, rather than prepared speeches. I also have not maintained an ongoing list of remarks, but I have attempted to reconstruct a responsive list for this purpose. I will supplement the list if I become aware of other speeches that fit within this question.

Remarks to Log Cabin Republicans on judicial appointments, 2003.

Remarks to Yale Law School Association of Washington, DC, on judicial appointments, 2003.

Remarks to American Forest and Paper Association on variety of legal issues, 2003.

Remarks to Federalist Society Southern Leadership conference, 2003.

Remarks to groups of historians interested in Presidential records, 2001-03.

Remarks to Iowa State Bar Association on judicial appointments, 2002.

Remarks to National Conference of Women's Bar Associations on judicial appointments, 2002.

Remarks at American Judicature Society panel on judicial appointments, 2002.

Remarks at Republican National Lawyers Association on judges, 2002, 2003.

Participant in Yale Law School panel on judicial appointments, 2002.

Participant in panel on judicial appointments sponsored by Association of the Bar of the City of New York, 2002.

Participant in panel on judicial appointments sponsored by Washington Council of Lawyers, 2002.

Moderator of Federalist Society panel on originalism, 2001.

Remarks at Yale Club of Pittsburgh on independent counsel law and role of White House Counsel's office, 2001.

Moderator of Federalist Society panel on First Amendment, 2000.

Remarks at American Bar Association panel on Internet regulation, 2000.

Participant in symposium sponsored by Georgetown Journal of Legal Ethics, 2000.

Moderator of Federalist Society panel on charitable choice, 2000.

Remarks at Federal Bar Association symposium on federal Sentencing Guidelines, 2000.

Remarks at Duke University Law School panel on independent counsel statute, 1999.

Remarks at tribute dinner for Judge Ken Starr, 1999.

Remarks at Georgetown University Law Center panel on independent counsel law, 1998.

**Television Appearances:**

CNN The World Today with Wolf Blitzer (2000).  
CNN Burden of Proof (in 1999 and 2000).  
MSNBC (2000).  
ABC 20/20 (1998).

13. **Health:** What is the present state of your health? List the date of your last physical examination.

Excellent. June 2003.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. **Citations:** If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Appointed by President George W. Bush as Assistant to the President and Staff Secretary, 2003-present.

Appointed by President George W. Bush as Associate Counsel, 2001-2003, and Senior Associate Counsel, 2003.

Appointed by Judge Kenneth W. Starr as Associate Counsel in Office of Independent Counsel, 1994-97, 1998.

Appointed by Justice Anthony M. Kennedy as Law Clerk, 1993-94.

Employed as Attorney, Office of the Solicitor General, 1992-93.

Appointed by Judge Alex Kozinski as Law Clerk, U.S. Court of Appeals for the Ninth Circuit, 1991-92.

Appointed by Judge Walter K. Stapleton as Law Clerk, U.S. Court of Appeals for the Third Circuit, 1990-91.

17. **Legal Career:**

- a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

From 1993 to 1994, I served as a law clerk to Justice Anthony M. Kennedy on the Supreme Court of the United States.

From 1991 to 1992, I served as law clerk to Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit.

From 1990 to 1991, I served as a law clerk to Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit.

2. **whether you practiced alone, and if so, the addresses and dates;**

I have never been a sole practitioner.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

President George W. Bush  
Assistant to the President and Staff Secretary, 2003-present  
The White House  
1600 Pennsylvania Avenue  
Washington, DC 20502

President George W. Bush  
Office of Counsel to the President  
The White House  
1600 Pennsylvania Avenue  
Washington, DC 20502  
Senior Associate Counsel, 2003.  
Associate Counsel, 2001-2003.

Kirkland & Ellis  
655 15<sup>th</sup> Street, N.W.  
Washington, DC 20005  
Partner, 1997-98 and 1999-2001.

Office of Independent Counsel  
1001 Pennsylvania Ave., N.W., Suite 490-N  
Washington, DC 20004  
Associate Counsel, 1994-97 and 1998.

Office of the Solicitor General  
United States Department of Justice  
950 Pennsylvania Ave.  
Washington, DC 20530  
Attorney, 1992-93.

Munger Tolles & Olson  
355 South Grand Ave., 35<sup>th</sup> Floor  
Los Angeles, CA 90071  
Summer Associate, 1992.

Williams & Connolly  
725 12<sup>th</sup> St., N.W.  
Washington, DC 20005  
Summer Associate, 1990.

- b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

I have devoted the bulk of my professional career to public service.

**Clerkships:**

I served as a law clerk to three appellate judges, including Justice Kennedy on the Supreme Court. My primary responsibilities were: (i) to prepare memos before oral argument that summarized the cases and issues presented; (ii) to prepare and edit draft opinions; and (iii) to analyze and make comments on draft opinions prepared by other judges.

**Office of the Solicitor General:**

I served for one year as an attorney in this office from 1992 to 1993. I was responsible for preparing briefs in opposition to certiorari petitions and appeal recommendations. In addition, I assisted the Solicitor General and his Deputies and Assistants in preparing briefs and in preparing for oral arguments before the Supreme Court. I also handled two court of appeals cases, writing the brief in both cases and arguing one in the U.S. Court of Appeals for the Fifth Circuit. The government prevailed in both cases.

**Office of Independent Counsel:**

In the summer of 1994, after my clerkship with Justice Kennedy concluded, I interviewed with law firms. At about the same time, in August 1994, Judge Starr was appointed independent counsel. I had worked briefly for Judge Starr in the Office of the Solicitor General, and he offered me a position in the Office of Independent Counsel.

In that Office, I performed six main functions during the course of my service.

First, I was a line attorney responsible for the Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. This assignment required management and coordination with a number of FBI agents and investigators, FBI laboratory officials, and outside experts

on forensic and psychological issues. I was responsible for conducting and assisting with interviews of a wide variety of witnesses with respect to both the cause of death and Mr. Foster's state of mind. I was responsible for preparing a draft of the report on his death. The investigation and report resolved questions about the cause and manner of Mr. Foster's death, concluding that he committed suicide in Fort Marcy Park, Virginia.

Second, I was one of two line attorneys responsible for conducting the investigation into possible obstruction of justice in the wake of Mr. Foster's death, including whether documents had been unlawfully removed from his office or otherwise concealed from investigators. This was an extensive grand jury investigation. I conducted numerous interviews and grand jury sessions and, with another attorney, prepared a memorandum of more than 300 pages summarizing the matter. At the time, this matter also was being investigated by the Senate. The Office conducted a thorough investigation of the facts and did not seek criminal charges against any individuals.

Third, I was substantially responsible for writing briefs and conducting oral arguments regarding privilege and other legal matters that arose frequently during the investigation. These included cases about the government attorney-client privilege, Secret Service privilege, and private attorney-client privilege. I argued once before the Supreme Court of the United States and twice before the U.S. Court of Appeals for the D.C. Circuit.

Fourth, I served as a legal advisor on a variety of issues facing the Office. I and several other attorneys sometimes served a function roughly equivalent to that of attorneys in the Office of Legal Counsel in the Justice Department. This required analysis of, for example, statutory reporting requirements, Rule 6(e) obligations, FOIA disclosure rules, and issues related to interaction with Congress.

Fifth, I was part of the team that prepared that part of Judge Starr's 1998 report to Congress, submitted pursuant to statute, that outlined information that "may constitute grounds" for impeachment. Although many volumes of evidence were provided to the House of Representatives under seal, the report as publicly released by the House of Representatives was divided into two parts. The first part was a summary of facts known as the "narrative" section. I did not draft that part of the report. The second part was a description of possible grounds for impeachment that identified areas where the President may have made false statements or otherwise obstructed justice. I drafted portions of that part of the report. This is a matter of some continuing controversy. As I have stated publicly before, I

regret that the House of Representatives did not handle the report in a way that would have kept sensitive details in the report from public disclosure (as had occurred with the House's handling of the Special Prosecutor's report in 1974) or, if not, that the report did not further segregate certain sensitive details. The House of Representatives voted to publicly release the report without reviewing it beforehand.

Sixth, I was an attorney primarily responsible for assisting Judge Starr with preparation of his two-hour statement to the House Judiciary Committee, which he submitted in written form and delivered orally on November 19, 1998. The statement identified and discussed the investigation and evidence.

**Kirkland & Ellis:**

At Kirkland & Ellis, I worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation. My most significant corporate clients were firm clients Verizon, America Online, General Motors, and Morgan Stanley. I represented them in a variety of litigation and administrative matters. I also represented individuals and non-corporate entities in litigation matters. I represented Adat Shalom synagogue pro bono in a case involving Montgomery County zoning regulations. I represented Governor Jeb Bush in his official capacity against a constitutional challenge to Florida's school choice legislation. I represented Elian Gonzalez's American relatives pro bono in their petition for rehearing in the Eleventh Circuit and their petition for certiorari in the Supreme Court. In all of these matters, I was part of a larger litigation team.

**Office of Counsel to the President:**

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

**Assistant to the President and Staff Secretary:**

I perform the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of documents for the President, among other responsibilities.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

In private practice, I specialized in constitutional issues, commercial litigation, and appellate practice. My typical former clients are described in the previous answer.

- c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

Occasionally. In both public service and private practice, I argued a number of appellate matters and also conducted legal arguments in district court.

2. **Indicate the percentage of these appearances in:**

(A) **civil proceedings:** approximately 50% (private practice)  
 (B) **criminal proceedings:** approximately 50% (government practice)

3. **What percentage of these appearances was in:**

(a) **federal courts;**  
 approximately 90%  
 (b) **state courts of record;**  
 approximately 10%  
 (c) **other courts.**

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

None, as I have not been a trial lawyer. I have worked on legal issues and appeals in both public service and private practice and argued in court, including the Supreme Court of the United States, the U.S. Court of Appeals for the D.C. Circuit, federal district courts, and state courts.

5. What percentage of these trials was:  
 (a) jury;  
 (b) non-jury.

Not applicable.

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- (a) the date of representation;
  - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
  - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

**Swidler & Berlin v. United States, 524 U.S. 399 (1998), reversing 124 F.3d 230 (D.C. Cir. 1997).**

I represented the United States and argued and briefed this case in both the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia Circuit. The court of appeals decision was rendered in 1997 and the Supreme Court decision in 1998.

The case presented the question whether the attorney-client privilege continues to apply in federal criminal proceedings when the client is deceased. A federal grand jury issued a subpoena for communications that occurred between Vincent W. Foster, Jr., and his attorney James Hamilton nine days before Mr. Foster's suicide. Mr. Hamilton challenged the subpoena, arguing that the attorney-client privilege continued to apply after the death of the client and that he was not permitted to disclose what Mr. Foster had told him. The United States, represented by the Office of Independent Counsel, sought to enforce the grand jury subpoena, arguing that the attorney-client privilege did not apply with full force in federal criminal proceedings when the client was deceased. Many legal treatises, including the American Law Institute's Restatement of the Law, had agreed with the position advocated by the Office of Independent Counsel. The U.S. Court of Appeals for the D.C. Circuit, in an opinion by Judge Patricia Wald and Judge Stephen Williams, ruled in favor of the Office of Independent Counsel. Judge Tatel dissented. The Supreme Court then granted certiorari and ruled 6-3 in favor of Mr. Hamilton in an opinion by Chief Justice Rehnquist. The dissent written by Justice O'Connor and joined by Justices Scalia and Thomas agreed with the position of the Office of Independent Counsel.

My co-counsel in this case were Ken Starr, now of Kirkland & Ellis, 655 15<sup>th</sup> Street, N.W., Washington, DC 20005, (202) 879-5130, and Craig Lerner, now a professor at George Mason University Law School, 3301 N. Fairfax Drive, Arlington, VA 22201, (703) 993-8080. The opposing counsel was James Hamilton of Swidler Berlin Shereff Friedman, 3000 K Street, N.W., Suite 300, Washington, DC 20007, (202) 424-7826. The counsel of record on the primary amicus brief was Mark I. Levy, Howrey & Simon, 1299 Pennsylvania Ave., N.W., Washington, DC 20004, (202) 383-7441.

**Concerned Citizens of Carderock v. Hubbard and Adat Shalom Reconstructionist Congregation, 84 F.Supp.2d 668 (D. Md. 2000).**

In this case, I represented pro bono Adat Shalom, a synagogue in Bethesda, Maryland, in the United States District Court for the District of Maryland (Judge Andre Davis). The district court decided the case in 2000.

Plaintiffs sued Montgomery County and Adat Shalom, arguing that Montgomery County's zoning ordinance violated the Establishment Clause by granting religious entities an exemption from the county's special exception zoning process. Adat Shalom argued that the ordinance was neutral between religious and non-religious entities and thus constitutional. In particular, Adat Shalom contended that the ordinance exempted several non-religious entities in addition to religious entities and therefore did not reflect a preference for religion. Judge Davis ruled in favor of Adat Shalom and the County. The court found that the ordinance was neutral toward religion and consistent with the Establishment Clause.

My primary co-counsel at Kirkland & Ellis were Jay P. Lefkowitz, now at the White House Domestic Policy Council, 1600 Pennsylvania Ave., N.W., Washington, DC 20502, (202) 456-1473, and John Wood, now at the Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2001. The primary counsel for the plaintiffs was Stanley D. Abrams of Abrams, West & Storm, 4550 Montgomery Ave., Suite 760N, Bethesda, MD 20814, (301) 951-1550. The primary counsel for Montgomery County were Charles W. Thompson and Edward B. Lattner of the County Attorney's Office for Montgomery County, 101 Monroe St., 3<sup>rd</sup> Floor, Rockville, MD 20850, (240) 777-6700.

**America Online 5.0 Litigation (1999-2000).**

In these cases, I represented America Online (AOL) in a series of class-action lawsuits. In particular, I filed briefs and conducted oral arguments for AOL in a number of federal district courts around the country. I also argued a proceeding before the Judicial Panel on Multidistrict Litigation and a motion to dismiss in a related case in the Circuit Court for Baltimore City. The complaints in these cases alleged that AOL had engaged in a variety of deceptive tactics and antitrust violations in designing and marketing AOL Version 5.0.

My primary co-counsel at Kirkland & Ellis were Thomas Yannucci and Eugene Assaf, Kirkland & Ellis, 655 15<sup>th</sup> Street, N.W., Washington, DC 20005, (202) 879-5000. The opposing counsel were a large group of attorneys representing different plaintiffs from around the country; many of the attorneys are listed in a reported consolidated case at 168 F.Supp.2d 1359.

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

I represented the United States (Office of Independent Counsel) in this case. I briefed and argued the case in the U.S. Court of Appeals for the D.C. Circuit and worked on the brief in opposition to the petition for certiorari in the Supreme Court of the United States. I also had worked on a petition for certiorari before judgment to the Supreme Court.

This case arose out of a federal grand jury subpoena issued to Bruce R. Lindsey, an attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Office of Independent Counsel sought to have the subpoena enforced. The D.C. Circuit (Judges Randolph and Rogers for the majority; Judge Tatel in dissent) ruled in favor of the Office of Independent Counsel. The Office of the President then filed a petition for certiorari in the Supreme Court. The Supreme Court denied the petition.

My co-counsel were Ken Starr, now of Kirkland & Ellis, 655 15<sup>th</sup> Street, N.W., Washington, DC 20005, (202) 879-5130, and Joseph Ditkoff, now of the Suffolk County District Attorney's Office in Massachusetts, One Bulfinch Place, Boston, MA 02114, (617) 619-4000. The primary opposing counsel were David Kendall of Williams & Connolly, 725 12<sup>th</sup> Street, N.W., Washington, DC 20005, (202) 434-5000; Neil Eggleston, Howrey Simon Arnold & White, 1299 Pennsylvania Ave., N.W., Washington, DC 20004, (202) 783-0800; and Douglas Letter, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20005, (202) 514-3301.

**Gonzalez v. Reno, 215 F.3d 1243 (11<sup>th</sup> Cir. 2000) (denying petition for rehearing en banc), cert. denied, 530 U.S. 1270 (2000).**

In this case, I represented pro bono the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for stay in the Supreme Court of the United States, and petition for writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing, application for stay, and petition for certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS's decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit's subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS's contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing and rehearing en banc arguing, in essence, that the court's original decision granting an injunction pending appeal had analyzed the issue correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing and rehearing en banc. The Gonzalez family then filed an application for stay and petition for writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

My co-counsel included Jeffrey Clark, then at Kirkland & Ellis and now at the U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-3370; and Kendall Coffey of Coffey & Wright, 2665 South Bayshore Drive, Miami, Florida 33133, (305) 857-9797. The primary opposing counsel was Ed Kneedler, Office of the Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2217.

**In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8<sup>th</sup> Cir.), cert. denied, 521 U.S. 1105 (1997).**

I represented the United States (Office of Independent Counsel) in this case. I primarily wrote the brief in the U.S. Court of Appeals for the Eighth Circuit and worked on the brief in opposition to the petition for certiorari in the Supreme Court of the United States. I also briefed the case in the United States District Court for the Eastern District of Arkansas.

This case arose out of a federal grand jury subpoena issued to the White House Office for documents of a government attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Eighth Circuit (Judges Bowman and Wollman for majority; Judge Kopf in partial dissent) ruled in favor of the United States, represented by the Independent Counsel. The Office of the President then filed a petition for certiorari in the Supreme Court. The Supreme Court denied the petition.

My co-counsel were Ken Starr, now of Kirkland & Ellis, 655 15<sup>th</sup> Street, N.W., Washington, DC 20005, (202) 879-5130; and John Bates, now of the U.S. District Court for the District of Columbia, 333 Constitution Ave., N.W., Washington, DC 20001, (202)

354-3430. The primary opposing counsel were David Kendall of Williams & Connolly, 725 12<sup>th</sup> Street, N.W., Washington, DC 20005, (202) 434-5000; Lawrence Robbins, Robbins, Russell, Englert, Orseck & Untereiner, 1801 K Street, N.W., Suite 411, Washington, DC 20006, (202) 775-4500; Andrew Frey, Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000; and Miriam Nemetz, now of Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000.

**Good News Club v. Milford Central School, 533 U.S. 98 (2001).**

In this Supreme Court case, I represented an amicus curiae, Sally Campbell, and filed an amicus brief.

The case involved a Free Speech Clause and Free Exercise Clause challenge to the community use policy of a school district in New York. The policy excluded religious organizations from using public school facilities after school hours. (Ms. Campbell had challenged a similar policy in Louisiana.) The question in the case was whether the exclusion of religious organizations was permitted under the Religion and Free Speech Clauses of the First Amendment. The amicus brief filed on behalf of Ms. Campbell argued that the policy was neither required nor permitted by the Constitution. The Supreme Court agreed in a 6-3 decision.

The counsel for the plaintiff/petitioner was Thomas Marcelle, 71 Fernbank Ave., Delmar, NY 12054, (518) 475-0806. The primary counsel for other amici were Paul Clement, now Deputy Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2206; and Viet Dinh, now at Georgetown University Law Center, 600 New Jersey Ave., N.W., Washington, DC 20001, (202) 662-2000. The primary counsel for the defendant/respondent was Frank W. Miller, 6296 Fly Road, East Syracuse, NY 13057, (315) 234-9900.

**Rubin v. United States, 525 U.S. 990 (1998).**

In this case, I represented the United States (Office of Independent Counsel) in the Supreme Court proceedings in which the Office of Independent Counsel opposed a petition for certiorari filed by the Secretary of the Treasury and Director of the Secret Service.

The question presented was whether the federal courts should recognize a new “protective function” privilege in federal criminal proceedings that would prevent Secret Service agents from testifying in the grand jury. The U.S. Court of Appeals for the D.C. Circuit ruled in favor of the Office of Independent Counsel (Judges Williams, D.H. Ginsburg, and Randolph). The Secretary of the Treasury filed a petition for certiorari and sought a stay of enforcement of the subpoena. The Supreme Court denied a stay and then denied the petition for certiorari (over the dissents of Justices Ginsburg and Breyer).

My co-counsel included Ken Starr, now of Kirkland & Ellis, 655 15<sup>th</sup> Street, N.W., Washington, DC 20005, (202) 879-5130. The primary opposing counsel was Ed Kneedler, Office of the Solicitor General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530, (202) 514-2217.

**General Motors v. Green, 709 A.2d 205 (N.J. Super. Ct. App. Div. 1998).**

General Motors was a significant institutional client of my former firm, Kirkland & Ellis. In this particular case, I was asked to represent General Motors and conduct oral argument on its behalf in the Appellate Division of the New Jersey Superior Court before Judges Dreier, Levy, and Wecker. The case was a design defect products liability case involving an alleged roof design defect. At trial, the jury had found General Motors liable and awarded plaintiff \$25 million. General Motors appealed on numerous grounds, challenging both the liability judgment and damages award. The Appellate Division affirmed the liability judgment and substantially reduced the damages award.

My primary co-counsel at Kirkland & Ellis was Paul T. Cappuccio, now General Counsel of AOL Time Warner, 75 Rockefeller Plaza, New York, NY 10019, (212) 484-7980; and another co-counsel was Thomas F. Tansey, 521 Green Street, Woodbridge, NJ 07095, (732) 634-7880. The primary opposing counsel was Maurice Donovan, 405 Northfield Ave., West Orange, NJ 07052, (973) 736-8050.

**Lewis v. Brunswick, No. 97-288 (Supreme Court of the United States) (dismissed as moot because of settlement after oral argument).**

In the Lewis case, I represented General Motors in filing an amicus brief in the Supreme Court. The question presented in the case was whether the Boat Safety Act preempted a state common-law requirement that recreational boats be equipped with propeller guards. Because of the similarity of the question to a question under the National Traffic and Motor Vehicle Safety Act, General Motors filed an amicus brief. The Supreme Court subsequently dismissed the case after oral argument because the parties settled.

My primary co-counsel were Paul T. Cappuccio, now General Counsel of AOL Time Warner, 75 Rockefeller Plaza, New York, NY 10019, (212) 484-7980; and Richard A. Cordray, of counsel at Kirkland & Ellis, 655 15<sup>th</sup> Street, N.W., Washington, DC 20005, (202) 879-5000. The primary counsel for plaintiff/petitioner was David E. Hudson, 801 Broad Street, Suite 700, Augusta, GA 30901, (706) 722-4481. The primary counsel for defendant/respondent was Kenneth S. Geller, Mayer Brown Rowe & Maw, 1909 K Street, N.W., Washington, DC 20006, (202) 263-3000.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

**Clerkships:**

I served as a law clerk to three appellate judges, including Justice Kennedy on the Supreme Court. My primary responsibilities were: (i) to prepare memos before oral argument that summarized the cases and issues presented; (ii) to prepare and edit draft opinions; and (iii) to analyze and make comments on draft opinions prepared by other judges.

**Office of Counsel to the President:**

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

**Office of Staff Secretary:**

I perform the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of documents for the President, among other responsibilities.

**II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)**

- 1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

None. I have a government Thrift Savings Plan retirement fund.

- 2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I will faithfully follow all applicable statutes, court decisions, and policies regarding recusal, including 28 U.S.C. 455.

- 3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

It is possible in the future that I would want to teach part-time at some point or write articles or books. If so, I would faithfully follow all applicable laws and policies.

- 4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

See attached financial disclosure report.

- 5. Please complete the attached financial net worth statement in detail (Add schedules as called for).**

See attached net worth statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

Lawyers for Bush Cheney, 2000. Regional Coordinator for Pennsylvania, Maryland, Delaware, and District of Columbia. I also went to Daland, Florida, in November 2000 to participate in legal activities related to the recount.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

| ASSETS                                  |     | LIABILITIES                                |     |
|---|-----|--|-----|
| Cash on hand and in banks               | 10k | Notes payable to banks-secured             |     |
| U.S. Government securities-add schedule |     | Notes payable to banks-unsecured           |     |
| Listed securities-add schedule          |     | Notes payable to relatives                 |     |
| Unlisted securities--add schedule       |     | Notes payable to others                    |     |
| Accounts and notes receivable:          |     | Accounts and bills due                     |     |
| Due from relatives and friends          |     | Unpaid income tax                          |     |
| Due from others                         |     | Other unpaid income and interest           |     |
| Doubtful                                |     | Real estate mortgages payable-add schedule |     |
| Real estate owned-add schedule          |     | Chattel mortgages and other liens payable  |     |
| Real estate mortgages receivable        |     | Other debts-itemize:                       |     |
| Autos and other personal property       | 20k |  |     |
| Cash value-life insurance               |     |  |     |
| Other assets itemize:                   |     |  |     |
| TSP account                             | 55k |  |     |
|   |     | Total liabilities                          | 0   |
|   |     | Net Worth                                  | 85k |
| Total Assets                            | 85k | Total liabilities and net worth            | 85k |
| CONTINGENT LIABILITIES                  |     | GENERAL INFORMATION                        |     |
| As endorser, comaker or guarantor       | No  | Are any assets pledged? (Add schedule)     | No  |

|                                  |  |  |  |    |  |  |
|----------------------------------|--|--|--|----|--|--|
| On leases or contracts           |  |  | Are you defendant in any suits or legal actions? | No |  |  |
| Legal Claims                     |  |  | Have you ever taken bankruptcy?                  | No |  |  |
| Provision for Federal Income Tax |  |  |  |    |  |  |
| Other special debt               |  |  |  |    |  |  |

## III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

I have devoted 10 of the 13 years of my legal career to public service for the United States Government in a variety of capacities. In private practice, I represented several clients pro bono, most notably Adat Shalom synagogue and Elian Gonzalez's American relatives. I have participated in community work on occasion, most recently by participating in an all-day playground build in Washington. I contribute to various charities and community organizations, including by way of the Combined Federal Campaign.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

No, other than my college fraternity and senior society, which were all-male.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

There was no commission process. In 2002, Counsel to the President Alberto Gonzales discussed with me a vacancy on the U.S. Court of Appeals for the Fourth Circuit. In 2003, he discussed with me a vacancy on the U.S. Court of Appeals for the D.C. Circuit. Later in 2003, Judge Gonzales informed me of the President's intent to nominate me to the D.C. Circuit. I underwent an FBI background investigation and was then nominated.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

A court of appeals judge should interpret constitutional and statutory provisions without regard to personal or policy views on any issue. Our legal system must ensure equal justice under law for all, and a court of appeals judge should interpret the law as enacted and as subsequently interpreted by the Supreme Court where applicable. A judge should treat parties and colleagues with dignity and respect and should act at all times -- in and out of the courtroom -- with an appropriate judicial temperament. A judge should always remember that the court's decisions will have an enormous impact on the lives and liberties of the individuals involved in the cases, as well as the American people. And a judge should approach the task of judging with humility, recognizing that federal judges are entrusted with a sacred responsibility to the American people.

|  |   |  |
|--|---|--|
| <b>FINANCIAL DISCLOSURE REPORT</b><br><b>FOR CALENDAR YEAR 2002</b>  |   | Report Required by the Ethics<br>in Government Act of 1978,<br>(5 U.S.C. App. §§101-111) |
| AG-10<br>Rev. 1/2001   |   |  |
| 1. Person Reporting (Last name, first, middle initial)<br><b>KAVANAUGH, BRETT M.</b>   | 2. Court or Organization<br><b>NOMINEE TO U.S. COURT<br/>                 OF APPEALS FOR D.C. CIRCUIT</b>   | 3. Date of Report<br><b>7-29-03</b>  |
| 4. Title (Article III judges indicate active or senior status;<br>magistrate judges indicate full- or part-time)<br><b>CIRCUIT JUDGE - NOMINEE</b>   | 5. Report Type (check appropriate type)<br><input checked="" type="checkbox"/> Nomination, Date <b>7-25-03</b><br><input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final           | 6. Reporting Period<br><b>1-1-2002<br/>                 7-25-2003</b>                    |
| 7. Chambers or Office Address<br><b>STAFF SECRETARY<br/>                 THE WHITE HOUSE<br/>                 WASHINGTON, DC 20502</b>   | 8. On the basis of the information contained in this Report and<br>any modifications pertaining thereto, it is, in my opinion,<br>in compliance with applicable laws and regulations.<br>Reviewing Officer _____ Date _____ |  |
| IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts,<br>checking the NONE box for each part where you have no reportable information. Sign on last page. |   |  |

**I. POSITIONS.** (Reporting individual only; see pp. 9-13 of Instructions.)

| POSITION   | NAME OF ORGANIZATION/ENTITY                             |
|--|---|
| <input type="checkbox"/> NONE (No reportable positions.) |   |
| 1  | ALUMNI BOARD OF GOVERNORS GEORGETOWN PREPARATORY SCHOOL |
| 2  | ALUMNI ASSOCIATION                                      |
| 3  |   |

**II. AGREEMENTS.** (Reporting individual only; see pp. 14-16 of Instructions.)

| DATE   | PARTIES AND TERMS |
|--|-------------------|
| <input checked="" type="checkbox"/> NONE (No reportable agreements.) |                   |
| 1  |                   |
| 2  |                   |
| 3  |                   |

**III. NON-INVESTMENT INCOME.** (Reporting individual and spouse; see pp. 17-24 of Instructions.)

| DATE  | SOURCE AND TYPE | GROSS INCOME<br>(yours, not spouse's) |
|---|-----------------|---------------------------------------|
| <input checked="" type="checkbox"/> NONE (No reportable non-investment income.) |                 |                                       |
| 1   |                 | \$                                    |
| 2   |                 | \$                                    |
| 3   |                 | \$                                    |
| 4   |                 | \$                                    |
| 5   |                 | \$                                    |

|                                    |                          |                |
|------------------------------------|--------------------------|----------------|
| <b>FINANCIAL DISCLOSURE REPORT</b> | Name of Person Reporting | Date of Report |
|                                    | KAVANAUGH, BRETT M.      | 7-29-03        |

**IV. REIMBURSEMENTS** -- transportation, lodging, food, entertainment.  
*(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)*

|   | SOURCE                                    | DESCRIPTION |
|---|---|-------------|
|   | NONE (No such reportable reimbursements.) |             |
| 1 | EXEMPT                                    |             |
| 2 |   |             |
| 3 |   |             |
| 4 |   |             |
| 5 |   |             |
| 6 |   |             |
| 7 |   |             |

**V. GIFTS.** *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

|   | SOURCE                           | DESCRIPTION | VALUE |
|---|----------------------------------|-------------|-------|
|   | NONE (No such reportable gifts.) |             |       |
| 1 | EXEMPT                           |             | \$    |
| 2 |                                  |             | \$    |
| 3 |                                  |             | \$    |
| 4 |                                  |             | \$    |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-33 of Instructions.)*

|   | CREDITOR                          | DESCRIPTION | VALUE CODE*       |
|---|-----------------------------------|-------------|-------------------|
|   | NONE (No reportable liabilities.) |             |                   |
| 1 | FIRST USA                         | CREDIT CARD | J<br>PAID IN FULL |
| 2 |                                   |             |                   |
| 3 |                                   |             |                   |
| 4 |                                   |             |                   |
| 5 |                                   |             |                   |

\*Value Codes: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001-\$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000  
 P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

|                                    |   |                                  |
|------------------------------------|---|----------------------------------|
| <b>FINANCIAL DISCLOSURE REPORT</b> | Name of Person Reporting<br><b>KAVANAUGH, BRETT</b> | Date of Report<br><b>7-29-03</b> |
|------------------------------------|---|----------------------------------|

**VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions** (Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)

| A.<br>Description of Assets<br>(including trust assets)<br><br><i>Place "X" after each asset<br/>exempt from prior disclosure.</i> | B.<br>Income<br>during<br>reporting period |  | C.<br>Gross value<br>at end of<br>reporting period |                                   | D.<br>Transactions during reporting period             |                               |                                |                               |  |
|--|--|--|--|-----------------------------------|--|-------------------------------|--------------------------------|-------------------------------|--|
|  | (1)  | (2)  | (1)  | (2)                               | (1)  | If not exempt from disclosure |                                |                               |  |
|  | Amt.<br>Code1<br>(A-I)                     | Type<br>e.g.,<br>div.,<br>rent or<br>int.) | Value<br>Code2<br>(J-P)                            | Value<br>Method<br>Code3<br>(Q-W) | Type<br>(e.g.,<br>buy, sell,<br>merger,<br>redemption) | (2)<br>Date:<br>Month-<br>Day | (3)<br>Value<br>Code2<br>(J-P) | (4)<br>Gain<br>Code1<br>(A-I) | (5)<br>Identity of<br>buyer/seller<br>(if private transaction) |
| <input type="checkbox"/> NONE (No reportable income, assets,<br><b>(TSP) - EXEMPT</b> )  |  |  |  |                                   |  |                               |                                |                               |  |
| <b>BANK OF AMERICA CHECKING</b>  | <b>A</b>                                   | <b>checking</b>                            | <b>J</b>   | <b>T</b>                          |  |                               |                                |                               |  |
| 2  |  |  |  |                                   |  |                               |                                |                               |  |
| 3  |  |  |  |                                   |  |                               |                                |                               |  |
| 4  |  |  |  |                                   |  |                               |                                |                               |  |
| 5  |  |  |  |                                   |  |                               |                                |                               |  |
| 6  |  |  |  |                                   |  |                               |                                |                               |  |
| 7  |  |  |  |                                   |  |                               |                                |                               |  |
| 8  |  |  |  |                                   |  |                               |                                |                               |  |
| 9  |  |  |  |                                   |  |                               |                                |                               |  |
| 10   |  |  |  |                                   |  |                               |                                |                               |  |
| 11   |  |  |  |                                   |  |                               |                                |                               |  |
| 12   |  |  |  |                                   |  |                               |                                |                               |  |
| 13   |  |  |  |                                   |  |                               |                                |                               |  |
| 14   |  |  |  |                                   |  |                               |                                |                               |  |
| 15   |  |  |  |                                   |  |                               |                                |                               |  |
| 16   |  |  |  |                                   |  |                               |                                |                               |  |
| 17   |  |  |  |                                   |  |                               |                                |                               |  |

|   |   |   |  |   |  |                     |
|---|---|---|--|---|--|---------------------|
| 1 | Income/Gain Codes:<br>(See Col. B1, D4) | A=\$1,000 or less<br>F=\$50,001-\$100,000                                   | B=\$1,001-\$2,500<br>G=\$100,001-\$1,000,000   | C=\$2,501-\$5,000<br>H=\$1,000,001-\$5,000,000                                  | D=\$5,001-\$15,000<br>H2=More than \$5,000,000       | E=\$15,001-\$50,000 |
| 2 | Value Codes:<br>(See Col. C1, D3)       | J=\$15,000 or less<br>N=\$250,001-\$500,000<br>P3=\$25,000,001-\$50,000,000 | K=\$15,001-\$50,000<br>O=\$500,001-\$1,000,000 | L=\$50,001-\$100,000<br>P1=\$1,000,001-\$5,000,000<br>P4=More than \$50,000,000 | M=\$100,001-\$250,000<br>P2=\$5,000,001-\$25,000,000 |                     |
| 3 | Value Method Codes:<br>(See Col. C2)    | Q=Appraisal<br>U=Book value   | R=Cost (real estate only)<br>V=Other           | S=Assessment<br>W=Estimated   | T=Cash/Market  |                     |

|                             |                          |                |
|-----------------------------|--------------------------|----------------|
| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
|                             | KAVANAUGH, BRETT         | 7-29-03        |

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Brett M. Kavanaugh Date July 29, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

**FILING INSTRUCTIONS:**

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure  
Administrative Office of the  
United States Courts  
Suite 2-301  
One Columbus Circle, N.E.  
Washington, D.C. 20544

AFFIDAVIT

I, Brett Kavanaugh, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

September 22, 2003  
(DATE)

Brett Kavanaugh  
(NAME)

  
(NOTARY)  
Notary Public for the District of Columbia  
Commission expires 12/08

Chairman HATCH. Well, thank you. Let me begin the questioning. We will have 10-minute rounds, and hopefully we can complete this in a reasonable period of time.

You have served in both the executive and the judicial branches of Government, the Federal Government. You graduated from Yale University, one of the finest law schools in the land. You have clerked for two separate circuit courts, and you have also clerked for the United States Supreme Court. You have tried cases before the Supreme Court. You have tried other appellate cases, so I dispute anybody's argument that you have never tried a case. There are appellate lawyers and there are trial lawyers. Some can do both. Some do do both. But primarily your experience has been on the appellate side, which is generally considered a very sophisticated side of the law.

But let me just ask you this question: How has your education and experience prepared you to be a Federal circuit court of appeals judge?

Mr. KAVANAUGH. Well, Mr. Chairman, I've always had a devotion to public service that I've had since I was young, and it was instilled in me again at Yale Law School, which has a deep commitment to encouraging its students to pursue public service. My mother had been a judge and a State prosecutor. She had instilled that and a lot more in me. And I went to become a law clerk after graduation from law school, and then after that I've chosen a variety of different jobs in public service, in the Independent Counsel's office, in the White House Counsel's office, as Staff Secretary. I've had a range of experience in the judicial branch, in the executive branch, in difficult matters. Senator Schumer raised a couple of them. I've clearly been in the arena for a lot of different types of matters, and I think I've learned a lot from those about the importance of being fair and impartial. And I come to the bench, were I to be confirmed, with a broad range of experiences and I think a commitment to fairness and impartiality in public service.

Chairman HATCH. You have been involved in improving the law, in the administration of the law, and I am interested in your work for the Commission on the Future of Maryland Courts. It is my understanding that this Commission was tasked with discovering ways to coordinate and promote fair and efficient criminal justice and public safety systems. Could you just tell the Committee a little bit about what lessons you have learned from that type of experience and how that might help you in your job as a circuit court judge if you are confirmed?

Mr. KAVANAUGH. In that Commission, I was asked by a lawyer in Rockville, Maryland, whom I knew to participate and help him—he was Chair of the Commission—and to help find ways to improve access to judicial services, access to legal services throughout the State of Maryland, which was my home State. So I helped with that Commission. The idea was that the justice system, while the best in the world, can always be better, and the idea of the Commission was to improve the delivery of legal services and the justice system in the State of Maryland and to look at recommendations of all kinds, whether it was creating a new family court, dealing with drug crimes, or what have you.

Chairman HATCH. As you are aware—I am just going to get into one aspect because that is about all the time I have right now. You are aware that an investigation was conducted by the Senate Sergeant-at-Arms into the downloading of certain Judiciary Committee files by two former Committee staffers. That investigation is complete and has been referred to the Department of Justice, so I want to ask you just a few basic questions about that matter.

Are you generally aware of that incident and that investigation?

Mr. KAVANAUGH. I am.

Chairman HATCH. Okay. I understand that as an Associate Counsel to the President of the United States, among your responsibilities was to advise the President on judicial nominations. Could you briefly outline your responsibilities and procedures you followed in fulfilling that duty?

Mr. KAVANAUGH. I was one of eight Associate Counsels who worked for Judge Gonzales. We had different areas of the country that we would work on and different nominations that we'd work on. I worked on California and Illinois, for example, with Senator Feinstein's office and Senator Durbin's office. I also worked on certain circuit court nominations. There's both the selection side and then the nominations—the confirmation side, working on the confirmation.

On the confirmation side, the idea was to help prepare the nominees for their hearings, to coordinate with our press office and other press offices in the Justice Department and in the Senate, to coordinate with the public liaison in the White House and the Justice Department and the Senate regarding any issues that could arise in connection with hearings or votes on nominees.

Chairman HATCH. As part of that responsibility, you had to meet with various staff members of the Senate Judiciary with regard to the limited work that you did for certain States, your share of the work on judges. And so I think you met with various staff members.

Now, did any staff member of the Senate Judiciary Committee or the Department of Justice ever provide you with information or documents that you were led to believe were obtained or derived from Democratic files or from my files?

Mr. KAVANAUGH. No.

Chairman HATCH. Do you know Manuel Miranda, the former Senate staff member?

Mr. KAVANAUGH. I do know him from his time and service on the Committee staff.

Chairman HATCH. Did you ever meet with him to discuss judicial nominations?

Mr. KAVANAUGH. He was part of the team—yes, he was part of the team that worked in your office and then in Senator Frist's office on judicial nominations.

Chairman HATCH. What were the circumstances of those meetings?

Mr. KAVANAUGH. Those meetings were usually to discuss upcoming hearings or upcoming votes, issues related to press interest in nominations or public liaison activities that outside groups were interested in.

Chairman HATCH. Now, this is an important question. Did Mr. Miranda 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?

Mr. KAVANAUGH. No, I was not aware of that matter ever until I learned of it in the media late last year.

Chairman HATCH. Did Mr. Miranda ever share, reference, or provide you with information that you believed or were led to believe was obtained or derived from Democratic files?

Mr. KAVANAUGH. No. Again, I was not aware of that matter in any way whatsoever until I learned it in the media.

Chairman HATCH. Do you know if any other Associate White House Counsels had access to these type of materials that were improperly taken?

Mr. KAVANAUGH. I don't know of anyone who was aware of this matter, again, until the media reports late last year.

Chairman HATCH. But you were not?

Mr. KAVANAUGH. I was not aware of it.

Chairman HATCH. Okay. Just one final question. Could you please speak about the significance of judicial temperament and indicate what aspects of judicial temperament you consider to be the most important?

Mr. KAVANAUGH. Well, I think it's critically important, Mr. Chairman, for any judge to exhibit the proper temperament on and off the bench at all times, and what that means is in dealings with one's colleagues on the bench, having an open mind, being respectful of a colleague's views, both at oral argument and in writing opinions. I think it means being respectful of the lawyers who come before the court and not treating them disrespectfully, but to have proper respect for the lawyers in the court. And it means having a proper respect for the law and a humility, understanding that you are just one judge on a panel. There's a reason you wear a black robe. It's because you lose your individual preferences, your individuality when you take a seat on the bench. The black robe signifies that you're part of the judicial system and you're there to interpret the law fairly.

So I think that's all encompassed within judicial temperament, and it's something I've seen firsthand with Justice Kennedy and Judge Stapleton and Judge Kozinski, and it's something that I, were I to be confirmed, would always remember my proper place in the system.

Chairman HATCH. One last question. Would you please explain to the Committee why you want to be a Federal judge?

Mr. KAVANAUGH. I've always had, Mr. Chairman, a commitment to public service since I was young. Since I got out of law school, I've always thought that being a judge was the highest form of public service that a lawyer could render because it helps maintain our constitutional system, which has been in place for over two centuries, and helps protect the rights and liberties of the people.

What the courts do every day—and I think Senator Schumer alluded to this—is not always apparent to the people, but it's critically important, and there's much of what Senator Schumer said about that that I agree wholeheartedly with about how important it is.

And so in terms of commitment to public service, a commitment to our constitutional form of government, and a commitment to protecting rights and liberties of the people, that's why I think I would want to be a judge.

Chairman HATCH. Okay. I have a little bit of time left, but I think I will turn to Senator Schumer at this point.

Senator SCHUMER. Thank you, Mr. Chairman. And thank you, Mr. Kavanaugh.

First, I just want to clear up the questions that Orrin asked. You had said that Mr. Miranda never provided these documents, you know, that were from this.

Mr. KAVANAUGH. Right.

Senator SCHUMER. Had you seen them in any way? Did you ever come across memos from internal files of any Democratic members given to you or provided to you in any way?

Mr. KAVANAUGH. No.

Senator SCHUMER. Thank you.

Okay. Now, as I noted in my opening remarks, you have cited the five criteria the President uses in selecting nominees, and at the same time you have repeatedly denied the President considers ideology when selecting judges. Am I correct to anticipate you stand by that claim?

Mr. KAVANAUGH. Yes, Senator.

Senator SCHUMER. Thank you. Now, you get high marks for consistency, but this claim raises serious credibility concerns.

If ideology doesn't affect the nomination process, how is it possible we have seen so many extreme conservatives and almost no progressives?

Ninth Circuit nominee William Myers thinks the Clean Air Act and the Endangered Species Act have harmed the environment.

District court nominee James Lee Holmes endorsed Booker T. Washington's notion that God brought slaves to America to teach white people how to be more Christ-like.

D.C. Circuit nominee Janice Rogers Brown has praised the Supreme Court's notorious ruling in *Lochner*, perhaps the most criticized decision of the 20th century, and has said the New Deal is the triumph of America's socialist revolution.

Charles Pickering unethically intervened on behalf of a convicted cross-burner, and William Pryor has spent a career trying to undo Federal laws that have achieved broad consensus in America that protect women, workers, and the disabled.

Carolyn Kuhl has one of the most restrictive views on the right to privacy of any judge in the country, ruling that a woman has no meaningful right to privacy in her own doctor's office.

The list goes on and on, extreme views all from the far right. How do you square the reality of these totally ideological nominations with the lack of any nominations that would be the mirror image or even close to those people when you say with the rhetoric that there is a non-ideological judicial nomination process?

Mr. KAVANAUGH. Senator, I'd like to answer that in a couple ways. First, as you and Senator Leahy pointed out, the vast majority of the President's nominees have been approved by this Committee and confirmed by the Senate. That's point one.

Point two is in terms of court of appeals nominees, we've worked very closely with home State Senators in individual States to find nominees that were consensus nominees in that State. We've worked, including States with two Democratic Senators, we've worked closely with Senator Leahy on the one nomination, and Rena Raggi in New York, Judge Callahan and Judge Bea on the Ninth Circuit in California. We have tried to work closely, and in each of those cases those nominations—

Senator SCHUMER. Did you work closely with the Senators from Michigan on the Sixth Circuit?

Mr. KAVANAUGH. The Sixth Circuit situation in Michigan, Senator, is one that goes back many years. I don't understand that situation to be related to the particular nominees, but to a—

Senator SCHUMER. But you haven't consulted either Senators Levin or Stabenow on that. Is that correct?

Mr. KAVANAUGH. My understanding is that Judge Gonzales has talked often to the two Senators, but they have not reached an accommodation that's—

Senator SCHUMER. What about on the D.C. Circuit? Have you talked to any Senators on this side, Senator Leahy or any of the members of this Committee, about nominees for the D.C. Circuit?

Mr. KAVANAUGH. I don't know who Judge Gonzales talked to before the nominations, the D.C. Circuit nominees. But I know as a general proposition we've been very careful to consult with the home State Senators.

Senator SCHUMER. So you would say ideology has no factor in the nominations you have put forward for circuit court judges? Is that correct? Do you truly stand by that statement?

Mr. KAVANAUGH. We don't—Senator, I appreciate the question, but we don't ask questions about one's personal views on—

Senator SCHUMER. I didn't ask that.

Mr. KAVANAUGH. Well—

Senator SCHUMER. I asked you: Does ideology play a role in who you select? And if it does not, why have there not been hardly any nominees—I mean, the most you could say are one or two, mainly from my circuit, who tend to be a little more moderate. Why are there nominees that are almost exclusively conservative? And we discussed the degrees of conservative. Many of the nominees I have voted for, some of us have voted for, we don't think are down-the-middle. We voted for them because we feel we have to pick our shots and because we give the President some deference. But I don't think anyone in this room, when they look at it fairly, believes that the President is choosing judges without ideology entering into it. And if that is the case, then answer again: Why have there been virtually no progressive nominees to circuit courts of appeals if ideology doesn't play a role?

Mr. KAVANAUGH. Senator, in terms of ideology, what the President is looking for is nominees who have a respect for the law and who understand that the legal system and the role as a judge is different from one's personal views or political views or political affiliation. So you're looking for someone who understands what the judicial function is.

Senator SCHUMER. You don't think there are any liberal people who feel that way?

Mr. KAVANAUGH. I think there are people of all political ideologies, Senator—

Senator SCHUMER. Well, how come no liberals have been nominated? I am not objecting to the President using ideology. Presidents do. I am objecting to the denial. It seems there is a credibility problem, because you know and I know—and my guess is if I was a fly on the wall and you had conversations with your other counsels and other things like that, that ideological considerations of course were part of the vetting process.

Mr. KAVANAUGH. Senator—

Senator SCHUMER. Have you ever used the word to any of the counsels when you were vetting judges, “This one may be too liberal”? Never?

Mr. KAVANAUGH. Senator, the important thing that Judge Gonzales emphasized to us and that the President has emphasized is to find people of experience who have good records and who know—

Senator SCHUMER. Have you ever used the words that someone might be “too liberal” to be a good judge—to be nominated by President Bush?

Mr. KAVANAUGH. I am confident, Senator, that in the course of 3 years I have thought that some people did not understand the proper judicial—

Senator SCHUMER. Did you ever use those words?

Mr. KAVANAUGH. I don’t know whether I ever—

Senator SCHUMER. What do you think?

Mr. KAVANAUGH. —used the word “too conservative” or “too liberal” to be a—in the sense that they don’t understand the proper judicial function.

Senator SCHUMER. Let me go to the second part of the questioning. It defies belief, in all due respect, sir, for anyone who looks at the broad nature of the nominees, particularly the court of appeals, that ideology didn’t play some role as you selected judges.

The second—

Mr. KAVANAUGH. Senator—

Senator SCHUMER. I just want to ask my second, because my time is limited. Now, when Ken Starr started his Independent Counsel investigation, he was tasked with looking into financial improprieties tied to a land deal in Arkansas. When he finished, he produced, with substantial assistance from you, a lengthy report that frequently dwelt on salacious details from President Clinton’s personal life. I am not asking did you—I am asking your personal opinion because we have to get your personal opinions here. I am not asking did you serve your client well.

In retrospect, did you go too far?

Mr. KAVANAUGH. Senator Schumer, in terms of the first part of your question, Judge Starr was assigned by Attorney General Reno to look into the Whitewater and Madison-related issues. It was then her decision to add on other investigations to his original jurisdiction, including the Travel Office matter—

Senator SCHUMER. But that is not my question, sir. I am asking your personal opinion. When the Whitewater commission ended up dwelling on the salacious details from President Clinton’s personal

life, do you believe personally that that was the correct thing to do or that went too far?

Mr. KAVANAUGH. I have said publicly before, as has Judge Starr, Senator—and I've written this publicly—that the way that the House of Representatives released the report without reviewing it beforehand caused unnecessary harm, combined with the way the report was structured—

Senator SCHUMER. I am not asking you a procedural issue. I am asking—you, as the chief cook and bottle washer here, working for Starr, came up with a report that focused on the salacious details—this is the last chance. Did it go too far? Yes or no.

Mr. KAVANAUGH. I think the way the House of Representatives released the report was a mistake, and I've said so publicly.

Senator SCHUMER. Do you think you are being—do you think you are giving me an answer to my question?

Mr. KAVANAUGH. I think given the public release of the report—

Senator SCHUMER. I am asking your personal views, not on the House of Representatives' procedure. I am asking you, just as a person, an observer, and a nominee to an important court, ended up with a report that focused on personal detail. Was that the correct thing to do?

Mr. KAVANAUGH. Senator, this is an important question, so I want to take a minute to answer this.

Senator SCHUMER. I know, but I would like you to answer your personal view on it, not what the House of Representatives did, not what Ken Starr did, not what Janet Reno did, but what you think now, 4 years later?

Chairman HATCH. Let him answer the question.

Mr. KAVANAUGH. And this is an important question so I want to take a minute to answer this.

First I worked on the grounds section part of the report, which was the part of the report that outlined possible legal grounds consistent with Judge Starr's statutory obligation under Section 595(c), so that is the first point I want to make clear.

Second, I have said publicly, I think I said it in my Committee submission, that I regret that the report was released to the public in the way it was released. I personally regret how that was released because I don't think it put the case in the perspective that Judge Starr thought about it, as he testified later, and you were there, in November of 1998 before the House Judiciary Committee. It was a serious legal matter. I think, Senator, you at the time made some strong statements about the legalities involved, and I regret how the report was released because I think it created a misimpression of what we thought and Judge Starr thought were the important aspects of the investigation, which he subsequently made clear in his House testimony.

So I personally regret how that report was released because I think it was—parts of it that were released were unnecessary to be in the public domain.

Senator SCHUMER. Do you think the President should have been convicted by the Senate? If you were a Senator, would you have voted aye or nay? And you cannot use Scottish law.

[Laughter.]

Senator SCHUMER. How would you have voted, aye or nay?

Mr. KAVANAUGH. Senator, as a—

Senator SCHUMER. Please answer my question.

Mr. KAVANAUGH. That is an important question as well, but I think I need to explain.

Senator SCHUMER. Can you give me a yes or no answer and then explain it, please?

Mr. KAVANAUGH. I cannot, because it was exclusively the Senate's province to make that determination—

Senator SCHUMER. I am asking you as a—

Chairman HATCH. Let him answer.

Senator SCHUMER. He said he cannot answer it, Mr. Chairman.

Chairman HATCH. He said he can answer it. He just cannot answer it the way you want him to.

Senator SCHUMER. Yes or no is a pretty simple way to put it.

Chairman HATCH. This is not a court of law. Let him answer it the way he wants to answer it.

Mr. KAVANAUGH. It would be a simple answer, but it is a complicated question. In our role, in Judge Starr's role as assigned by Attorney General Reno, was to find the facts and to submit any evidence to Congress that may constitute grounds for an impeachment based on history and historical practice. As part of the office that submitted that report, Judge Starr made it very clear in his November testimony—and I have always tried to maintain this as well—that it was not our place to say what the House should do with that or what the Senate should do with that evidence. There is an important reason for that.

Senator SCHUMER. Sir, I am not asking you as a member working for Ken Starr. I am asking you now as an individual who has broad ranges of opinions—we know that—on all sort of things, who is before this Committee, where there is a great deal of doubt whether how you feel about things or whether you can be fair and dispassionate. It is not a question that seals your nomination or guarantees a veto. I am asking you as a person, as a nominee, would you have voted yes or no, or do you refuse to give me a yes or no answer.

Mr. KAVANAUGH. Senator, again, I think that is an important question, and because I worked—

Senator SCHUMER. That is why I asked it.

Mr. KAVANAUGH. Right, I understand. And because I worked in that office, just as a prosecutor works on a criminal case should not be commenting about whether the jury got it wrong or got it right, I do not think it is appropriate for me to say whether the House got it right in impeaching President Clinton or the Senate got it right in declining to convict. I think there was serious legal issues involved, as Judge Starr explained, and there was a debate about what to do about what everyone agreed were serious issues. I know Senator Feinstein authored the censure resolution in the Senate, and that many members of the Committee joined her censure resolution, which used very strong language about President Clinton in that censure resolution. There was a debate about what sanction should be imposed, and having worked in the office that was assigned a narrow legal duty, I just do not think it is appropriate for me to say what my personal view is on that issue.

Chairman HATCH. Certainly not in retrospect.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Welcome to the pit, Mr. Kavanaugh.

Mr. KAVANAUGH. Thank you, in the arena.

Senator SESSIONS. The arena. It is a great country. People have a right to express their views, and I appreciate your willingness and your consistent dedication to public service. I think it is something to be respected and not denigrated. Your legal skills are extraordinary, and I think the way your background and record has been portrayed is not fair, is not accurate, and does not fully reflect your contributions to law and what you would do on the bench.

As a Yale undergraduate, Yale Law School graduate, you came out and clerked for three Court of Appeals Judges. As a law clerk to a Court of Appeals Judge, and you are being nominated to a Court of Appeals position, what do you do? What kind of experience do you have in dealing with the cases and how does that help you take a position that you might take with the D.C. Circuit?

Mr. KAVANAUGH. I think, Senator, I was very fortunate to serve as a law clerk to three outstanding judges, and serve as a law clerk on the Supreme Court.

Senator SESSIONS. That is correct. Two Court of Appeals Judges and one Supreme Court Justice, Anthony Kennedy, you clerked for.

Mr. KAVANAUGH. Right. I learned a lot from each of them about how I should perform my role were I to be confirmed to be a Judge. Judge Stapleton, as Senator Biden knows well, in Delaware, is one of the most widely respected judges in that circuit or in the country because of his judicial temperament, because of his dedication and fairness. I do not think there is anyone who has ever said anything negative about Judge Stapleton. He treats everyone with complete respect. He works hard, and he taught me how to try to get the right answer in every case.

Judge Kazinski has a unbelievable passion for the law, unbelievable passion for getting the right answer, for working and working and working, and for his law clerks working and working and working, to get the right answer. He is someone who I think has proved to be as a judge someone who takes a new angle on a lot of different cases. He does not just see a case and say the accepted wisdom or the conventional wisdom about an issue is right. He is someone who rethinks everything from first principles. That is something I learned from him.

Justice Kennedy has passion for the law, has passion for American history, has devotion to how the Supreme Court fits into our constitutional system. Anyone who has heard Justice Kennedy talk about the role of the Supreme Court or the history of the Supreme Court cannot help but be influenced, and I heard that day in and day out for a year and it just had a profound effect on me.

If I were to be confirmed to be a judge, I would, I think, take lessons from each of those three with me, and I hope I could be like all three of them.

Senator SESSIONS. You were just participating and doing the very thing you would do now. You were participating with those judges and helping them write opinions, to analyze complex legal questions and briefs, and to distill that into a principled decision. I think that is terrific background for you, and I also notice you

were in the Solicitor General's Office of the Department of Justice, where in that position you represent the United States of America in Appellate Courts around the country, which also is extraordinarily good background for an appellate lawyer, and I also notice you served a period of time as a partner with the great law firm of Kirkland and Ellis, one of the best known law firms I guess in the country.

Senator Schumer and I, we have had—I chair the Courts Committee now. For a while he chaired it. We had a different view about this ideology question, and I think he uses the word maybe a little differently, people interpret it differently. Let me tell you what I think we are dealing with.

Is it not appropriate, Mr. Kavanaugh, for the President of the United States, when he appoints someone to a life term appointment on a bench, to know what that person's judicial philosophy is, his approach to the law, how it should be interpreted and how decisions should be made?

Mr. KAVANAUGH. It is important to know that the person is someone who will put aside personal beliefs, prior political affiliations, and will approach the law, follow precedent fairly and impartially, follow the text and the precedent and the history to try to reach the right answer that will come to each case impartially. All of that is very important and people use different labels to describe those factors that I just described, but the President has made clear, and Judge Gonzales to us, those are the things we should be looking at, not an individual's views on any particular issues.

Senator SESSIONS. The President would not be concerned about a person's view on the death penalty or an issue like that. He would be more concerned, in making an appointment, as to how he would interpret the Constitution's injunctions or requirements with regard to the death penalty; is that correct?

Mr. KAVANAUGH. I think the President has spoken publicly many times about how it is important that a judge or a judicial nominee be someone who is going to interpret the Constitution fairly and consistent with precedent, and not superimpose his or her personal beliefs onto any judicial decision, and it is a very critical function of a judge.

Senator SESSIONS. I think ideology is an entirely different matter. Ideology suggests that judges should in fact, according to Senator Schumer's arguments, it seems to me, allow their personal ideological views to affect their judicial decisionmaking processes. Let me ask you, do you believe that? Do you believe that a person's political philosophy, whether or not they think a death penalty is good or bad, should affect their interpretation of existing Supreme Court precedent or the Constitution of the United States when it speaks to the death penalty?

Mr. KAVANAUGH. I do not think one's personal views on that issue or on other policy issues should affect how you go about deciding the cases. I think what Senator Schumer points out on pointing out some differences between judges on the D.C. Circuit is that judges reach different results in different cases, but I think that happens because judges just analyze the cases differently, not because of any partisan affiliations. It is critically important for

judges, when they become judges, to recognize that they are entering a new phase, a new role, and political background has been very common, Government service background has been very common for judges, not because we want the Judiciary to be an extension of the Congress, quite the contrary, but we want the Judiciary to be independent and for the judges on the Judiciary to understand how the Government operates. So that is why political service has been common in judicial nominees' backgrounds in the past. That is why it is important, but it is not because courts are then just an extension of the political differences that may exist elsewhere. It is because of that important Government service gives you a perspective, whether it is Judge Buckley or Judge Mikva on the D.C. Circuit, or Justice Breyer who served on this Committee.

Senator SESSIONS. I agree with that, and I think that is why the American Bar Association, which is certainly a liberal political institution, in my view, has rated you the highest rating, well qualified. They believe that if their members appear before you, your demonstrated record of commitment to following the law as written, whether you agree with it or not, is clear. In fact, let me ask you, is it a deep personal philosophy of yours that a judge should follow the law whether or not he agrees with it, and is that one of the most key points of your personal judicial philosophy?

Mr. KAVANAUGH. It is critical, Senator, for a lower court judge to follow Supreme Court precedent faithfully in all instances. Whether you might agree with it, you might have decided differently, you have to follow that precedent faithfully. It is something I learned when I was a law clerk, and I have seen in practice, and it is something I can commit to this Committee, were I to be confirmed, that I would do.

Senator SESSIONS. We have a difference of views in America today about what judges should be—their philosophy as a judge. There is no doubt about it. A number of members of this Committee and this Senate are determined to see judges appointed that believe—that are activists, as Senator Hatch described it, and he defined very carefully what that word means. It means promoting a political, ideological agenda from the bench, which I believe is incorrect, President Bush believes is incorrect, and I believe overwhelmingly the American people believe it is incorrect. The reason it is incorrect is judges, if you are confirmed, are not accountable to the public. You never stand for election again. You hold your office for life. Many of your decisions are unreviewable ultimately, and it leaves the American people subject to decisions in an anti-democratic forum unless that judge restrains him or herself, and enforces the law as written or the Constitution as declared by the people of the United States. I think that is important. We do not need ideology, and as Lloyd Cutler, the White House Counsel under President Clinton and Carter, really criticized the idea that we should politicize the courts and bring ideology into the courts.

Chairman HATCH. Senator, your time is up.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman HATCH. We will turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Let me shift to a slightly different area. I am sure everybody is going to ask these questions on some of the other areas. I am

thinking back to right after September 11th, back in 2001. On September 20th, a week later, you came to the Hill as a representative of President Bush to offer legislation designed to protect the airline business from having to take responsibility for the death and destruction of the attacks in New York and Pennsylvania and Virginia. That is a bill that ultimately became law. It provided victims compensation in return for immunizing the airlines from liability.

When you brought the bill up, it had no compensation for victims. It had immunization for the airlines, nothing for the victims. It actually had sort of a wish list of tort reforms that the airline industry had punitive damages caps for the airlines, attorney fee limits against victims' lawyers, but not against the airlines' lawyers. It even reduced victim compensation court by disaster payments that may have been in there.

I remember the negotiations on this bill. You vehemently opposed any compensation for the victims' families. You insisted the bill only limit the liability of the airline industry. Now, wisely, we rejected that approach. We established the September 11th Victims Compensation Fund. I happened to write it. And in that bill, while we limited liability for the airlines, we did compensate the victims.

Why were you so opposed to compensating the victims, and why were you so singularly fixed on protecting just the airlines?

Mr. KAVANAUGH. Senator, I do not think the facts as stated in the question are accurate.

Senator LEAHY. How would you state them?

Mr. KAVANAUGH. They are not consistent.

Senator LEAHY. How would you state them? Let me ask you this then. Let me break it down. Did you not come up with a bill that had nothing in it for victims, but did have a list of areas where airline liability would be limited?

Mr. KAVANAUGH. Senator, I think there were two separate issues. One was the airlines, which were going to go bankrupt that Monday.

Senator LEAHY. But I am thinking—I may not have stated my question well. I am just a small-town lawyer from Vermont, but let me try it one more time. Did you not come up with a bill that had a number of different limits of liability for the airlines and nothing for the victims? Yes or no?

Mr. KAVANAUGH. And to answer that question, I need to explain, Senator, and the reason is there were two separate issues that were in play at that time. One was the airline liability issues because the airlines were potentially going to go bankrupt on that Monday unless Congress acted. That is why, as I recall, there was—

Senator LEAHY. They found out afterward they were not going to go bankrupt on that Monday, but did the bill—

Mr. KAVANAUGH. There was bipartisan agreement that the airlines were going to go bankrupt that Monday unless Congress acted and the President signed the bill.

Senator LEAHY. Did you object strongly, or did you object to putting in compensation for victims?

Mr. KAVANAUGH. No. The question was what kind of precedent should be used to compensate the victims.

Senator LEAHY. Mr. Kavanaugh, I was there. You are under oath. I am not. But let me ask you again, did you object on that legislation—you are under oath—to having compensation for the victims?

Chairman HATCH. Senator, let him answer the question.

Senator LEAHY. I will.

Chairman HATCH. He said there were two—

Senator LEAHY. That is why I made sure he understood it.

Chairman HATCH. But let him state it.

Mr. KAVANAUGH. Senator, I was there as a representative of the administration, and there were two separate issues that needed to be addressed, one which needed to be addressed immediately, as I recall, was the question of liability for the airlines. I think there was bipartisan agreement. And I participated in a meeting in the Speaker's Office after the President's speech on Thursday night, the 20th, where the Speaker and Senator Lott, Representative Gephardt, and Senator Daschle were all present, as was the Director of OMB.

The question was there at the airlines' liability. There was a separate question which was important, and the two ultimately got linked in the same bill, of compensation for the victims of September 11th. On that separate question there was an issue, what precedent do we have for compensation for victims of terrorism? There was the Oklahoma City issue, which Senator Nichols raised, that they had not received significant compensation. There was the Police Safety Officers Benefit Legislation. That was a possible precedent. We were looking at those precedents.

Then there were further discussions including with Mr. Pagano and your staff, Senator Leahy, and there was a discussion of if we are going to do the limitations on airlines' liability, we should give the victims the same kind of compensation that they would recover had they been allowed to litigate the matter in court, but to do it more expeditiously.

Senator LEAHY. What position did you take on that?

Mr. KAVANAUGH. On that we were concerned about the fact—

Senator LEAHY. I am not asking what you were concerned about. What position did you take?

Mr. KAVANAUGH. At the ultimate meeting on behalf of the administration, Director Daniels agreed to that.

Senator LEAHY. Did you oppose that initially?

Mr. KAVANAUGH. There were discussions about how to do it and there was concerns about—

Senator LEAHY. Did you oppose that initially?

Mr. KAVANAUGH. The precedent that was on point that we cited initially was the Police Safety Officer's Benefits Fund. That was the most relevant precedent. We had not thought, at least I had not thought of doing a separate litigation model for—essentially a damages model at that point. That was an idea that was raised during the discussions with Senator Lott's staff, as I recall. Senator Lott's staff, I believe, first raised that idea, at least in my presence. And the one concern about that at the time that I recall being discussed with your staff, Senator Leahy, was the fact that that would mean unequal compensation. In other words, the victims of a rel-

atively poor family would get a much smaller amount. The family of a poor victim would get a much smaller amount.

Senator LEAHY. Did you oppose linkage of the two?

Mr. KAVANAUGH. As I recall—

Senator LEAHY. When the proposal was made to you, okay, we will agree on protecting the liability of the airlines—and I was meeting with the heads of all the airlines at that time too—we will do that, but we are going to take care of the victims and get this is. We will Public Service Commission them both. Did you oppose that linkage?

Mr. KAVANAUGH. I remember personally being involved in those discussions and saying that it was important, I thought—at least this was in the fluid negotiations—of compensating each victim's family equally. That was the principle that I had stated at the time.

Senator LEAHY. Did you oppose linking them?

Mr. KAVANAUGH. Linking the two bills?

Senator LEAHY. Yes.

Mr. KAVANAUGH. I do not remember opposing linkage of the two bills. I knew the two had to be—both had to occur. Whether they had to occur together I think was a discussion. It was fluid discussions. I was not speaking for the administration either. It was Director Daniels who was.

Senator LEAHY. So you did not oppose the idea of putting victims' compensation in that airline bill? It is kind of hard to understand your answer with all the caveats, and I realize you have not spent much time in trying cases, but let me assure you that if you had, the judge would be all over you on the way you are answering.

Mr. KAVANAUGH. Senator, I do not recall opposing the linkage of the two. I remember they started as two separate issues and then they got linked. Then the second question, which was important, was what precedent do we look to for compensation? There were precedents out there in terms of Oklahoma City, in terms of the Police Safety Officer Benefit Fund. I remember also being concerned about the administrative time it would take for people to get compensated through the kind of fund.

Now I want to say—

Senator LEAHY. You did not have any problem with the administration trying to wipe out all our liability statutes to help the airlines to make sure that their attorneys were compensated, but to put limits on anybody else's attorneys? That did not bother you.

Mr. KAVANAUGH. Senator, as I recall, there was bipartisan, I think unanimous—

Senator LEAHY. It did not bother you. I do not care what—I was involved in those negotiations, Mr. Kavanaugh. I remember them very well. It did not bother you.

Mr. KAVANAUGH. It was unanimous agreement, as I recall, Senator, that something had to be done for the airlines or they were going to go bankrupt that Monday morning.

Senator LEAHY. Let me go to a different subject because you are not going to answer my question, so let me go to another one.

The question of secrecy in Government, and this administration has shown more secrecy than any administration I have served with from the Ford administration forward. You were the author,

one of the first indicators of this increase in secrecy, Executive Order 13233, that drastically changed the presidential records. It gave former Presidents, their representatives, and even the incumbent President, virtual veto power over what records of theirs would be released, posed a higher burden on researchers petitioning for access to what had been releasable papers in the past. After the order was issued, a number of historians, public interest organizations, opposed the change. The Republican-led House Committee on Government Reform approved a bill to reverse this. A lawsuit to overturn it was filed by Public Citizen, American Historical Association, Organization of American Historians, and a number of others. Why did you favor an increase in the secrecy of presidential records?

Mr. KAVANAUGH. Senator, with respect to President Bush's Executive Order, I think I want to clarify how you described it. It was an order that merely set forth the procedures for assertion of privilege by a former President, and let me explain what that means.

The Supreme Court of the United States in *Nixon v. GSA* in 1977, opinion by Justice Brennan, had concluded that a former President still maintains a privilege over his records, even after he leaves office. This was somewhat unusual because there was an argument in the case that those are Government records. But the Court concluded that both the current President and the former President have the right to assert privilege to prevent the release of presidential records. That is obviously a complicated situation. The issue was coming to a head for the first time because there is a 12-year period of repose, so 12 years after President Reagan left office was when this President Bush came into office, and there was a need to establish procedures. How is this going to work, two different Presidents asserting privilege or having the right to review?

No one really had a good idea how this was going to work. The goal of the order was merely to set forth procedures. It specifically says in Section 9 of the order that it is not designed in any way to suggest whether a former President or current President should or should not assert privilege over his records.

You are quite right, Senator Leahy, that there was initial concern by historians about the order. I like to think it was based on a misunderstanding, and Judge Gonzales and I undertook to meet every 6 months or so with a large group of historians first to discuss the order and to explain it, and then after that, to discuss any problems they were having with the order, and to help improve it if they suggested ways for improvement. I think those meetings, I think the historians who come to see us, have found them useful, and I think we helped to explain what we had in mind and what the President's Order meant in terms of the procedure. So that is my explanation of that order.

Senator LEAHY. Thank you, Mr. Chairman. I have other questions for the record, although I suspect they probably will not be answered, but I will still submit them. Thank you.

Chairman HATCH. Thank you, Senator.

Senator Cornyn.

Senator CORNYN. Mr. Kavanaugh, as I understand, the objections to your nomination go like this. First, you do not have the proper

experience. Alternatively, you have the wrong kind of experience. And alternatively, or maybe concurrently, you have represented the wrong clients. Could you explain to the Committee how you view the role of a lawyer as an advocate, which has been your professional career to this point, and how you view the role of Judge, which of course will be your duty and obligation when you are confirmed?

Mr. KAVANAUGH. Senator, every lawyer has ethical obligation to zealously represent his or her client in court or in other matters, regardless of whether the lawyer might agree with the position of the client. That is true as well as a law clerk for a judge or Justice. You have the obligation to give the judge your best advice, but then to do what the judge decides, not what you may think is right. When you are working in public service in the Independent Counsel's Office or in the White House Counsel's Office or in my current role as staff secretary, my job is to give recommendations and advice, but ultimately to carry out the direction of my superiors without regard to whether I might have chosen a different path. And that is an important function of our legal system, the adversary system when I was in private practice, and in Government service, and it is something that I feel strongly about.

As a judge, again, it is not your personal views. It is a similar kind of mindset in some ways. It is not your personal views that are relevant or your past affiliations that are relevant. It is important to follow the law faithfully, the precedent of the Supreme Court, regardless of what those views may be.

Senator CORNYN. I happen to agree with the distinction of a lawyer as an advocate and a judge as an impartial decider of the law and fact as the case may be. Unfortunately, we seem to have—some seem to be engaging in what I think is a very dangerous tendency to associate a lawyer, who is a professional advocate, with the views of their client as if they were always inseparable and as if they were always one.

I don't have any doubt that if you were a criminal defense lawyer and represented those accused of crime in courts on a daily basis, members of this Committee and others would surely have no trouble distinguished between the views of your client and your duties as a criminal defense lawyer to represent that client in court. But somehow when it comes to the administration's policies or lawyers representing the President or the Department of Defense in the case of Mr. Haynes, who has been nominated to the Fourth Circuit, people have trouble making that distinction. But I believe it is a very important one, and I appreciate your answer.

And I have to say that Senator Schumer said no one in the room disagrees with him about the role of ideology in judicial selection, and I just want to say "me, too" to Senator Sessions who said he had disagreed with Senator Schumer on that.

But as I understand the role of the Committee and the advise and consent role under the Constitution, it is to explore qualifications and judicial philosophy, that is, whether you are willing to subjugate any personal views that you may have, whether they be political, ideological, or otherwise, to what the law is and to faithfully enforce the law as written by the Congress or as determined by precedents of the United States Supreme Court.

Do you have a similar understanding of what the role is of a judge and how that is different from any personal opinions, philosophical or ideological or others that you may have?

Mr. KAVANAUGH. Well, I think, Senator, the Founders established an independent judiciary, discussed it in the Federalist Papers, because they wanted people who would be independent of the legislative and executive branches to decide cases fairly and impartially, without regard to their personal preferences.

There was discussion at the time, I think Federalist 81 discusses making the judiciary an extension of the legislature, or somehow having review by the legislature. But there was a decision made to have an independent judiciary, and that is the foundation of our system of rule of law.

The Founders also recognized, I think necessarily and certainly at the time, that people with Government service who had served in the legislative branch or served in the executive branch would become judges—Chief Justice Marshall, for example—would have backgrounds that involved Government service or political service. But they also had confidence in the ability of people in our system, once they became judges and put on the black robes, to decide cases fairly and impartially. And that's the way that system has worked for more than two centuries. And I know there has been some discussion about that, but that's the way the system has worked in terms of deciding cases fairly and impartially and not based on political or personal views.

Senator CORNYN. In your opinion, did Justice Kennedy in your experience, was he able to make the transition from lawyer to judge and make that sort of transition you described?

Mr. KAVANAUGH. Justice Kennedy always decided cases fairly and impartially and taught a lot to his law clerks about how to do the same.

Senator CORNYN. And in my introductory comments, I pointed out that you are not the only person to come before the Court who has represented a client in the arena, for example, Justice Ruth Bader Ginsburg. In your opinion, has she been able to successfully distinguish between her role as general counsel for the American Civil Liberties Union and her role as a judge?

Mr. KAVANAUGH. In my observation, she's—yes, she's an excellent Justice on the Supreme Court. It's not for me to be commenting too much on Supreme Court Justices, but I think she obviously decides cases fairly and impartially and was a judge on the D.C. Circuit before that who was widely respected, as she is on the Supreme Court.

Senator CORNYN. And Justice Breyer, who was the Democrats' chief counsel on the Senate Judiciary Committee, do you think he has been able to successfully make the change between that job and the role as judge, a circuit judge first and then now as a member of the United States Supreme Court?

Mr. KAVANAUGH. Yes.

Senator CORNYN. And Byron White, who was a political appointee at the Justice Department under President Kennedy, Abner Mikva, I guess the list could go on and on. But in your experience and in your observation, have others that have had perhaps not the same but a similar experience, either in the political arena

or representing clients who were, been able to successfully make the transition from advocate to impartial judge?

Mr. KAVANAUGH. Yes, Senator, absolutely.

Senator CORNYN. And I guess the problem is, in some instances, there are those who just don't simply believe that is true, that anyone can actually make that transition. There are those, I guess, who think that those who come to the bench continue to be advocates for an ideology or political persuasion or see it as appropriate to issue judicial edicts or decisions that satisfy only their own sense of justice and not what the law is.

I don't know how anyone can truly believe that and still say that we are Nation of laws and not individuals. Do you have any thoughts on that?

Mr. KAVANAUGH. I agree with that, Senator, very much, and I guess I firmly disagree with the notion that there are Republican judges and Democrats judges. There is one kind of judge. There is an independent judge under our Constitution. And the fact that they may have been a Republican or Democrat of an independent in a past life is completely irrelevant to how they conduct themselves as judges. And I think two centuries of experience has shown us that that ideal which the Founders established can be realized and has been realized and will continue to be realized.

Senator CORNYN. And I know for all the attempts made during the confirmation process to try to predict how an Article III judge will act once they have a life-tenured position and have the responsibility of being a judge, we don't have a particularly good track record of making that prediction. I point out Harry Blackmun, who I believe was appointed by President Nixon; Justice Souter, appointed by President Bush; and Earl Warren, appointed by President Eisenhower.

Have you observed judges consciously or unconsciously make that transition of judge in your experience, in your clerking experience? Or have you discussed that with Justice Kennedy or Judge Kozinski or any other judges you have worked with?

Mr. KAVANAUGH. I believe that the judges for whom I've worked and all the judges I've observed in my experience understand the importance of putting on the robe and understand the importance of sitting in the courtroom as a fair and impartial arbiter of cases, and I think they all have understood that and helped pass it along.

Chairman HATCH. Senator, your time is up. Thank you.

Senator Feinstein? Then we will go to Senator Kennedy and finally Senator Durbin.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Kavanaugh, while you worked for Mr. Starr in the Office of the Independent Counsel, you argued to the D.C. Circuit in an opinion entitled *In re Bruce Lindsey*. There you convinced the D.C. Circuit that the Deputy White House Counsel Bruce Lindsey must testify to a grand jury despite his claims that the information sought was protected by attorney-client privilege.

Since then, you yourself have worked in the White House Counsel's Office. There you drafted Executive Order 13233. That order significantly limits which documents the administration releases to the public.

Do you see any contradiction between the arguments you made in the D.C. Circuit in the *Lindsey* case, which weakened Presidential privilege, and your work on the Executive Order, which strengthened Presidential privilege?

Mr. KAVANAUGH. Senator Feinstein, let me explain that in two ways.

First, in both instances, I was representing a client, in the first in Judge Starr's office, and the second working in the White House.

But, second, let me answer the heart of the question, which is, I think, the two positions are consistent in that the *Lindsey* case arose in the context of a criminal investigation, and the Supreme Court had said years ago in the *U.S. v. Nixon* case that the needs of a criminal investigation trump any governmental interest in confidentiality, whether it be Everything privilege—and the question in the *Lindsey* case was whether that *Nixon* case also extended to Government attorney-client privilege. And the court concluded that it would.

The Executive Order, as I explained to Senator Leahy in some part, was merely designed to set up procedures for the assertion of privilege. The order itself didn't assert any privileges. President Bush wasn't asserting any privileges there. It merely set up the procedures to implement the assertion of privilege by a former President. And so that's what the order was designed to do. It didn't address the context of the criminal investigation at all.

So I think the two are, in fact, consistent.

Senator FEINSTEIN. Okay. In response to a question by Senator Schumer, you indicated that ideology is not—and you were rather definite—any kind of a test for a Bush judge. Let me read you from a Patriot News editorial. This is a Pennsylvania newspaper, and the date is April 30, 2003. The editorial stated, "Only two things apparently guided Bush's selection: first, that the candidate be sure of Senate confirmation; and, second, that he be opposed to abortion."

The article goes on to add, "What we find perplexing and more than just a little disturbing is that the abortion issue was put forward by the Bush administration as the sole litmus test."

I would like you to respond to that.

Mr. KAVANAUGH. Senator, as Judge Gonzales has said before publicly, as have I, we don't ask judicial nominees or candidates their positions on issues like that. We don't know in the vast, vast majority of cases, unless there has been a public record before—

Senator FEINSTEIN. You say you don't know?

Mr. KAVANAUGH. Don't know, correct. We don't know what someone's position is.

Senator FEINSTEIN. Well, let me ask you this: Could you identify five pro-choice judges that the White House sent to the Hill?

Mr. KAVANAUGH. I don't know whether the nominees are pro-choice or pro-life unless—

Senator FEINSTEIN. Four? Three? Two? One?

Mr. KAVANAUGH. Senator, I'm sure there are many. I don't know what someone's—I don't know and we don't ask what someone's position on issues like that is. So I don't know if there are some, many, of any particular viewpoint on any particular issue like that. So we don't ask, and that's an important part of the process.

Senator FEINSTEIN. Well, let me ask this question: Would you agree, then, that most nominees that come up here are politically conservative?

Mr. KAVANAUGH. This goes to a question that Senator Schumer asked, and I'm going to answer you directly. Most of the nominees of any President share the same political affiliation as the President. That's been a tradition in our country going back two centuries. Most of President Clinton's nominees were Democrats. Now, that didn't mean they couldn't be independent and fair judges. It just meant that their prior political affiliation was Democrat. So, too, most of President Bush's nominees—not all by any stretch, but most are Republicans. Again, that's part of the tradition.

Again, as with President Clinton's nominees, it doesn't mean that they won't be—because they will be—fair and impartial judges. It's a difference between political affiliation and political beliefs and being a fair and impartial judge. And I believe firmly in the notion that there is a strong difference in those two things, and I think our system has reflected that for two centuries.

So they might be mostly Republican, just as President Clinton's might be mostly Democrat. But they'll be all good judges.

Senator FEINSTEIN. Well, we take that for a given and that isn't the problem. The problem is where they are on the political spectrum and whether their ideology is so strong that they can't separate themselves from that ideology to be a fair and impartial judge on major questions that come up before an appellate court. And what I'm trying to find out is if you're willing to do that, and thus far the indicators are that you are not.

Mr. KAVANAUGH. Willing to be a fair—

Senator FEINSTEIN. Willing to separate yourself from the ideology. I think to say that ideology is not any kind of a test, it is just that somebody belongs to the Republican Party, really I find dismaying because the evidence of the people that come before us doesn't really display that in any way, shape, or form.

Mr. KAVANAUGH. I understand the question, Senator—

Senator FEINSTEIN. And what I had hoped you would be is up front and direct with this Committee.

Mr. KAVANAUGH. Well, Senator Feinstein, it's important that a judge understand the proper role of a judge to decide cases based on the law before him or her. In terms of the judges that have come before the Committee, I know there have been a few that have been raised here today and discussed publicly, but the vast majority have been approved by the Committee. We've worked closely with your office and Senator Boxer's office. In California, a commission has been set up. The district court judges have moved through, Judge Bea and Judge Callahan, Consuelo Callahan and Carlos Bea. I talked to your office and Senator Boxer's office about those two nominees, and they were approved.

So there have been some that have been highlighted, I understand, but I think the vast majority have been approved, and I think we've worked—tried to work well with the home State Senators.

Senator FEINSTEIN. Well, let me just set the record straight. I don't review nominees to the district court. We have a screening committee, three Republicans, three Democrats, non-partisan. All

the nominees go there. They review them and they make recommendations. I don't believe Senator Boxer—and I know do not interfere in that process.

With respect to the circuit court, what has happened is, on occasion, I would receive a call from Judge Gonzales. Now, if this is conferring, so be it. But it is, "Do you have an objection to Carlos Bea?" That is the specific question. It really isn't conferring in the traditional sense.

However, I must tell you, I welcome even that phone call. So, you know, I am not being critical about it. But, you know, for me—and I can only speak for myself as to how I judge a nominee. It is my interest—because I happen to know that everybody coming out here is conservative. Do I believe they can be a fair and impartial judge? Do I believe they can interpret the law without a particular political bias of any kind?

Mr. KAVANAUGH. And I agree that should be—

Senator FEINSTEIN. Now, say something that gives me some assurance that you can do that, because the questions that Senator Schumer asked to detect just that you wouldn't respond to.

Mr. KAVANAUGH. Senator, I have throughout my career committed myself to public service. When I work in the independent counsel's office, I thought deeply about the issues raised by that investigation and raised by the statute. I wrote an article in the Georgetown Law Journal trying to outline a new approach for independent counsel investigations, and I hope, you know, you have it. And it's important because it shows that I took what I thought was a fresh look, an independent look at an issue raised by the investigation. I talked about how reports were a problem, how they were inevitably perceived as political acts. I wrote that in 1997. I talked about some of the problems in the investigation in terms of the statute afterwards. I think I was trying to—what I was trying to do there was taken an independent look at an issue that I had personally been involved in. When I've written other matters—when I wrote on Batson procedures when I was in law school, about the hearings for *Batson v. Kentucky*, I tried to take a fresh look at an issue on how procedures should work.

When I was in law practice, I tried to—I represented clients of the firm, but I also made sure to do pro bono cases. And I got a range of pro bono clients that I worked on for the firm.

When I was in public service in the Starr office, before the Lewinsky matter came to the office, one of the important things that I worked on was what was known as the Foster documents investigation. And we received a referral from the Committee about a few people, and we concluded in that office not to seek charges against any of the individuals named in those referrals from the Senate.

When I was in the Starr office, we prepared a report under Section 595(c)—and Judge Starr has talked about this before publicly—a report on the Whitewater-Madison matter outlining whether there were grounds for an impeachment. And we looked at that report, and we decided the evidence was not sufficient under the statute to send it to the Senate.

When I worked for Justice Kennedy—and he knows—I gave him my independent advice on matters that probably didn't always fit a pre-existing impression of what I would say.

When I worked in the Justice Department, I represented clients on—I represented the United States on a variety of issues, and I think the people who worked with me in the Solicitor General's office know I took an independent look. The judges I clerked for on the court of appeals, the same.

I think throughout my career in the White House as Staff Secretary, one of my jobs is to be the honest broker for competing views that come in on memos to the President. Will those views be reflected accurately in the memo? One of my jobs is to make sure not to let the memo get slanted, not to let one person dominate the memo, to make sure the President is getting the best advice from all sides, regardless of what I think is the right answer or the right policy position the President should take in a particular case. I was selected for that job to be the honest broker for the President in making sure he got competing views.

In the counsel's office, so too I tried to work very closely with home State Senators in Illinois and in California. I might not have always agreed with particular recommendations that came from Senators. I tried to work closely to do the best job I could for the President.

So I think my record is replete with examples where I've been independent, where I've tried to take a fresh look, where I've done something because I'm an honest broker. And I think that's how I would serve as a judge as well.

Chairman HATCH. Senator, your time is up.

Senator FEINSTEIN. Thank you. My time is up.

Chairman HATCH. Senator Kyl?

Senator KYL. Mr. Kavanaugh, I want to get back to the privilege issue. You have been criticized on the one hand for attacking the Clinton administration's assertions of various privileges during your work in the Office of Independent Counsel, and on the other hand helping to draft Executive Order 13233, which establishes policies and procedures to govern the processing of requests for Presidential records and the assertion of constitutionally based privileges.

Does this Executive Order set forth those circumstances under which an assertion of Executive privilege should be made or would be successful? Or does anything in the Executive Order purport to block prosecutors or grand juries from gaining access to Presidential records in a criminal investigation?

Mr. KAVANAUGH. Senator, nothing in the order purports to assert a privilege at all. It's up to the individual President, former President or current President, to assert a privilege following the procedures in the order. So nothing blocks anything from a criminal or grand jury investigator. And, again, there have been some misimpressions about the order when it first came out. Some historians were concerned, and we took proactive steps. Judge Gonzales and I met with historians to try to allay their concerns and explain the order. We met with people on the Hill also who had questions about it, and over time I think we've explained what the order was designed to do, which is merely to set up procedures.

Senator KYL. And with regard to the criminal aspect, does it block prosecutors or grand juries from gaining access to Presidential records in a criminal proceeding?

Mr. KAVANAUGH. It does not block any access.

Senator KYL. And your arguments on behalf of the Office of Independent Counsel regarding privilege was that Government attorneys in the Clinton administration could not invoke the attorney-client privilege to block the production of information relevant to a Federal criminal investigation, right?

Mr. KAVANAUGH. The court ruled that the Government could not assert a privilege to block it from a criminal investigation under *Nixon*. It said that it would—yes, that's correct.

Senator KYL. So I don't understand where the inconsistency is here. I know some of my colleagues may have tried to assert it, but I don't see it. And correct me if I'm wrong or if I'm missing something here. But the key issue is the assertion of privileges in the context of Federal criminal investigations. In fact, you referred to your Georgetown Law article in 1998 which was authored during the Clinton administration, and didn't you there specifically recognize the difference between asserting Executive privilege in the criminal context versus outside of the criminal context?

Mr. KAVANAUGH. I did recognize the difference in that article. That was a difference that had been also recognized in the cases.

Senator KYL. And isn't it further the case that you actually acknowledged or argued a presumptive privilege for Presidential communications—and I have a quotation here that was supplied to me by the staff—and that “it may well be absolute in civil, Congressional, and FOIA proceedings”?

Mr. KAVANAUGH. That's correct. That's from my Georgetown article.

Senator KYL. And entirely consistent with this statement, doesn't the Executive Order that I referred to specifically recognize that there are situations where a party seeking access to Presidential records may overcome the assertion of constitutionally based privileges?

Mr. KAVANAUGH. Yes.

Senator KYL. Okay. A few more points here.

During your service as Associate White House Counsel, have you ever worked on a matter where the President invoked or threatened to invoke Executive privilege in a criminal context?

Mr. KAVANAUGH. Senator, I'd like to answer that question, but I don't think it's my place to talk about internal discussions of privilege claims.

Senator KYL. Okay.

Mr. KAVANAUGH. I just want to be careful not to go down a road—

Senator KYL. All right. Well, let me ask you—

Mr. KAVANAUGH. There's been no public assertion. I just don't want to go down that road.

Senator KYL. I appreciate your desire to treat that with confidentiality.

Did you work on the Bush administration's assertion of Executive privilege to shield the records regarding the pardons issued by Bill Clinton at the end of his Presidency and to withhold from Con-

gress Justice Department documents related to the investigation of alleged campaign fundraising abuses by the Clinton administration?

Mr. KAVANAUGH. I was involved in that matter working for Judge Gonzales, who in turn was providing advice to the President, yes.

Senator KYL. So it seemed, at least I would assert, Mr. Chairman, that Mr. Kavanaugh has been evenhanded and hardly partisan with respect to the privilege issue. And if I have just a little bit more time—

Chairman HATCH. You do.

Senator KYL. One of the last questions had to do with the Starr Report. I understand you were one of several authors for that report, and that that report was actually required as a matter of Federal law. Is that correct?

Mr. KAVANAUGH. That report was required as a matter of Federal law based on the jurisdiction that Attorney General Reno had given Judge Starr.

Senator KYL. And what part of the report did you help draft?

Mr. KAVANAUGH. I helped on the grounds section of the report, which outlined possible grounds for an impeachment, which was the standard specifically in the statute.

Senator KYL. Did the independent counsel's report ever state that President Clinton should be impeached?

Mr. KAVANAUGH. It never did.

Senator KYL. Now, of course, majorities in the House of Representatives determined that information presented by the independent counsel constituted grounds for impeachment, but that report did not state that conclusion. Is that correct?

Mr. KAVANAUGH. That is correct. And Judge Starr in his November testimony before the House Judiciary Committee emphasized over and over again that it was for the House solely to decide whether to impeach, that he was making no recommendation.

Senator KYL. And the House concluded that the evidence was sufficient to impeach, and 50 members of the Senate found the evidence compelling enough and acted accordingly. Much of the report was criticized for containing extensive details of certain activities which some considered sensational.

What part, if any, did you have in the authorship of that section of the report?

Mr. KAVANAUGH. On the narrative section of the report, I did not write or work on the grounds section of the report. I worked on, again, how the report was released, I think was an issue I've discussed publicly before, and said how it was released by the House turned out to be a mistake, but—and I've said that publicly before.

Senator KYL. Is it fair to ask you whether you had an opinion on whether or not some of the details in the narrative part of the report should have been included?

Mr. KAVANAUGH. They were relevant to the facts in the case, but I've said that how the report was released publicly was a mistake because some of those facts should not have been necessarily released publicly.

Senator KYL. Well, again, Mr. Chairman, it seems to me that in looking at the entirety of Mr. Kavanaugh's record and the activities

in which some of have criticized him for participating, in fact, the record reveals a very evenhanded, straightforward, honest, forthright, and very non-partisan approach to these issues. And I would hope that my colleagues, unhappy about certain historical events, would not transfer that unhappiness to a candidate here who is obviously extraordinarily well qualified, has served in a variety of public capacities, and in my view would make a tremendous addition to the bench. I hope that they wouldn't transfer that unhappiness with certain things that occurred in the past to Mr. Kavanaugh, who I think has demonstrated that he would not be the source of any of the unhappiness if the issue were carefully considered.

Chairman HATCH. I certainly agree. Would the Senator yield his last 2 minutes to me?

Senator KYL. I am happy to do that.

Chairman HATCH. Because I just want to clarify a few things. The editorial referred to by Senator Feinstein, that was not a White House statement.

Mr. KAVANAUGH. I am not sure where that came from.

Chairman HATCH. I am not either, but let me just say this. The Committee questionnaire asks judicial nominees if any specific case, legal issue, or question has been discussed in a manner that could reasonably be interpreted as asking how a nominee would rule on such a case, question, or issue. So I think the question is this: Is it a practice of the White House to discuss particular issues, like abortion, with the nominees?

Mr. KAVANAUGH. No, it's—

Chairman HATCH. I know that that's true. You don't. And one reason you don't is because of the Committee's requisite there, plus it is just you know darn well somebody would make a fuss about it if you did up here. Is that right? I may have said it in more blunt terms than you would with your finesse, but—

Mr. KAVANAUGH. Mr. Chairman, the President has said and Judge Gonzales has said that one's personal views on particular policy issues is not relevant to how one goes about being a fair and impartial judge.

Chairman HATCH. I agree with that.

Mr. KAVANAUGH. And so we don't ask questions about personal views on policy issues.

Chairman HATCH. Or on litmus test issues that have become litmus test issues up here, apparently.

Mr. KAVANAUGH. We don't ask questions on that and don't know the answers.

Chairman HATCH. Now, with regard to the airlines, as I understand it, the proposed legislation did not provide immunity to the airlines; rather, it limited their liability to their insurance policy limits. Is that correct?

Mr. KAVANAUGH. That is correct, Senator.

Chairman HATCH. Okay. Now, the administration did not oppose the principle of victim compensation, but wanted to get that issue right. The airline liability issue was a more urgent matter in that they were facing bankruptcy. And that is why these issues were not originally linked. Isn't that a fair appraisal?

Mr. KAVANAUGH. That's absolutely right, Mr. Chairman. The two issues were separate.

Chairman HATCH. I just wanted to clarify that because if you just listen to one side up here, you might get the wrong impression. But that is actually what happened, isn't it?

Mr. KAVANAUGH. That's correct, Mr. Chairman.

Chairman HATCH. I stated it correctly.

Mr. KAVANAUGH. They're two separate issues. The question—ultimately in the discussions, the two became part of the same bill, and there were discussions then about what kind of compensation fund, we were looking at precedents that were already in place, and then ultimately the administration supported the proposal that was discussed on the night of September 20th, after the President's speech.

Chairman HATCH. Senator Kyl was kind enough to give his time to me. I appreciate it. My time is up.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Kavanaugh, thank you for joining us today.

Mr. KAVANAUGH. Thank you.

Senator DURBIN. You have many friends in this room, but you certainly do not have as many as your mother and father who have many friends in Washington on Capitol Hill and many of them have contacted me. And it is a testament to your family, and I am sure you are very proud of them and the support that they give you.

I listen to the questions that have been asked, and no one has questioned your honesty, nor should they. There is no indication on the record of any reason to question, but it comes down to two areas, repeatedly: your skill and talent, whether you are up to this job and, second, whether you can be fair and objective. That is really, all of the questions focus on those two areas.

I have been a fan of baseball since I was a little kid. If the owner of the Chicago Cubs called me and said, "Listen, we know you follow baseball very closely, and we would like you to be the starting pitcher tonight in Arizona," I would say, "Stop. I know my limitations. I am flattered that you would even consider me."

Did that thought ever cross your mind when they said it is time for the D.C. Circuit Court of Appeals, that it was a flattering offer, but frankly your resume just was not strong enough? When you listen to what Senator Schumer says about the people serving on that court, Republicans and Democrats, when you consider the fact that despite your commitment to public service, you have limited experience when it comes to litigation, and trial work, and things that may be very important in decisions that you make, did it ever just dawn on you at some point to say, "Stop. I am flattered, but in all honesty, I am not ready to be the starting pitcher on that team"?

Mr. KAVANAUGH. Senator, when it was mentioned to me, I was humbled and honored to be considered, but I also, based on my record and experience, am ready to hit the ground running, were I to be confirmed to be a judge, based on my experience as a law clerk, in the Justice Department, performing grand jury work, working on matters in litigation, arguing before the Supreme Court, private practice for major clients, for pro bono clients, work-

ing in the White House Counsel's Office on difficult matters, several of which we have discussed here today that were difficult matters, working now as staff secretary for the President and anticipating a lot of conversations with senior staff and with the President at the White House.

Senator DURBIN. But, Mr. Kavanaugh—

Mr. KAVANAUGH. I think that record means that I think I can hit the ground running.

Senator DURBIN. It is a good record. It is a great record, but it does not avoid the obvious, and that is that you come to this position, the second-highest court in America, the second-highest court in America, the training ground for the U.S. Supreme Court, with less legal experience than virtually any Republican or Democratic nominee in more than 30 years. Of the 54 judges appointed to this court in 111 years, only one—Kenneth Starr—had less legal experience. That is a fact.

And you have made it your professional life now, for some time now, to look closely at the qualifications of nominees. Were you able to look at your own qualifications in this context? Would it not have been better for you to have started off at a District Court or some other appointment and work your way up? But to start at this level is—I do not think it is warranted.

Mr. KAVANAUGH. Senator, I think the President made the decision to nominate me. I know the American Bar Association, which many in this Committee have relied on for years, rated me well-qualified for a seat on this bench at this time. And so I look to other evaluations of me—the American Bar Association conclusion—and based on my own record in appellate law, and my experience in a wide range of difficult issues, which I have not shied away, but have tackled the best I could, I think I am prepared to be a judge on the circuit.

Senator DURBIN. Let us talk about that wide range of issues. Of course, the fear is, if you hit the ground running, are you only going to be running to the right, and that is a legitimate fear.

As I look through all of the different issues that you have been involved in as an attorney in public service and the private sector, it seems that you are the Zelig or Forrest Gump of Republican politics. You show up at every scene of the crime. You are somehow or another deeply involved, whether it is Elian Gonzalez or the Starr Report, you are there.

And it strikes me as worrisome, as Senator Schumer and others have noted, that you have been in this position consistently and raises the question in my mind, would you not understand that an attorney coming before the D.C. Circuit Court, looking at your resume, has to assume—just assume—where you are going to end up. There are so few exceptions, if any, in your legal career that point to objectivity.

Give me a good example of where you just flat out disagreed with the Republican Party and leadership and said, “I am going to do the right thing, even if my party elders do not agree with me on this.” Give me an example of that.

Mr. KAVANAUGH. Well, Senator, my background has not been in party politics. I have been a lawyer for clients, working for judges, Justice Kennedy, working in the Justice Department, working in

the Independent Counsel's Office. I guess I cited to Senator Feinstein an example where the Senate had referred some people over for possible violations. We declined to seek charges in those cases. In private practice, again, my clients were not Republican clients or Democratic clients. They were just clients, whether institutional clients of the firm or pro bono clients that I worked on at the firm.

So my background and experience is one where I have been in the law, primarily. And then in the White House Counsel's Office and as staff secretary, as in any White House, there is the mix of law and policy that goes with it to be sure, but my background has been one where I have been involved in legal issues.

Senator DURBIN. Well, I would disagree. I think your high-profile work has all been on one side, but I want to go to one area that is particularly personal to me.

I was victimized by Manny Miranda and the computer theft more than any other member of this Committee. We believe over 2,000 documents were stolen from my computer. At the time, Mr. Miranda served first on the Republican staff of the Senate Judiciary Committee and then in Senator Frist's office, involved in judicial nominees. And, clearly, you had a working relationship with him. You have conceded that point.

He, also, we believe, distributed the memoranda, which he stole from my computer and other computers, to organizations such as C. Boyden Gray's operation—I am going to get these names wrong, so I better read them—something called the Committee for Justice, a fellow named Sean Rushton. Do you happen to know Sean Rushton?

Mr. KAVANAUGH. I have met him, yes.

Senator DURBIN. In what context did you meet him?

Mr. KAVANAUGH. I think I 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. I think I have met him at those meetings.

Senator DURBIN. And so the horror that has been expressed by the right-wing press about members of the Senate meeting with outside groups to speak of nominees turns out to be a sin committed by the administration, as well.

Mr. KAVANAUGH. I think it is quite proper, and certainly we did it, and appropriate for anyone to speak to members of the public who are interested in public issues. That is one of the important functions of anyone in Government, and we certainly do it.

Senator DURBIN. How about Kay R. Daly, president of a group called the Coalition for a Fair Judiciary, do you know her?

Mr. KAVANAUGH. I have met her as well and do know her.

Senator DURBIN. In what context?

Mr. KAVANAUGH. Same context.

Senator DURBIN. She published on her website the stolen memos. Were you aware of that?

Mr. KAVANAUGH. I was not aware of that until I read it in some stories in the media or on the Internet, I guess.

Senator DURBIN. I guess what it boils down to is this. Since you've worked up here for so long. You had to be able to spot things that were being said that looked revealing. When Manny Miranda

has a revelation about questions that might be asked of a nominee or what the schedule is going to be under a Democratic Chairman, did that ever come up, and did it ever raise a question in your mind that perhaps he knew just a little bit too much for a staffer on Capitol Hill?

Mr. KAVANAUGH. There was—I have thought about this, Senator—there was nothing out of the ordinary of what Senate staffs would tell us or what we would hear from our Legislative Affairs folks. That said, I cannot tell you whether something that he said at some point, directly or indirectly, derived from his knowledge that may have come from these documents. I just cannot speak to that at all. I can say, in direct response to your question, that, no, I never suspected anything untoward. Had I suspected something untoward, I would have talked to Judge Gonzalez about it, who I know would have talked to Senator Hatch about it, but I never did suspect anything untoward.

Senator DURBIN. One last brief question. One percent of the lawyers in America are members of the Federalist Society, a third of the Circuit Court nominees you have sent to the Judiciary Committee have been members of that society. Coincidence?

Mr. KAVANAUGH. I think the Federalist Society is a group that brings together lawyers for conferences and legal panels. I guess others would have to make a judgment about that. The Federalist Society does not take position on issues. It does not have a platform. It brings together people of divergent views. Many of them may share a political affiliation, I do not know that, but they do not take a platform on particular issues.

Senator DURBIN. Just a coincidence.

Mr. KAVANAUGH. I think a lot of them are members of the American Bar Association and of the Federalist Society because—and I have been a member of both—because, for me at least, both organizations put on conferences and panels that you can attend or speak at to learn more about legal issues you are interested in and meet some of your colleagues. So I have always found both organizations helpful to me in my legal practice.

Senator DURBIN. Thank you, sir.

Chairman HATCH. Senator, your time is up.

Senator Kennedy?

Senator KENNEDY. Thank you very much.

There is a very definite philosophical common view with regard to members of the Federalist Society, is there not, though, Mr. Kavanaugh? You are not trying to suggest that this is just some social group that they are getting together.

Mr. KAVANAUGH. No. And I agree with that, Senator Kennedy. I do think there is wide disparity in views, for example, on some might call it libertarian versus conservative, whether the text of the Eleventh Amendment or the sovereign immunity principle behind the Eleventh Amendment should govern, I have heard debates on that by people who are members of the Federalist Society. So I think that within the group that are members, there are wide views.

And the panels they put on, and the ones I have worked on, are designed to bring together divergent views. I was responsible for putting on a Federalist Society panel one time on First Amendment

cases. And on it, I recruited the people to be on the panel, and it was Judge Starr, Mr. Dellinger and Nadine Strossen, the head of the ACLU, to talk about the Supreme Court's First Amendment jurisprudence. I thought that was a representative panel of diverse views to discuss the Supreme Court. That is what the—

Senator KENNEDY. Well, I had not planned to go down this, but, as I understand, you were co-chair of one of the practice groups?

Mr. KAVANAUGH. Yes, I was co-chair of the School Choice Practice Group.

Senator KENNEDY. And do you agree with the following statement from the Federalist Society's mission statement that "law schools and the legal professions are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society"?

Mr. KAVANAUGH. I can only speak to Yale Law School, where I attended, and the professors I attended there—

Senator KENNEDY. Well, that is not what I am asking you. That is in the, that is part of the—

Mr. KAVANAUGH. But I cannot—

Senator KENNEDY. You can answer the question in any other way, but I am just telling you what we are trying to find out here. You can say anything you want to, but I mean that is the—you have the right, obviously, to do it.

But I am just asking you whether you agree. That is the mission statement. If you want to answer what happened at Yale, that is fine, too, but if you want to answer it with regard to that question, that is what I would like to hear.

Mr. KAVANAUGH. There is a common perception that law school faculties are more Democratic than the population as a whole, but I do not know if that is—I have not done my own survey at Yale Law School. My mentors, and the people I looked up to, and the people who wrote my recommendations were Harold Koh, Paul Gewirtz, and George Priest, three people with different views, who recommended me for my initial clerkships out of law school. I think I will leave it at that, Senator.

Senator KENNEDY. I am going to come back. I just wanted—I am sorry Senator Cornyn is not here because I want to make a brief comment. He mentioned about Byron White being a political appointee. Of course, Byron White was a Rhodes Scholar. Byron White was the leading law partner at one of the prestigious law firms in Denver. Byron White was a deputy attorney general. Byron White was a Silver Star winner. I know that some are disparaging about people who fought in wars recently, but he was a hero in World War II, in the Navy. Plus, he was a leading ground-gainer when he was in his first year at Yale Law School, and he served with great distinction in the Justice Department.

So I resent, very deeply—I am sorry Senator Cornyn is not here. I will make sure he knows. I did not have a chance because others wanted to question—and I will just talk about Byron and about Judge Breyer was probably one of the leading antitrust and deregulation professors in the country. And to somehow, I guess it is meant to be in a disparaging way, that they are nominated by political individuals to serve in this part, and was extraordinarily thoughtful, and his record can speak for itself.

Mr. KAVANAUGH. Senator, can I say one thing there?

Senator KENNEDY. Yes.

Mr. KAVANAUGH. I think the question there was about prior Government service in the administration with Justice White, and I just want to say—

Senator KENNEDY. It was generally about the, the question about legal experience. I mean, the fact is, on the average, judges appointed to the D.C. Circuit in the past three decades have over 20 years of experience—Justice Scalia, 22 years; Rogers, 30 years; Tatel, 28 years.

You have had just over 13 years of legal, counting your service as a law clerk. You have been a practicing attorney for only 10 years, and you have never tried a case.

Mr. KAVANAUGH. I have been—

Senator KENNEDY. I think the record is, when people were talking about or characterizing some of the concerns that people have up here about that background and experience and comparing them to the others, I just wanted to make—you can make whatever comment you want to make.

Mr. KAVANAUGH. I was going to say that Justice White is one of the justices—and people who know me know this well—who I have the most admiration for, in terms of his background, and his record, and how he conducted himself as a Supreme Court justice. He is one of the ones, maybe with Chief Justice Marshall, if you put aside the current Court, that I really think did a tremendous service to the Court.

And so when you mentioned Justice White, I just wanted to underscore that people who have known me for years know how much I talk about him, and I have read a lot of his—

Senator KENNEDY. Well, I appreciate that. I appreciate that. He was an extraordinary individual.

Let me come at this in a somewhat different way, and that is about the District Court, the D.C. Circuit Court and its importance to the millions of Americans. This court draws the opinions on the air we breathe, and the water, the cleanliness of the water the children are going to drink, whether workers will be safe on the job, can join unions without fear of reprisal, minorities will be free to work in the workplace without harassment.

So, for me, the nominees to this important Court must demonstrate a commitment to the core constitutional issues, but also to the statutory principles that protect these basic rights. Many of us have worked long and hard to get these rights, and we are not going to support, at least this Senator is not going to support someone that is going to undo them or vote to undo these parts.

And as you are familiar, in the sixties and seventies, the D.C. Circuit expanded public access to administrative proceedings, protected the interests of the public against big business. The Court enabled more plaintiffs to challenge agency decisions. It held that a religious group, as a member of the listening public, could oppose the license renewal of a television station accused of racial and religious discrimination. It held that an organization of welfare recipients was entitled to intervene in proceedings before Federal agencies, and these decisions empowered, at least from this Senator's

point of view, individuals and organizations to shine a brighter light on the governmental agencies.

Then, we have over the same period of time, for example, with the NLRB, which, as you know, guarantees a worker's right to join a union without discrimination or reprisal from employers, and the NLRB interprets the act, and those are appealable to the Circuit Court.

As a result, the D.C. Circuit is available as a forum to challenge the decision. In 1980, the D.C. Court fully enforced the Board's decision 83 percent of the time, at least partly enforced the Board's decision in all other cases. By the year 2000, when the Court had a 5-4 Republican majority, including a solid majority of Reagan and Bush appointees, the D.C. enforced it only 57 percent of the time and enforced at least part of the Board's decision just 70 percent of the time.

These enforcement statistics puts the D.C. Circuit significantly below the national average of 83-percent enforcement for the Board in all of the Courts of Appeals.

Now, I am concerned about your own kind of background, experience, commitment in these areas that affect working families and the national labor protections that are protected in this, and ask you what is your experience involving labor law?

Mr. KAVANAUGH. Senator, if I were to be confirmed as a judge, I would follow and enforce the laws passed by the Congress, signed by the President, faithfully, regardless of what position they took, faithfully enforce the environmental laws of this country and the workers' rights laws of this country, absolutely.

In terms of my background, it has been primarily in public service, in Government positions. In those positions, I have tried to work for the benefit of all of the people. I have had specific assignments in those and tried to do them to the best of my ability.

In private practice, I have represented a few institutional clients of the firm and also made sure that I did pro bono work and also did outside activities.

So I have not been involved in some of the areas that you have mentioned, but I have a range of experience, and I can commit to you that I will faithfully interpret all of the laws passed by this Congress.

Senator KENNEDY. Well, this is important. I mean, we passed the Americans With Disabilities Act. It took a long time to get there, a long time to make progress.

Mr. KAVANAUGH. That is right.

Senator KENNEDY. And we are seeing, at least for many of us who were very much involved in the passage of that, the gradually whittling away in terms of the rights and protections and this kind of—as someone who was very much involved in the shaping of that legislation, interpretations that are far beyond what was—in restricting these rights.

This is a very deep concern, since this is the Court. The Supreme Court, obviously, number one. This is the number one court in terms of interpreting Americans With Disability, the wide range of environmental acts. Many of us are deeply concerned by judgments, and decisions, and orders that this administration has taken with

regards to environmental, and these are going to be directly appealed to the District Court.

I see this red light on.

And the real concern that many of us have is what, in your background and experience, could give us at least some indication or show some sensitivity to these kinds of concerns, to these interests, to the issues on clean air and clean water, to the issues in terms of affecting the disabled in the society, to the concerns in terms of working families that they are going to get a fair shake. And that is, with all respect to it, I give great respect to a brilliant background, academic background, and I admire your commitment to public service, but this is something that is of concern.

My red light is on.

Mr. KAVANAUGH. I appreciate that, Senator. What the Committee is entitled to expect from a judge on the D.C. Circuit or any court is that that judge will follow the law passed by the Congress and signed by the President faithfully, and independently, and impartially. And I can commit to you, my public service has been in different areas than the few that you have mentioned, but I can commit to you that I will faithfully follow the law, and enforce the law in all respects were I to be confirmed to sit as a judge. And I think, although it has been in different areas, I have background with a wide range of experiences that I could bring, and it shows that I would do that, but I commit to you that I would.

Chairman HATCH. Thank you, Senator.

Senator SCHUMER, we will turn to you.

Senator SCHUMER. Thank you, Mr. Chairman. I appreciate the witness staying for a second round.

First, Senator Sessions described you as nonpartisan. Do you believe you are nonpartisan?

Mr. KAVANAUGH. I am a—

Senator SCHUMER. I do not mean how you will be as a judge. I mean, in your life, up to now, have you been nonpartisan?

Mr. KAVANAUGH. Let me explain that. I am a registered Republican. I have been a Republican. I have supported Democrats for office. I have contributed to Democrats for office. My background, family background, shows bipartisanship, I would say. But anyway, in my personal life, I have supported Democrats.

Senator SCHUMER. I am asking you do you consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself someone who, as a judge, would be independent—

Senator SCHUMER. I am not asking that.

Mr. KAVANAUGH. I know, and I am going to answer the question.

Senator SCHUMER. You are never answering my questions, sir, I have to tell you.

Mr. KAVANAUGH. Senator—

Chairman HATCH. I think he does. I mean, he said he is a Republican.

Senator SCHUMER. We will have to disagree.

I asked him if he considered—Jeff Sessions, Senator Sessions described as nonpartisan. I think that defies, I mean, we are in “Alice in Wonderland” here. I do not think anybody, I would say even you,

yourself, do not consider yourself nonpartisan. You treat the two parties equally. You are not involved.

I mean, let us talk, frankly.

Mr. KAVANAUGH. I am a Republican, and I work for President Bush—

Senator SCHUMER. You consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself—

Senator SCHUMER. If you are a Republican, and you have worked mainly for Republican causes, 99,999 people out of 100,000 would say you cannot consider yourself nonpartisan. Now, why is it so hard for you to say that?

Mr. KAVANAUGH. I guess I am concerned with how the term is being used. I am a Republican—

Senator SCHUMER. I am not asking are you unfair or fair. I am asking are you nonpartisan? Most of the judges we have voted for I doubt would say that they are or some of them, at least—you cannot go through all of them—would say some of them are partisan. You have had a more partisan record than any single nominee who has come before us, Democrat or Republican. You have been more active in more political causes, hot-button issues than anyone. Now, I am asking you to be, you know, to give a straight answer with this Committee. Do you consider yourself nonpartisan?

Mr. KAVANAUGH. I consider myself a Republican, and I support President Bush, and I have worked for him, and others can attach labels to it.

Senator SCHUMER. Let me ask another question.

The Committee for Justice, Boyden Gray's group, which very few consider nonpartisan, they have a distinct point of view; is that correct?

Mr. KAVANAUGH. I know that they support the President's judicial nominees. Beyond that, I do not know what they might do.

Senator SCHUMER. How often—did you go to a fund-raiser for them?

Mr. KAVANAUGH. I attended it was a party where I think it cost, and it might have been a fund-raiser, I do not know, but I think it cost \$20 or something.

Senator SCHUMER. Did you make a contribution?

Mr. KAVANAUGH. I do not think I did. I think I just went.

Senator SCHUMER. You just went, okay.

Mr. KAVANAUGH. It was a—

Senator SCHUMER. Do you think that was, if somebody is trying to be down the middle—

Mr. KAVANAUGH. Senator, can I say I will try to check on that, but I am pretty sure I just went to that. It was a Friday afternoon.

Senator SCHUMER. How often do you speak to Boyden Gray?

Mr. KAVANAUGH. I—

Senator SCHUMER. Once every 6 months? More than that?

Mr. KAVANAUGH. Less than that.

Senator SCHUMER. Less than that.

Mr. KAVANAUGH. He is, since—

Senator SCHUMER. How about Sean Rushton.

Mr. KAVANAUGH. Since I have been staff secretary, he would come—Boyden Gray—would come at times to meetings where

members of the administration would talk to outside groups, and he would be there at times.

Senator SCHUMER. How often have you—you have had a conversation with him less than once every 6 months?

Mr. KAVANAUGH. Well, since I have been staff secretary, I do not think I have talked to him at all, not since July of last year.

Senator SCHUMER. How about Sean Rushton?

Mr. KAVANAUGH. I am pretty sure I have not talked to him since July of last year either, and I—

Senator SCHUMER. How about before that?

Mr. KAVANAUGH. I do not think I talked to him much. I think, again, he was in the groups sometimes, but not often. He would come to those meetings where we would talk about the President's judicial nominees. There were people who would come, and we would provide information about them.

Senator SCHUMER. How often, over the 4 years, say, you have been in the White House?

Mr. KAVANAUGH. On the phone or in person?

Senator SCHUMER. Either one. I did not qualify it.

Mr. KAVANAUGH. Very rarely.

Senator SCHUMER. Even by signals. Signals would be included.

[Laughter.]

Mr. KAVANAUGH. Rarely. I think the one thing I want to be careful, the one caveat I will say, is I think he has a mass e-mail list or had one that would sent out these mass e-mails of newsletters. So, if those are counted, then that would be more, but not in terms of personal communication.

Senator SCHUMER. Now, I asked you another question, and you are under oath, I asked you had you ever in your course in vetting judges used the word "too liberal." You said you could not recall. Have you ever heard others use the word "too liberal" who were White House employees?

Mr. KAVANAUGH. Senator, I think with respect to discussions of nominees, it is not my place to go into internal discussions of character—

Senator SCHUMER. You do not want to answer the question?

Mr. KAVANAUGH. I do not think it is my place to talk about—

Senator SCHUMER. Why not? You have maintained—

Mr. KAVANAUGH. I think it is Judge Gonzalez's—

Senator SCHUMER. —and we have heard maintained that ideology does not enter into any discussions or vetting. So, counselor, you have opened this line of questioning up. I am asking you something that would prove that one way or the other, and that is because liberal is an ideological term.

Have you heard people use the term "too liberal," yes, no or you do not want to answer?

Mr. KAVANAUGH. I think that is—I am going to answer that in part—but I think it is a question that is not my place to answer, but it should be directed to Judge Gonzalez. But in terms of—I want to say this, though.

Senator SCHUMER. You are the nominee, not Judge Gonzalez.

This is the first time that you are sort of stepping out on your own, in a certain sense, you know, except when you did maybe those pro bono activities that you volunteered for. So we want to

know your views, not Judge Gonzalez's, not George Bush's. You are going to have a lifetime appointment should you get this nomination, okay? So I am not asking—if Judge Gonzalez were here, I would ask him the same question. You are the nominee. Now, have you heard the words used?

Mr. KAVANAUGH. Senator, it is not my place to disclose the internal communications—

Senator SCHUMER. Okay. You do not want to answer.

Mr. KAVANAUGH. —but there are people who have been too political in the judgment—

Senator SCHUMER. I did not ask that question. I asked you have you heard the term used by others or used yourself “too liberal”?

Mr. KAVANAUGH. And I was going to say I have heard, and I know that there have been people who have been judged to be, who could not shed, in the judgment of people there, personal beliefs to be fair and impartial judges, and shorthand could have been used to describe those—

Senator SCHUMER. Did you ever use it?

Mr. KAVANAUGH. —on either way.

I do not recall using it.

Senator SCHUMER. Next question: We have talked about judicial activism here. Would you like to define what you think is judicial activism?

Mr. KAVANAUGH. Yes, Senator. I think judicial activism is when a judge does not follow the law before him or her, but instead superimposes his personal beliefs on the decisionmaking process.

Senator SCHUMER. Fair enough. When Judge Brown says that she believes *Lochner* was correctly decided and when she says that San Francisco should not have any zoning laws, is she being an activist?

Mr. KAVANAUGH. I am not familiar with all of her statements, but I will say—

Senator SCHUMER. You said you vetted judges for California. You didn't vet her?

Mr. KAVANAUGH. I wasn't involved in—

Senator SCHUMER. Well, let me tell you she said repeatedly both in court decisions and in conversation that *Lochner* was correctly decided. I think it is about 70 years ago that that doctrine was discarded. It meant you couldn't pass any kinds of labor laws because—is that being an activist, yes or no?

Mr. KAVANAUGH. Can I take a minute to answer the question?

Senator SCHUMER. Yes, surely.

Mr. KAVANAUGH. Senator, first of all, I want to clarify that I am familiar with Judge Brown's judicial record. I am not familiar with her speeches. So I just want to clarify that.

Senator SCHUMER. It was in one of the decisions—I don't remember the name of the decision—it was in one of the decisions she dissented from. You are not familiar with it?

Mr. KAVANAUGH. I don't remember that phrasing. I am familiar with her judicial record, although it has been a while, but I am familiar with some of her judicial record.

As to your question of examples of judicial activism, I think *Lochner* is often cited as a classic example of judges superimposing their personal views on the decisionmaking process in an improper

manner. The case has been discredited. The case isn't followed any longer.

Senator SCHUMER. So that means it would seem that that is being an activist to want to undo *Lochner*, undo zoning laws.

Now, I want to ask you this. I don't like activists on either side.

Mr. KAVANAUGH. Right.

Senator SCHUMER. Your administration and you in this process seem to say that activism on the right is just fine. After all, Judge Brown was sent here. And activism on the left is activism. How can you discourage us from believing that?

Clearly, many of the judges you have set forward do not believe in what is established law. And, again, it is not that they wouldn't as judges—every judge who comes before us says, I will be fair. We all have to take that with a grain of salt, obviously. We have to make our own judgment, not just their assertion.

Yet, we see a nominating process skewed hard to the right. And then when Jeff Sessions, whom I enjoy bouting with here, says, well, I am talking about activist judges, activist means nothing more than conservative because Judge Brown is as activist as they come. She wants to turn the clock back a hundred years.

Did you have any dissent in the office when they nominated her? How do you square the view that it is okay to nominate Justice Brown and she is okay, but others are activists whose views are more to the left? I mean, I would just like some understanding here because I think it is code words. Activist means liberal; strict interpretation means conservative. The nominees we have had before us are clearly not interpreting the law. They believe they should interpret the law as it was 100 years ago or 200 years ago.

I will give you a few minutes to elucidate on this. It seems to me the whole process is a subterfuge, basically.

Mr. KAVANAUGH. Senator, the President's nominees, the majority of them, the vast majority, have been approved by this Committee and supported by both sides of this Committee, and confirmed by the Senate. There have been some examples where that hasn't occurred and there have been debates about their records. But in terms of the description of the nominees as a general class, it is important to make that point.

They are also, as I understand it, the highest rated nominees ever under the ABA's rating standards.

Senator SCHUMER. Do they look at activism or non-activism when the ABA judges? No. You know that.

Mr. KAVANAUGH. They look at the traditional criteria for—

Senator SCHUMER. Right, law school, right. Many of us have broken with that tradition. The President has forced us to because he has nominated judges through an ideological prism. It is obvious.

So I want to ask you again, why is it, if ideology doesn't matter and the President is just—do you think Democrats or liberals are less likely to interpret the law fairly—just interpret the law, than conservatives?

Mr. KAVANAUGH. Senator, I think this is an important question. And I mentioned earlier, but I am not sure you were here, it is tradition since the founding of our country for Presidents to select judicial nominees from the party of the President.

Senator SCHUMER. That is not the question I asked.

Mr. KAVANAUGH. But I want to help explain. And so President Bush—most of his nominees, not all by any stretch, are Republicans. President Clinton—most of them were Democrats, their backgrounds, their political affiliations. That has been the way. It doesn't have to be that way, but it has always been that way, and that is the tradition that has—

Senator SCHUMER. And do you think there were ideological differences as a whole between the Clinton nominees and the Bush nominees?

Mr. KAVANAUGH. I think there were policy differences in their backgrounds. I don't know in terms of ruling on the bench. I do know on the Ninth Circuit, for example—

Senator SCHUMER. Well, have you seen Cass Sunstein's study? You don't know that study?

Mr. KAVANAUGH. I do.

Senator SCHUMER. Okay. Doesn't it show that Democratic nominees, particularly on economic and environmental and other issues, decide things quite differently than Republicans, and that the difference is stark?

Mr. KAVANAUGH. Senator, I know that that study has been challenged as to its accuracy, as well.

Senator SCHUMER. Can you give me a yes or no answer to any question? I apologize, but you haven't answered it. I asked you simply is that what Sunstein's study shows?

Mr. KAVANAUGH. I am told—

Senator SCHUMER. If you said, yes, but let me say that it has been challenged, I would appreciate that a lot more than refusing to answer just about a single question that any of us have asked.

Mr. KAVANAUGH. Yes, but it has been challenged.

Senator SCHUMER. Thank you.

Mr. KAVANAUGH. And it has been challenged because the sample was under-representative, and I think the Ninth Circuit is a good example, Senator. My understanding—and I am familiar only at the margins with this now—is that the range of President Clinton's nominees, for example—there is a wide range of views represented in his nominees and in President Reagan's nominees on that court, and that some of President Reagan's nominees joined with some of President Clinton's nominees.

And the reason for that, Senator—and it is something I firmly believe and I think it is important—is there should be no such thing, and there hasn't been such a thing as a Republican judge or a Democrat judge. And I think it is very important that we maintain that in our system.

Senator SCHUMER. So why do we see virtually very few—if ideology doesn't matter and if we are just nominating people on legal qualifications and their ability to interpret the law—and when I asked you the question, you basically acknowledged that Democrats and Republicans could interpret the law equally.

Mr. KAVANAUGH. Yes, I agree firmly with that.

Senator SCHUMER. Why is it that one-third of the nominees here are from the Federalist Society, one of the most conservative groups in town? And everyone knows that. You are telling me Judge Scalia is no more conservative than Justice Ginsburg if you

don't acknowledge that the Federalist Society is an extremely conservative group.

Chairman HATCH. Senator, I have been very lenient on the time.

Senator SCHUMER. Yes, you have, Mr. Chairman.

Chairman HATCH. You are way over.

Answer that question, and then we will turn to Senator Kennedy and then I will sum up.

Mr. KAVANAUGH. Well, I think there were two questions there. One, in terms of why most of the nominees of a President are of the same party, that is the tradition.

Senator SCHUMER. I didn't ask party; I asked ideology.

Mr. KAVANAUGH. Okay, but then the study refers to Democrat judges and Republican judges, which is party. So I think the study you cited as evidence of ideology actually is party.

Senator SCHUMER. So you don't think ideology enters into President Bush's selection of judges, particularly at the court of appeals level, at all?

Mr. KAVANAUGH. I think it is critical to have people who have demonstrated experience and—

Senator SCHUMER. I didn't ask that question. Can you answer yes or no?

Chairman HATCH. Senator, this isn't a court of law. He ought to be able answer the question.

Senator SCHUMER. He ought to be able to.

Chairman HATCH. And if you don't like the answer, rephrase another question.

Senator SCHUMER. Okay, I will.

Mr. KAVANAUGH. It is important that the judge or judicial candidate demonstrate both in the interview process and in his or her record an ability to follow the law fairly, and you judge that based on an assessment of the entire record.

Senator SCHUMER. And so ideology has not entered one iota into President Bush's selection of court of appeals nominees. Is that correct? Do you believe that?

Mr. KAVANAUGH. I am not sure how you are defining ideology.

Senator SCHUMER. I am not asking you whether people can judge the law fairly. We have been through that part of this discussion. I am asking you as someone intimately involved with the process, has ideology at all entered into the nomination of judges by President George Bush to the court of appeals?

Mr. KAVANAUGH. Can I ask you how you are defining ideology in that question?

Senator SCHUMER. I am defining ideology by their predispositions on the issues that face the day. And I am not asking you whether you asked them or not. It is plain as the nose on your face, sir, that the nominees don't come from across the political spectrum; they come from one side of the political spectrum. Everyone in this room would admit that.

Chairman HATCH. Not I. That isn't true. That is not true.

Senator SCHUMER. How many ACLU members have been nominated by President Bush?

Chairman HATCH. There have been a few, I have got to say.

Senator SCHUMER. I disagree with the ACLU on a whole lot of things.

Chairman HATCH. Well, so do I.

Senator SCHUMER. But the Federalist Society has one-third and the ACLU probably has none. You are denying the obvious, I guess is what I have said.

Chairman HATCH. Senator, come on. We have got a conservative President. He naturally is trying to find people who agree with his philosophy.

Senator SCHUMER. Orrin, thank you. I was trying to get Mr. Kavanaugh to say that for the last 15 minutes.

Chairman HATCH. I think he has been saying it. He just hasn't said it in the words you want to hear. That is all.

Senator SCHUMER. Okay.

Mr. KAVANAUGH. But in terms of judges who will apply the law without their personal predisposition on the issues, that is exactly what the President has said he is looking for, and that is your definition.

Senator SCHUMER. It seems to me—and I will conclude, Orrin, thank you.

Chairman HATCH. Okay.

Senator SCHUMER. It seems to me and to just about everyone else, not judging whether they would apply the law despite their predisposition on the issues, that predisposition on the issues, for one reason or another, has greatly influenced who the nominees are because they come from a rather narrow band of political thinking by and large.

With that, Mr. Chairman—

Chairman HATCH. Well, with that, I just have to make this comment before I turn to Senator Kennedy. I have been here for the Carter judges, for the Reagan judges, the Bush I judges, the Clinton judges, and now George W. Bush's judges. Every one of those Presidents tried to find people who shared their philosophy.

I have got to say Carter appointed basically all Democrats, with very few exceptions. Reagan basically appointed all Republicans, very few exceptions, and the same with the others. The fact of the matter is, of course, they are trying to find people who share their philosophy. That is why they ran for President.

This is the third of the separated powers of Government. It is one of the biggest issues there is, whether we are going to have liberals on the courts throughout the country or conservatives, or a mixture of both.

Having sat here through all of the George W. Bush's 173 confirmed judges, 29 that are on the executive calendar reported out of this Committee sitting there vegetating, I have to say that there is a wide variety—yes, more on the moderate to conservative side, but a wide variety of judges.

Now, look, I think where you have had trouble is with the word "partisan," and I would, too, if I were in your shoes.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Just quickly, I will mention, since this topic has come up, President Clinton nominated several individuals to both the circuit and district courts with no close ties to him or other Democrats who were championed by Republican Senators because they were either

registered Republicans or close friends of Senators of the other party.

For example, Richard Talman was nominated to the Ninth Circuit and confirmed at the urging of Republican Senator Slade Gorton. Judge Barry Silverman was nominated to the Ninth Circuit and confirmed at the request of Jon Kyl. Judge William Traxler was put on the district court by President Reagan and 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 Connie Mack.

Did you ever consider that some nominees who were Democrats should be nominated?

Mr. KAVANAUGH. I think, Senator, President Bush has chosen to nominate some Democrats for a variety of seats, as I understand it. I know in his first group of nominees, Roger Gregory was nominated, along with others. I know that in Pennsylvania—I just know more of the States that I worked on at the district court level—there were several Democrats, and some very strong Democrats, nominated for district court seats in Pennsylvania that I worked on and helped through the process. So there have been some Democrats. I am sure there are others, but I can't recall them all here.

Senator KENNEDY. Let me, if I could, ask you about your role in the vetting process, and particularly with regard to William Pryor. The requirement that appellate judges follow the Supreme Court is a bedrock principle, but Mr. Pryor repeatedly criticized decisions of the Supreme Court in ways that raise serious questions about whether he would follow those decisions.

He called *Roe v. Wade* the worst abomination of constitutional law in our history. He criticized the Supreme Court's decision in *Miranda v. Arizona*. He referred to the members of the Supreme Court as nine octogenarian lawyers.

When you recommended Mr. Pryor for nomination to the Eleventh Circuit, were you aware that he had made these extreme statements? And if so, do they cause you any concern?

Mr. KAVANAUGH. Senator Kennedy, I know President Bush nominated Mr. Pryor. And Judge Gonzales, of course, chairs the judicial selection committee. That was not one of the people that was assigned to me. I am familiar generally with Mr. Pryor, but that was not one that I worked on personally.

Senator KENNEDY. Well, did you know those remarks had been made prior to the time that he appeared before the Judiciary Committee?

Mr. KAVANAUGH. Senator, can I answer that this way? It is not my place to discuss our internal deliberations, but it is safe to assume that we have done a thorough vet of the nominee's records.

Senator KENNEDY. Well, if you agree it is important that judges obey the precedent, why didn't you recommend against Pryor's nomination? Why take the chance that he might seek to undo an important legal precedent such as *Roe v. Wade*?

Mr. KAVANAUGH. Senator, again, the President nominated Bill Pryor. I know he has got a lot of Democrat and Republican support in Alabama, support in his home State community. In terms of in-

ternal discussions, I don't think it is my place to talk about those here.

Senator KENNEDY. Well, I know you are talking here about the background discussions, but once you have the nominee and you are involved in the process where he calls a case the worse abomination of constitutional law in our history, criticizes the *Miranda* case and refers to the Supreme Court as nine octogenarian lawyers—you are involved in the vetting process. Whether you did anything at all about it, I gather you say that you did not.

Mr. KAVANAUGH. No, I was not involved in handling his nomination. I do know he explained that in his hearing, and I will leave it at that.

Senator KENNEDY. After the Supreme Court decision of five-to-four in *Bush v. Gore*, Mr. Pryor said that he—this is Mr. Pryor—wanted the decision to be decided five-four so that President Bush would have a full appreciation of the judiciary and judicial selection so that we can have no more appointments like Justice Souter.

Did you know about Pryor's criticism of Souter?

Mr. KAVANAUGH. Senator, again I think it is safe to assume that the record was fully vetted and fully known.

Senator KENNEDY. So you weren't involved in any of the vetting, as I understand it, of Mr. Pryor. Is that right?

Mr. KAVANAUGH. No. I know him and I have met him before, but it wasn't one of the—the way the work is divvied up, that wasn't one of the ones I—

Senator KENNEDY. Well, did you know about his involvement with the Republican Attorney Generals Association?

Mr. KAVANAUGH. I actually—I think I heard that for the first time the day before his hearing, but that doesn't mean it wasn't known. I am just talking about what I—you asked me about my personal knowledge.

Senator KENNEDY. Did you ever discuss that subject with Mr. Pryor or anyone before his hearing?

Mr. KAVANAUGH. Again, Senator, it is not my place, I think, here to disclose internal communications, but the background record of someone is vetted before nomination.

Senator KENNEDY. So your response with regard to the Attorney Generals Association is that you didn't know anything about it prior to the time of the hearing?

Mr. KAVANAUGH. Yes. Again, it is not for me to discuss internal deliberations. The record, I am sure, was fully known. Someone's background is fully vetted before nomination, and so it is safe to assume that people knew about involvement in various organizations.

Senator KENNEDY. Well, did you prepare him for his testimony on that subject?

Mr. KAVANAUGH. I don't remember preparing for his testimony on that subject. I might have attended a moot court session, but I don't know—that subject might—I don't know. I might have attended a moot court session. Oftentimes, we will go to moot courts to prepare nominees for hearings to prepare them for this process.

Senator KENNEDY. Well, I think you just said that you didn't know about this until the day before his testimony. Did that come up during the moot court session?

Mr. KAVANAUGH. I think there were news articles, I think, if I recall. But I want to be careful, Senator. I don't recall precisely when—

Senator KENNEDY. Well, I am just wondering whether this did come up during the preparation of the nominee.

Mr. KAVANAUGH. Again, Senator, it is not for me here, I think, to disclose internal discussions and deliberations. Someone's record is thoroughly vetted before nomination. In terms of internal discussions, what I was referring to by that is I remember a news article at some point reading, but I can't place it in time. If I saw the news article in relation to his hearing, I might be able to place it better.

Senator KENNEDY. Well, the Washington Post had reported that RAGA was founded by Pryor and the Republican National Committee, with the explicit aim of soliciting funds from the firearms, tobacco and paint industries and other industries facing State lawsuits over cancer deaths, lead poisoning, gunshot wounds and consumer complaints, according to statements by Pryor and other officials. That was in the newspaper.

I am trying to find out, if you knew about this, what you did about it, if you did anything about it. And if you didn't do anything about it, then you didn't do anything about it, but once you found out about it, whether you thought that it was important enough to do anything about it. Did you ask the FBI to check it out or do anything further about it? Did you ask the FBI to investigate, or did you discuss it with Pryor or anyone else? That is what we are trying to find out. These are serious charges, obviously.

Mr. KAVANAUGH. Senator, I think that issue was explored at his hearing, as I recall, and that probably would be the best record of the issue.

Senator KENNEDY. Well, I know he was here, but I am just trying to find out the information that you all had about it. He was asked if he ever solicited funds from corporations with business before the State and he replied he did not think so. He told the Committee that the RNC had all the records regarding corporate contributions raised by RAGA.

So the question is you must have had, or someone or prepped him must have had the conversation and know about those records before he came to the Committee. The evidence received by the Committee indicated that Mr. Pryor had repeatedly been assigned to make RAGA fundraising solicitations of the type he denied making. That is the issue.

So did you or anyone you were working with receive copies of the evidence before it was leaked to an Alabama columnist friendly to Mr. Pryor? And did you or anyone you were working with leak any of the material, or do you know of anyone who did?

Mr. KAVANAUGH. Senator, I know very little about this. You know far more than I do about it, and I think it was explored at the hearing. I don't know enough to give you much of an answer on that. I don't know much of anything specific about that.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman HATCH. Well, let me just say with regard to that the materials were leaked by a former employee of the organization who basically, according to the record, stole the materials. By the way, the Democrats set up their own Democrat Attorney Generals

Association to compete with the Republican one. So, you know, you can find fault on both sides as far as I am concerned.

I think what you have had trouble with here is the word “partisan” and the word “ideology.” I wouldn’t have answered those questions either, to be honest with you. What bothers me about this hearing is that much of the hearing has been spent attacking other Republican nominees, not you, other Republican nominees. And in every case, I think their records have been distorted.

When General Pryor was asked why he said the *Roe v. Wade* case was an abomination, I mean he answered it very forthrightly. He said, if I recall it, because of the millions of unborn children who were killed. Now, people may not agree with that assessment, but it was a sincere statement and certainly a matter of fact, whether you agree with the nature of it.

With regard to *Lochner* and Janice Rogers Brown, I certainly don’t remember it the way Senator Schumer does. As a matter of fact, she gave a speech and it was tremendously distorted here in this Committee. It bothered me a great deal, to be honest with you.

Now, let me just say a few other things here with regard to ideology, and Professor Sunstein’s study has been brought up. Let me just make a few basic observations. First, there is no doubt that in the vast majority of cases there is a unanimous result from the court throughout the country.

You agree with that, don’t you?

Mr. KAVANAUGH. And especially in the D.C. Circuit.

Chairman HATCH. Well, that is right. The law is clear and the application of the law is straightforward. Professor Sunstein attempts to explain the context in which Democratic and Republican appointees largely agree by noting that in many areas the law is clear and binding, and that judges appointed by different Presidents largely agree on the appropriate principles. Ideology apparently doesn’t matter in those cases.

We don’t hear much about these cases, probably, because they don’t lend themselves very well to charged political speeches or questions, or emotional fundraising appeals from the usual suspects. But the fact remains that these cases make up the lion’s share of Federal court jurisprudence.

Do you agree with that?

Mr. KAVANAUGH. Excuse me, Senator?

Chairman HATCH. The cases that basically both sides agree on?

Mr. KAVANAUGH. Absolutely, Senator. In the D.C. Circuit, I think, in response to the Sunstein article, there were some responsive articles that both, number one, attacked the methodology that Mr. Sunstein used, and, number two, pointed out how many cases were unanimous in the D.C. Circuit. And I think that is because the culture of the D.C. Circuit and the people who are on that court are outstanding judges.

Chairman HATCH. That collegially work together.

Mr. KAVANAUGH. Right.

Chairman HATCH. Which you would do, as well, once confirmed.

Mr. KAVANAUGH. Absolutely.

Chairman HATCH. Now, Professor Sunstein is a brilliant professor. I have a lot of respect for him, but there is no question he is a brilliant liberal professor. His study does not examine large

areas of case law, including torts, bankruptcy, labor law and civil procedure. Those are serious liabilities to the study, and I think anybody who is fair would say that.

Second of all, it is difficult to understand several of the methods used in Professor Sunstein's study. For example, he counts a vote as pro-life if the judge voted at all to support the pro-life position. Why this is done is certainly not clear.

Thus, if a judge votes to strike down part of an injunction against demonstrations near an abortion clinic, his or her vote is pro-life. Well, we know there are different issues there. Of course, a judge casting such a vote is likely relying on First Amendment principles of free speech, but the study takes no apparent accounting of that fact. Instead, it simply counts as pro-life. I would suggest that such a vote may be better counted as pro-free speech or pro-civil liberties, but that isn't the way he did it.

Third, it may come as a surprise to some that Professor Sunstein's study reports that ideology does not matter where some might like to see it. For those who would like to argue that ideology, which Professor Sunstein's study crudely, and I think simplistically derives from, the political party of the appointing President, is especially important in the D.C. Circuit because of the types of cases it hears.

The study shows something else. We hear a great deal from the liberal interest groups about Republican appointees casting extremist anti-environmental votes in taking cases. Unfortunately, Professor Sunstein's study shows no differences between Republican- and Democratic-appointed judges in terms of how their votes are cast.

We also hear so much about how Republican appointees threaten to, quote, "roll back the clock," unquote, or, quote, "take us back to the 19th century," unquote, on civil liberties. But I don't expect these groups to cite Professor Sunstein's study on this point. He examined criminal appeals cases in the D.C. Circuit, the Third Circuit and the Fourth Circuit. Again, there was no difference in how Republican- and Democratic-appointed judges cast their votes either for the Government or for the criminal defendant. And I suspect there is not going to be much more difference when you get on the court.

I also don't expect the usual interest groups to cite Professor Sunstein's study to argue that Republican appointees are striking down Federal statutes on federalism grounds left and right, day and night. Again, there was no difference in Republican- and Democratic-appointed judges in the way that they voted. Both groups have upheld challenged statutes against federalism or Commerce Clause challenges more than 90 percent of the time.

You are aware of that; I know you are.

Those who would like to argue that Republican- and Democratic-appointed judges vote differently in race discrimination cases will also be severely disappointed by Professor Sunstein's study. There is no such evidence. It seems that ideology matters, except when it doesn't.

So I don't blame you for being wary of questions that say yes or no on ideology. Give me a break.

Mr. KAVANAUGH. Mr. Chairman—

Chairman HATCH. Now, let me just finish here because I want to make a couple of these points before we finish here today because I don't think you have been treated very fairly with some of the questions. In fact, I think you have been treated anything but fairly, and you have had patience, have showed good judicial temperament. You have taken all this stuff and answered as best you can back, and I think you have answered very well.

Now, objections to your nomination based on a supposed lack of experience ring pretty hollow to anybody who is fair. First, there is no doubt in my mind that if you had worked in the Clinton White House defending the former President in the various legal battles surrounding the impeachment proceedings, you would be the toast of the national media. And, of course, my Democratic colleagues would be falling all over themselves to support your nomination. That is just a matter of fact.

They would point out that Mr. Kavanaugh has achieved their, quote, "gold standard," unquote. They were the ones who said the ABA rating was the gold standard, the "well qualified" highest rating by the American Bar Association standard given to you.

They might observe that Mr. Kavanaugh has argued both civil and criminal matters before the United States Supreme Court—something that almost none of these other judges that have been put on the bench have done, in both civil and criminal matters before the Supreme Court and appellate courts throughout the country. You have had that experience.

I would just further note your extensive experience in the appellate courts both as a clerk and as a counsel. Those are important positions. Very few people have that opportunity to serve in those areas. You have got to be really somebody special to get those positions. I know it, you know it, my colleagues know it.

They would say that it is remarkable that Mr. Kavanaugh served as a law clerk to not one, but two Federal judges—Judge Walter Stapleton, of the U.S. Court of Appeals for the Third Circuit, and Judge Alex Kozinski, of the U.S. Court of Appeals for the Ninth Circuit.

And then I think any respectful, honest person would praise you, Mr. Kavanaugh, for your service as a law clerk to the United States Supreme Court for Justice Anthony Kennedy, the author of last year's *Lawrence v. Texas* decision, with which I am sure most all of our Democrat friends agreed.

Now, if any Republicans were to question Mr. Kavanaugh's qualifications for the D.C. Circuit, if you were their nominee and you had worked in the Clinton White House, they would certainly point out that 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.

You have had more judicial experience than them by having been a clerk on major courts, having watched how judges operate, having helped them write the opinions, having done the research for them. 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.

Judge Edwards, by the way, was 39 years of age when I helped to confirm him, the same age as you. He didn't have quite the same

experience as you do, but he is a fine man and he has been a good judge there. And I don't think any of us can really legitimately find a lot of fault. We may disagree with some of his decisions, but he is a good man.

Also, the current Chief Judge of the Ninth Circuit, Judge Mary Schroeder, was nominated by President Carter and confirmed at the age of 38. So let's not pretend that the expressed concerns about Mr. Kavanaugh's age or experience are anything more than thin pretexts veiling purely political objections. Democrats would never raise such concerns about a nominee of similar age and experience if he or she had litigated across the courtroom aisles from Mr. Kavanaugh.

Finally, let me just point out that President Clinton nominated and the Senate confirmed without a single filibuster, which is what we are putting up with right now—I know; I was Chairman during much of President Clinton's term—a total of 32 lawyers with any prior judicial experience to the Federal appellate courts. Some of these have turned out to be very good judges, and I would be the first to say it.

I have to admit that I get tired of the partisanship in this body. The very people who are trying to use the terms "partisanship" and "ideology" are the ones who are filled with it. Frankly, they have a right to be. I don't have any problem with that. But to try and impose that on you just because you belong to the Federalist Society—I do, too. I am on the board of whatever it is, and all I can say is that I know that it puts on the best seminars in the country right now.

The Board of Advisers. I guess I had better be clean on this. I might be held to account to that someday.

Senator SCHUMER. Only if you are nominated.

Chairman HATCH. Don't worry. I am not so stupid that I would go through this.

See how dumb you are? I just can't believe it.

My point is this: Every President tries to appoint persons who share that President's political philosophy. That is why these presidential elections are so important. Frankly, those who are very liberal naturally will want a liberal President. Those who are conservative are going to naturally want a conservative President in this country.

And you can expect when you get that liberal President that that liberal President, as was the case with Jimmy Carter, in particular, and in the case of President Clinton, will nominate primarily people who agree with his liberal philosophy. And that is going to be true of President Reagan, President Bush I and President Bush II. They are going to try and nominate people of quality, hopefully people like you who have "well qualified" ratings or "qualified" ratings, which is no small thing, who then will serve with distinction on the bench.

Now, let me just close with this final remark. I think you have handled yourself very well here, when you consider some of the tough questions. And my colleagues have a right to ask these questions. I am not finding fault with them. I disagree with the way some of these questions have been asked and I disagree with some of the fairness, because I think some of it was not fair.

I disagree with Senator Kennedy when he brings up Justice White. We all know Justice White was a great Justice. Nobody was saying that he wasn't a great Justice, or not qualified. It is just that he didn't have some of the experience that they claim you don't have, although you have had a lot of experience in the courts that I don't think they are giving you much credit for.

Take Ruth Bader Ginsburg, or take Justice Breyer. Yes, he was one of the leading authorities on antitrust in the country. He served as chief counsel of this Committee when Senator Kennedy was Chairman. I recommended him to President Clinton, but I don't think he had ever tried a case in his life. I am not sure he would know how to try one, had he had a chance. He is smart enough and I am sure he would have figured it out, but he hadn't had any experience in that area.

I happen to really admire him. I happen to think he is a great man; I thought he was when he was chief of staff. He was fair, he was honest, he was decent. That is one of the reasons why I recommended him to President Clinton, and everybody knows that who knows anything about it.

The point is some of these straw issues are brought for only one reason, to try and make nominees look bad or to try and make nominees look like they are not qualified, when, in fact, you are eminently qualified. The fact that you are 39 years of age—you know, that is not exactly young anymore in the eyes of some people. In my eyes, it is very young. In Senator Kennedy's eyes, it is very young. But to other young members of the Senate, you are pretty old.

Hardly anybody who has been nominated to these courts has had the experience that you have had. Now, to sit here and say that you have got to have every aspect of experience to serve on the courts that nobody really has had is a little bit unfair and smacks a little bit of, should I use the word "partisanship?"

I want to say I think you have done very well. I hope my colleagues on the other side will give you a fair shake. If they will, they will pass you out of this Committee and they will confirm you to the Circuit Court of Appeals for the District of Columbia, where I suspect you will become one of the great judges. I suspect that they will find that you will be one of the most fair judges ever to sit on that court, and I suspect you will be one of those judges who will understand those very complex and difficult issues that Senator Kennedy has so eloquently described.

If I didn't think that, I wouldn't be for you. It is just that simple. I wouldn't, because this is in one respect the most important court in the country because it does hear cases that the Supreme Court will never hear, thousands of cases the Supreme Court will never hear, because of the limited number of cases the Supreme Court takes.

The Supreme Court naturally is the more important court, but the fact of the matter is this court is extremely important. And I have every confidence, knowing you—and I have known you for a long time—that not only can you do this job, but you can do it in an honest, fair way, and that you know the difference between an activist judge, one who just ignores the law and does whatever his or her personal predilections dictate, and a real judge who does

what is right and who looks at the law and lives within the law, as defined by the legislative body, and perhaps through executive orders of the President and, of course, by prior decisions by the United States Supreme Court.

I admire my colleagues on this Committee. They are a tough bunch. I love my friend from New York. There is no question about it. He gets on my nerves terribly from time to time with some of this stuff that he comes up with, but the fact of the matter is I care a great deal for him. And he is sincere on this; he really believes in what his position is. He is nuts, but he believes it.

[Laughter.]

Chairman HATCH. All I can say is that I respect him and I respect the other members of this Committee, but I hope they will be fair and give you this shot that you really deserve. And I will guarantee you I will be watching just like they will to make sure that you are one of the best judges in the country, and I believe you will be.

With that, we will adjourn until further notice.

[Whereupon, at 1:22 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

**Brett M. Kavanaugh**  
3633 M Street, N.W., #3A  
Washington, DC 20007

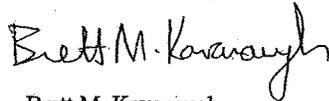
November 19, 2004

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

Dear Chairman Hatch:

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

Sincerely yours,



Brett M. Kavanaugh

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

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

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

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

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

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

Response: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: See response to question 21.

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

Response: See response to question 21.

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

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

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

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

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

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

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

Response: See response to question 25.

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

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

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

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

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

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

Response: See response to question 25.

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

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

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

Response: See response to question 28.

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

Response: See response to question 28.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response to questions 33-58:

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

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

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

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

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

**I. FOLLOW-UP ON QUESTIONS AT THE HEARING**

**A. THE DEMOCRATIC COMPUTER FILES**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**In addition to the above:**

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

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

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

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

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

Response: See my response to IA.

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

Response: See my response to IA.

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

Response: See my response to IA.

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

Response: See my response to IA.

#### **B. FEDERALIST SOCIETY**

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

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

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

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

**C. PRYOR NOMINATION**

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

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

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

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

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

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

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

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

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

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

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

**D. LEGAL EXPERIENCE AND ROLE IN JUDICIAL NOMINATIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

## **II. OTHER ISSUES**

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

**A. CIA LEAK INVESTIGATION**

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

Response: No

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

Response: No

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

Response: No

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

Response: No

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

Response: No

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

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

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

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

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

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

**B. BARRIERS TO ACCESS TO 9/11 INFORMATION**

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

Response: I did not work on this matter.

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

Response: I did not work on this matter.

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

Response: I did not work on this matter.

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

Response: I did not work on this matter.

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

Response: I did not work on this matter.

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

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

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

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

Response: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**A. Do you believe that affirmative action constitutes a "racial preference"?**

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

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

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

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

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

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

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

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

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

**as Regional Coordinator.**

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

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

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

## SUBMISSIONS FOR THE RECORD



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FOR IMMEDIATE RELEASE

April 27, 2004

**CORNYN INTRODUCES BRETT KAVANAUGH  
IN JUDICIARY COMMITTEE HEARING**

WASHINGTON—*U.S. Sen. John Cornyn, Chairman of the Judiciary Committee's Constitution subcommittee, introduced Brett K. Kavanaugh, nominee for the U.S. Court of Appeals for the D.C. Circuit, at his nomination hearing in the Judiciary Committee on Tuesday.*

*--Below is the text of Sen. Cornyn's introduction of Brett Kavanaugh as prepared--*

Mr. Chairman and Ranking Member, I am privileged to introduce to the committee Brett Kavanaugh – a distinguished attorney and devoted public servant. I have known Brett for several years, and I have had the privilege of working with him on a case I argued to the US Supreme Court, so I have been able to observe his legal skills from up close. I have every confidence that Brett would be an exceptional jurist on the U.S. Court of Appeals for the D.C. Circuit. His distinguished academic and professional record confirms beyond all doubt that he possesses the intellectual ability to be a federal judge. His temperament and character demonstrate that he is well suited to the office. Indeed, I can think of no better evidence of his sound judgment than the fact that he has chosen to marry a good woman from the great state of Texas. Brett deserves the support of this committee, and the support of the United States Senate.

As you know, Mr. Chairman, one-fourth of the active D.C. Circuit court is currently vacant. And as you also know, Mr. Chairman, the D.C. Circuit is unique amongst the federal courts of appeals. Of course, the D.C. Circuit is an appellate court, not a trial court. Appellate judges do not try cases or adjudicate factual disputes – instead, they hear arguments on legal issues. But unlike the docket of other courts of appeals, the docket of the D.C. Circuit is uniquely focused on the operations of the federal government. Accordingly, attorneys who have experience working with and within the federal government are uniquely qualified to serve on that distinguished court.

Brett Kavanaugh is an ideal candidate for the D.C. Circuit. He has an extensive record of public service. For over a decade, he has held the most prestigious positions an attorney can hold in our federal government. After graduating from Yale College and Yale Law School, Brett served as a law clerk to three distinguished federal appellate judges, including U.S. Supreme Court Justice Anthony Kennedy. Brett has also served as an attorney in the Office of the Solicitor General, representing the United States government in cases before the U.S. Supreme Court. He has served as a federal prosecutor in the Office of Independent Counsel under the Honorable Kenneth Starr. He has personally argued civil and criminal cases in the U.S. Supreme Court and federal courts of appeals throughout the country. And he has been called upon for his wisdom and counsel by the President of the United States – first through his service as Associate Counsel and Senior Associate Counsel to the President, and now as Staff Secretary, one of the President's most senior trusted advisers.

Mr. Chairman, I can think of few attorneys of any age who can boast this level of experience with the inner workings of the federal government. It is no wonder, then, that the American Bar Association has rated Brett Kavanaugh “well qualified” to serve on the D.C. Circuit – “the gold standard by which judicial candidates are judged,” according to leading Senate Democrats on this very committee.

Ordinarily, a nominee possessing such credentials and experiences would have little difficulty receiving swift confirmation by the United States Senate. Unfortunately, as observers of this committee well know, we are not living under ordinary circumstances today. I hope that the distinguished nominee before the committee today will receive fair treatment. His exceptional record of public service in the federal government will serve him well on the D.C. Circuit bench. His wisdom and counsel have been trusted at the highest levels of government. Yet I fear that it is *precisely* Brett's distinguished record of experience that will be used against him. I sincerely hope that that will not happen – after all, it would be truly perverse to use one's record of service against a nominee, especially with respect to a court that is so much in need of jurists who are knowledgeable about the inner workings of the federal government.

Indeed, many successful judicial nominees have brought to the bench extensive records of service in partisan political environments. I have often said that, when you place your hand on the Bible and swear an oath to serve as a judge, you change – you learn that your role is no longer partisan, your duty is no longer to advocate on behalf of a particular party or client, but rather to serve as a neutral arbiter of law. The American people understand that when your job changes, you change – and that people are fully capable of putting aside their personal beliefs in order to fulfill professional duty.

That's why this body has traditionally confirmed nominee after nominee with clear records of service to one particular party or political philosophy. Ruth Bader Ginsburg served as General Counsel of the ACLU. Of course, it's difficult to imagine a more ideological job than General Counsel of the ACLU. Yet she was confirmed by overwhelming margins of the United States Senate – first by unanimous consent to the D.C. Circuit, and then by a vote of 96-3 to the U.S. Supreme Court. Stephen Breyer was the Democrats' Chief Counsel on the Senate Judiciary Committee, before he too was easily confirmed to the 1st Circuit and then to the U.S. Supreme Court. Byron White was the second most powerful political appointee at the Justice Department under President Kennedy, when the Senate confirmed him to the Supreme Court by voice vote. Liberal activist Abner Mikva was a Democrat member of Congress when he was confirmed to the D.C. Circuit by a majority of the Senate. Indeed, as many as 42 of the 54 judges who have served on the D.C. Circuit came to the bench with political backgrounds – including service in appointed or elected political office. All received the respect of an up-or-down vote on the floor of the United States Senate, and all received the support of at least a majority of Senators, as our Constitution demands.

So historically, this body and this committee have exercised the advice and consent function seriously and appropriately, by emphasizing legal excellence and experience – and not by punishing nominees simply for serving their political party. It would be tragic for the federal judiciary, and ultimately harmful to the American people who depend on it, to establish a new standard today, and to declare that any attorney who takes on a political client is somehow disqualified from confirmation – no matter how talented, how devoted, or how fit for the federal bench they may truly be.

Brett Kavanaugh is a skilled attorney who has demonstrated his commitment to public service throughout his life and career. He happens to be a Republican, and he happens to be close to the President. This is a Presidential election year, but the rigorous fight for the White House should not spill over to the judicial confirmation process. Last year, it was wrong for close friends of the President like Texas Supreme Court Justice Priscilla Owen to be denied even the basic courtesy and Senate tradition of an up-or-down vote, simply to score political points against the President. This year, it would be terribly wrong for Brett to be denied confirmation – or at least an up-or-down vote – simply because he has ably and consistently served his President, his party, and his country.



News Release  
**JUDICIARY COMMITTEE**

*United States Senate • Senator Orrin Hatch, Chairman*

April 27, 2004

Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin G. Hatch  
 Before the United States Senate Committee on the Judiciary  
 Hearing on the Nomination of**

**BRETT M. KAVANAUGH**

**TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT**

I am pleased to welcome to the Committee today members, guests, and our nominee, Mr. Brett Kavanaugh, who has been nominated by President Bush to be a United States Circuit Judge for the District of Columbia Circuit. We also welcome members of his family. I would note his father, Mr. Ed Kavanaugh, long-time President of the CTFA, is a great individual whom we all respect. Welcome to you all.

Before we turn to the nomination, I want to tell members of the Committee that I remain hopeful that we can continue to complete the work of the Committee on both legislation and nominations. I was disappointed that we were not able to accomplish more at our markup last week. Earlier this month we did report five district judges and two circuit judges. I do appreciate the Committee's efforts in that regard.

I remain concerned about the executive calendar and floor action. I remain hopeful that an accommodation on nominees can be reached and that floor action can be scheduled for those judges. The Senate has confirmed only four judges this year – all District court judges. By comparison, in the last Presidential election year of 2000 – with a Democratic President and a Republican Senate – seven judges had been confirmed by this point in the year, including five Circuit court judges. Furthermore, we are way behind the pace of that election year, which saw a total of 39 judges confirmed. And we remain well behind President Clinton's first term confirmation total of 203.

So while we have made some progress in reporting nominees to the full Senate, the work of confirming judges remains. We presently have twenty-nine judges on the Executive Calendar. Five Circuit nominees remain from last year on the executive calendar in addition to the six reported this year. Eighteen district nominees are available for Senate confirmation, including two holdovers from the last session. But we are making progress, and I thank all members for their support and ask for their continued cooperation.

Today we will consider the nomination of Mr. Brett M. Kavanaugh. He is an outstanding nominee, who has been nominated to the Circuit Court of Appeals for the District of Columbia. He comes to us with a sterling resume and a record of distinguished public service. Mr. Kavanaugh currently serves as Assistant to the President and Staff Secretary, having been

appointed to that position by President George W. Bush in 2003. He previously served in the Office of Counsel to the President, as an Associate Counsel and Senior Associate Counsel.

After graduating from Yale Law School in 1990, Mr. Kavanaugh served as a law clerk for three appellate judges: Justice Anthony M. Kennedy of the Supreme Court, Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, and Judge Walter K. Stapleton of the United States Court of Appeals for the Third Circuit. He served for one year as an attorney in the Office of the Solicitor General, where he prepared briefs and oral arguments.

Mr. Kavanaugh served in the Office of Independent Counsel, under Judge Starr, where he conducted Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. He also was responsible for briefs and arguments regarding privilege and other legal matters that arose during investigations conducted by the Office. Mr. Kavanaugh was part of the team that prepared the 1998 report to Congress regarding possible grounds for impeachment of the President of the United States.

In addition to his extensive public service, Mr. Kavanaugh was also in private practice. As a partner at the distinguished firm of Kirkland & Ellis he worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation.

Mr. Kavanaugh received his law degree from Yale Law School, where he was a Notes Editor for the Yale Law Journal. He is a *cum laude* graduate of Yale College, where he received his B.A. degree.

The American Bar Association has rated Brett Kavanaugh as "Well Qualified." Let me remind everyone what that rating means. According to guidelines published by the American Bar Association Standing Committee on Federal Judiciary, "To merit a rating of 'Well Qualified,' the nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, breadth of experience, the highest reputation for integrity and either have demonstrated, or exhibited the capacity for, judicial temperament."

I want to turn now to a few of the arguments which I have heard raised by a number of Mr. Kavanaugh's opponents and address some of the concerns I expect to hear today.

First, is that Mr. Kavanaugh is too young and inexperienced to be given a lifetime appointment to the federal bench, particularly to the important D.C. Circuit Court of Appeals. There are many examples of judges who were appointed to the bench at an age similar to Mr. Kavanaugh, who is 39 years old, and have had illustrious careers. For example, all three of the judges for whom Mr. Kavanaugh clerked were appointed to the bench before they were 39 and all have been recognized as distinguished jurists. Justice Kennedy was appointed to the 9th Circuit when he was 38 years old; Judge Kozinski was appointed to the 9th Circuit when he was 35 years old; and Judge Stapleton was appointed to the district court at 35 and later elevated to the 3rd Circuit.

I think many of my colleagues would agree that age is not a factor in public service, other than the constitutional requirements. I would note that many in this body began their service in

their 30's if not barely age 30. Through successful re-elections we have been benefited from a life-time of service from such members.

With regard to judicial experience, I would reiterate that Brett Kavanaugh has all of the qualities necessary to be an outstanding appellate judge. He has impeccable academic credentials with extensive experience in the appellate courts, both as a clerk and as counsel, having argued both civil and criminal matters before the Supreme Court and appellate courts throughout the country.

As I have pointed out with previous nominees, a number of highly successful judges have come to the federal appellate bench without prior judicial experience. On this particular court, the D.C. Circuit, only three of the nineteen judges confirmed since President Carter's term began in 1977 previously had served as judges. Furthermore, 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.

Opponents will attempt to portray Mr. Kavanaugh as a right-wing ideologue who pursues a partisan agenda. I believe this allegation is without merit and a careful scrutiny of his record will demonstrate otherwise. He is an individual who has devoted the majority of his career to public service, not private ideological causes. Within his public career he has dedicated his work to legal issues, always working carefully and thoroughly in a professional manner.

In short, Mr. Kavanaugh is a person of high integrity, of skilled professional competence, and outstanding character. He will be a great addition to the federal bench and I look forward to hearing his testimony and responses.

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United States Senate  
**Committee on the Judiciary**

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Committee Information

Statement of  
**The Honorable Patrick Leahy**  
United States Senator  
Vermont

April 27, 2004  PRINTABLE  
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Statement of Senator Patrick Leahy  
On the Nomination of Brett Kavanaugh  
April 27, 2004

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Today we are considering the nomination of yet another controversial nomination to a U.S. Court of Appeals, this time to the extremely important D.C. Circuit Court of Appeals. This is arguably the most important court in the nation, with the exception of the Supreme Court, and nominations to it deserve the most careful scrutiny we can give. They also deserve the utmost seriousness of purpose from the President who sends these nominations up to the Senate, as well as rigorous consideration and a respect for the stature of the judges who have served there over the years.

While I see that Mr. Kavanaugh is a well-educated young man who has had a series of prestigious jobs, some legal, some political, with prominent conservatives, I have serious doubts about whether this job is right for him and whether he is right for this job.

This is not his first involvement with judicial selection. During his time in the White House Counsel's Office he served as the President's point man on judicial nominations, bringing us such nominees as Charles Pickering, Priscilla Owen, Miguel Estrada, William Pryor, Carolyn Kuhl and Janice Rogers Brown. Nor is this Mr. Kavanaugh's first involvement with politics. He has built quite a political resume having served four years with the Office of Independent Ken Starr in his pursuit of the Clintons, even helping Mr. Starr write his notorious report to Congress. But whether those experiences add up to the quality and quantity of experience usually associated with the D.C. Circuit remains to be seen.

I look forward to hearing from Mr. Kavanaugh on those and other issues of concern to me about his nomination.

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WASHINGTON BUREAU  
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE  
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(202) 638-2269 FAX (202) 638-5936

April 26, 2004

The Honorable Orrin G. Hatch  
Chairman, Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Patrick Leahy  
Ranking Member, Senate Judiciary Committee  
152 Dirksen Senate Office Building  
Washington, D.C. 20510

**RE: NAACP OPPOSITION TO THE NOMINATION OF BRETT  
KAVANAUGH TO THE DC CIRCUIT COURT OF APPEALS**

Dear Senators Hatch and Leahy:

On behalf of the National Association for the Advancement of Colored People (NAACP), our nations oldest, largest and most widely recognized grassroots based civil rights organization, I would like to express our opposition to the nomination of Brett Kavanaugh to the United States Court of Appeals for the District of Columbia.

Mr. Kavanaugh served on the staff of the White House Judicial Selection Committee as Associate Counsel. As such, Mr. Kavanaugh was responsible for overseeing efforts initiated by President George W. Bush, to pack our nations Courts with extreme right-wing judicial nominees. Clearly inherent to the President's judicial selection process should be the impetus to select nominees that maintain the judicial temperament and integrity necessary to temperate our nations laws as intended by it's crafters, instead of legislating from the Bench. Rather than focusing on nominees that would earn the respect of the American people by maintaining an ideological balance on the U.S. Circuit Court, Brett Kavanaugh focused on right-wing extremist candidates that would seek to employ judicial activist strategies to eviscerate civil rights laws. This disregard for judicial balance and intent of law is clearly

demonstrated in nominees such as Caroline Kuhl, Priscilla Owen, Charles Pickering, William Pryor, Janice Rogers Brown, and Claude Allen. Kavanaugh's actions to fill the U.S. Court system with such extremist Jurist is deeply disturbing to the NAACP, as well as all other Americans that believe our Courts should reflect the sensibilities and values of the American people.

The NAACP is opposed to the nomination of Brett Kavanaugh to the D.C. Circuit Court of Appeals based on the troubling extremist characteristics demonstrated by the nominees he sought to confirm. One nominee, Judge Charles Pickering, demonstrated affection for segregationist policies, his continued insensitivity to racial justice issues, civil rights, voting rights and equal employment protections clearly demonstrates how woefully unqualified he is to serve in this crucial position. As an example, records show Pickering, as a state legislator, supported electoral measures to disenfranchise African Americans by supporting redistricting plans that locked over 40% of the population of Mississippi out of the electoral process. During his confirmation hearing, when asked by members of the Senate why he supported such a racially discriminatory redistricting plan, he simply stated "they" don't vote anyway.

The NAACP opposed Alabama Attorney General William Pryor's nomination to the Eleventh Circuit Court of Appeals because of his opposition to electoral protections under the Voting Rights Act of 1965, and his opposition to equal opportunity programs like affirmative action. William Pryor played a major role in perpetuating the racial segregation of Alabama's three highest State courts, all three courts of which, to this day, have no African American representation whatsoever by convincing a federal court to reject a historic settlement. Finally, William Pryor opposed affirmative action, as he indicated, "I would wholeheartedly support" Alabama's adoption of California's Proposition 209, which banned the use of equal opportunity programs in state hiring, contracting and school admission decisions.

The NAACP opposed Janice Rogers Brown's nomination because her record demonstrated a disdain for affirmative action, a disregard for racial discrimination, and a tremendous lack of experience to serve on the D.C. Circuit Court of Appeals. Brown authored a majority decision that makes it extremely difficult to conduct any sort of meaningful affirmative action program in California. In fact, Brown expanded

Proposition 209, by prohibiting California cities from requiring that their contractors conduct meaningful outreach to minority and women owned subcontractors. The NAACP opposed the nomination of Claude Allen to the United States Court of Appeals for the Fourth Circuit because his views would jeopardize the civil rights and civil liberties protections of African Americans and other racial and ethnic minorities. His stated opposition to the Martin Luther King, Jr. holiday and certain electoral protections under the Voting Rights Act and other social issues during his tenure with former North Carolina Senator, Jesse Helms are adverse to civil rights for African Americans and other racial and ethnic minorities.

The United States Court of Appeals for the District of Columbia is considered the second most powerful court in our country. The Supreme Court's limited caseload means that the D.C. Circuit often provides the determinative legal review of federal agency action involving labor relations, voting rights, affirmative action, clean air standards, health and safety regulations, consumer privacy and campaign finance. Nominees to all courts, including the D.C. Circuit Court, should have superior qualifications.

As such, we urge you in the strongest possible terms to oppose the confirmation of Brett Kavanaugh to the U.S. Court of Appeals for the District of Columbia and urge the Bush Administration to nominate men and women that represent the values, diversity and judicial temperament that will be respected by the American people, as we experienced with President Bush's nomination, and the U.S. Senate's confirmation of Judge Roger Gregory to the U.S. Court of Appeals to the Fourth Circuit.

Thank you for your careful consideration of this crucial matter. Should you have any questions or concerns, please contact me, or my Bureau Counsel, Crispian Kirk, at (202) 638-2269.

Sincerely,



Hilary D. Shelton  
Director



*New York's Senator*  
**CHARLES E. SCHUMER**

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**FOR IMMEDIATE RELEASE**  
April 27, 2004

**CONTACT:** Brent Colburn  
(202) 224-7433

**REMARKS ON THE NOMINATION OF BRETT  
KAVANAUGH TO DC CIRCUIT COURT OF APPEALS**

US Senator Charles Schumer issued the following statement at the Judiciary Committee's markup of the nomination of Brett Kavanaugh to the DC Circuit Court of Appeals:

Mr. Chairman, I want to welcome Brett Kavanaugh, his parents, and his fiancée, to today's hearing. Something tells me this won't be the easiest or most enjoyable hearing for them or for us, but I know that he appreciates what an important position he has been nominated to and how important this process is and I know how proud his family is of him.

Mr. Chairman, it's really unfortunate that we have to be here yet again on a controversial nomination. It's unfortunate because it's so unnecessary. We have offered time and time and time again to work with the Administration to identify well-qualified mainstream conservatives for these judgeships, especially on the DC Circuit. Instead, the White House insists on giving us extreme ideological picks. In this instance, the nomination seems to be as much about politics as it is about ideology.

While the nominations of William Pryor, Janice Rogers Brown, and Priscilla Owen may be among the most ideological we've ever seen, the nomination of Brett Kavanaugh is among the most political in history. In short, this nomination appears to be judicial payment for political services rendered.

Mr. Kavanaugh is a tremendously successful young lawyer. His academic credentials are first rate. He clerked for two prestigious circuit court judges and a Supreme Court justice. And he has been quickly promoted through the ranks of Republican lawyers. Some might call Mr. Kavanaugh the Zelig of young Republican lawyers, as he has managed to find himself at the center of so many high-profile controversial issues in his short career.

From the notorious Starr report, to the Florida recount, to this President's secrecy and privilege claims, to post-9/11 legislative battles including the Victims' Compensation Fund, to controversial judicial nominations, if there's been a partisan political fight that needed a good lawyer in the last decade, Brett Kavanaugh was probably there. And if he was there, there's no question what side he was on.

In fact, Mr. Kavanaugh would probably win first prize as the hard-Right's political lawyer. Where there's a tough job that needs a bright, hard-nosed political lawyer, Brett Kavanaugh has been there.

Judgeships should be above politics. Brett Kavanaugh's nomination seems to be all about politics.

If President Bush truly wanted to unite us, not divide us, this would be the last nomination he would send to the Senate. Anyone who has any illusion that President Bush really wants to change the tone in Washington ought to take a look at this nomination. You could not think of another nomination, given Mr. Kavanaugh's record, more designed to divide us.

Brett Kavanaugh's nomination to the DC Circuit is not just a drop of salt in the partisan wounds, it's the whole shaker.

There is much that many of us find troubling about this nomination and I look forward to hearing the nominee address our myriad concerns. I'd like to take just a moment to lay out two areas that will be central to this discussion.

First, for the first two years of the Administration, when the Administration was developing and implementing its strategy to put ideologues on the bench, Mr. Kavanaugh quarterbacked President Bush's judicial nominations battles. He spoke frequently at public events defending the President's decisions to nominate such controversial jurists as Charles Pickering, Carolyn Kuhl, Priscilla Owen, and William Pryor.

As you all know, many of us have been shocked and appalled by the extreme and out-of-the-mainstream ideologies adhered to by these and other nominees. I speak for myself, many of my colleagues, and a sizeable majority of the American people when I say that we do not want ideologues on the federal bench - whether too far Left or too far Right.

Judges who bring their own agendas to the Judiciary are inclined to make law, not interpret law as the Founding Fathers intended. We want fair and balanced judges, in the real sense of those words.

Nonetheless, this Administration has repeatedly bent over backwards to choose nominees who defend indefensible ideas and whose records are rife and replete with extreme activism.

During his time in the White House Counsel's office, Brett Kavanaugh played a major role in selecting these judges, prepping them for hearings, and defending their nominations at public events. In the course of defending the Administration's record on judicial nominations, Mr. Kavanaugh routinely cited the five criteria used by President Bush in selecting judges.

The five criteria he cites are:

1. Extraordinary intellect;
2. Experience;
3. Integrity;
4. Respect in the legal community and the nominee's home state community; and,
5. Commitment to interpreting law, not making law.

I don't think I'm stepping out on a limb when I say that every one of us up here sees those five criteria as outstanding factors to consider when choosing judges.

But in the same public discussions of the President's judicial nominations where he has cited these five criteria, Mr. Kavanaugh has routinely denied that the President considers a nominee's ideology. The record before us starkly belies that claim -- it just doesn't hold water.

If ideology did not matter, we would see nominations scattered across the ideological spectrum. There would be roughly equal numbers of Democrats and Republicans with a healthy dose of independents thrown in. We would see some nominees edge left of center while others tip right, with a few outliers at each extreme.

Even a President who wanted to have only some ideological impact on the bench would have some balance. That's not the case with the nomination's Brett Kavanaugh has shepherded.

If you were to map the circuit court nominees on an ideological scale of 1-10, with 10 being very liberal and 1 being very conservative, there's a huge number of 1's with some 2's and 3's thrown in and only a smattering of 4's and 5's.

Of course ideology has played a role in this process. Suggesting otherwise insults our intelligence and the intelligence of the American people.

For the last three years, I have been trying to get us to talk honestly about our differences over these judicial nominees. We have pretty much stopped citing minor personal peccadillos in nominees' histories as pretexts for stopping nominations that we really oppose on ideological grounds. The process is better for the honesty we have brought to it.

I hope we can continue having an honest dialogue today. Toward that end, I look forward to hearing Mr. Kavanaugh explain how it's possible that the President who has made the most extreme ideological nominations in history does not consider ideology when he makes those picks.

A second area I expect we will get into is closely related to the first. As I noted at the outset, there is no question that Brett Kavanaugh is a bright and talented young lawyer. There is no question that for someone of his age, he has an extraordinary resume and that he has achieved in every job he has held.

But there are serious questions as to why, at 39, having never tried a case, and with a record of service almost exclusively to highly partisan political matters, he is being nominated to a seat on the second most important court in America.

Why is the DC Circuit so important?

The Supreme Court currently takes fewer than 100 cases a year. That means that the lower courts resolve the tens of thousands a cases a year brought by Americans seeking to vindicate their rights. All the other federal appellate courts handle just those cases arising from within its boundaries. So, for example, the Second Circuit, where I'm from, takes cases coming out of New York, Connecticut, and Vermont.

But the DC Circuit doesn't just take cases brought by residents of Washington, DC. Congress has decided there's value in vesting one court with the power to review certain decisions of administrative agencies.

We've given plaintiffs the power to choose the DC Circuit – and in some cases we've forced them to go to the DC Circuit – because we've decided, for better or worse, that when it comes to these administrative decisions one court should decide what the law is for the whole nation.

When it comes to regulations adopted under the Clear Air Act by the EPA, labor decisions made by the NLRB and rules propounded by OSHA, gas prices regulated by the Federal Energy Regulatory Commission, and many other administrative matters, the decisions are usually made by the judges on the DC Circuit.

To most, it seems like this is the Alphabet Soup Court, since virtually every case involves an agency with an unintelligible acronym. EPA, NLRA, FCC, SEC, FTC, FERC, and so on and so on.

The letters that comprise this Alphabet Soup are what make our government tick.

They are the agencies that write and enforce the rules that determine how much “reform” there will be in campaign finance reform.

They determine how clean water has to be for it to be safe for our families to drink.

They establish the rights workers have when negotiating with corporate powers.

The DC Circuit is important because its decisions determine how these federal agencies go about doing their jobs. And, in so doing, it directly impacts the daily lives of *all* Americans more than any other court in the country, with the exception of the Supreme Court.

There's a lot at stake when considering nominees to the DC Circuit, how their ideological predilections will impact the decisions coming out of the court, and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

Perhaps more than any other court aside from the Supreme Court, the DC Circuit votes break down on ideological lines with amazing frequency. The divide happens in cases with massive national impact.

So we have a real duty to closely scrutinize the nominees who come before us seeking lifetime appointment to this court. And it is no insult to Mr. Kavanaugh to say that there is probably not a single person in this room, except perhaps Mr. Kavanaugh and his family, who doesn't recognize that there are scores of lawyers in Washington and around the country who are of equally high intellectual ability, but who have much more significant judicial, legal, and academic experience to recommend them for this post.

It's clearly an honor and a compliment that despite his relative lack of experience, this Administration wants Brett Kavanaugh to have this job. But when a lifetime appointment to the second-highest court in the land is at stake, the Administration's desire to honor Mr. Kavanaugh must come into question.

When the President picked Brett Kavanaugh, he was not answering the question, “Who has the broadest and widest experience for the job?” He was rewarding a committed aide who has proven himself in some tough political fights.

Would we have welcomed the renomination of Allen Snyder or Elena Kagan (now the dean of Harvard Law School), two moderate and extremely well-qualified Clinton nominees who never received consideration from this Committee? Of course, we would have.

But we also would have welcomed the nomination of a mainstream conservative who has a record of independence from partisan politics, who has a demonstrated history of non-partisan service, who has a proven record of commitment to the rule of law, and who we can reasonably trust will serve justice, not his political patrons, if confirmed to this powerful lifetime post.

Brett Kavanaugh is the youngest person nominated to the DC Circuit since his mentor, Ken Starr. If you go through the pre-judicial appointment accomplishments of the 9 judges who currently sit on the DC Circuit, you will see that Mr. Kavanaugh's accomplishments pale by comparison.

Chief Judge Ginsburg held several high level Executive Branch posts including heading the antitrust division at DOJ and was a professor at Harvard Law School.

Judge Edwards taught at Michigan and Harvard Law Schools, was the Chairman of Amtrak's board of directors, and published numerous books and articles.

Judge Sentelle had extensive practice as a prosecutor and trial lawyer, and experience as a state judge and as a federal district court judge.

Judge Henderson had a decade in private practice, a decade of public service, and five years as a federal district court judge.

Judge Randolph spent 22 years with federal and state attorneys general offices, including service as Deputy Solicitor General of the United States, and a law firm partnership.

Judge Rogers had roughly 30 years of service in both federal and state governments, including a stint as the Corporation Counsel for DC, and several years on DC's equivalent of a state supreme court.

Judge Tatel divided his nearly 30 years of experience between the public and private sectors, including a partnership at a prestigious law firm and service as general counsel of the Legal Services Corporation.

Judge Garland practiced for 20 years, held a law firm partnership, and supervised both the Oklahoma City bombing trial and Unabomber trial while in a senior position at the Department of Justice.

And Judge Roberts spent nearly 25 years going back and forth between his law firm partnership where he ran his law firm's appellate practice and significant service in the Department of Justice.

Like Mr. Kavanaugh, many of the 9 current judges on this court held prestigious clerkships, including clerkships on the Supreme Court. But they all had significant additional experience, non-partisan experience, to help persuade us that they merited confirmation.

If Mr. Kavanaugh had spent the last several years on a lower court or in a non-political position proving his independence from politics, we might be approaching this nomination from a different posture. But he has not. Instead, his resume is almost unambiguously political. Perhaps with more time, and different experience, we would have greater comfort imagining Mr. Kavanaugh on this court. Suffice to say, on the record before us, Mr. Kavanaugh faces a serious uphill battle. I look forward to hearing his answers to the difficult questions he will face.